

**THE HIGH COURT****2009 4524 P****BETWEEN****MARY BOURKE****PLAINTIFF****AND****GEORGE O'DONNELL, PAULINE O'DONNELL AND THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND****DEFENDANTS****Judgment of Mr. Justice Hedigan delivered on the 5th day of October, 2010**

1. The plaintiff is a widow and resides at Portumna Retirement Village in the County of Galway. She was born on the 22nd May, 1930.
2. The first and second named defendants are husband and wife and reside at Shannon Park, Portumna in the County of Galway. The third named defendant is a publicly quoted company having their registered offices at Lower Baggot Street in the City of Dublin.
3. The plaintiff claims against the first and second defendants damages in respect of an alleged improvident transaction in which she was induced to make a gift to the first and second named defendants of €124,000 being the full amount of an insurance policy recently cashed by her. Against the third named defendant the plaintiff claims damages for negligence and breach of contract in causing or permitting the plaintiff to enter into such an improvident transaction.

**4. The background:**

4.1 The plaintiff at the time of this impugned transaction was 77 years old. Her family have been associated with Portumna Bridge for a number of generations. Her father in his time was the man who opened the bridge to allow boats pass through on the Shannon River either en route to Lough Derg and south or north to Banagher and beyond. She was married but had no children. When her husband died in 1994 she moved back to the Bridge where she lived with her brother who had succeeded his father on the Bridge. She herself operated the Bridge and was apparently well known to travellers on the river and locals as the woman who opened the Bridge. When her brother died eight years ago, she remained on in the Bridge House. She has no close family. Her only family with whom she has regular contact seems to be her nephew, Robert Butler. He lives in Birmingham where he works as a window fitter. He visited her four to five times a year.

4.2 The plaintiff knew the defendants for many years. The first defendant used to come to the house while her brother lived. He used to do messages for them and was paid therefor. The defendants helped to look after the plaintiff and she paid them. The first defendant had a key to the house. For at least some time the first defendant had possession of her Old Age Pension book. He returned it at some stage to her nephew at his request. Her OPW pension went to the Killimer Nursing Home.

4.3 The plaintiff has been in poor health for many years. In June 2007 she had a bad fall. She was suffering from several large lacerations and widespread skin infections. She was and had been for many years suffering from chronic lung disease. This resulted in lung infections during which she becomes a little confused according to her GP. She also suffered from cirrhosis of the liver. She was admitted to Portiuncula Hospital on the 6th June, 2007. She was very ill. She remained there until 11th June, 2007 when she was transferred to Killimer Nursing Home. She was confused and disoriented in time and place. She was considered dangerously ill. Over the following six weeks she improved but remained confused. She required re-admission to hospital for just over two weeks and returned to the nursing home on 24th August, 2007. She was noted by the nursing home at that time as being confused at all times. Her GP, Dr. Murphy, agreed with that assessment. On further reports by the nursing home dated 28th September, 2007 she was still confused at all times – her GP again agreed. On 18th October, 2007 she was reported as intermittently confused – her GP agreed, explaining she was fine some days but confused others. On the 23rd November, 2007 she was reported orientated at all times, was much better, was mainly good in conversation but sometimes confused. On the 3rd December, 2007 she was transferred to Portumna Retirement Village and Nursing Home. She was brought there by her nephew, Richard Butler. On the 7th December, 2007 her GP reported her as lucid. He did not ask her any searching questions as this was a routine visit. He recorded no comments. This was on the day following the events in question.

4.4 On the 4th December, 2007 the plaintiff went to the bank (the third defendant) in company with her nephew. She lodged three cheques totalling €1,264.01 and withdrew €1,200. These related to overpayments to the nursing home. The money withdrawn was given by her nephew to Portumna Nursing Home. There is disagreement as to whether her nephew saw an account with a balance of €124,000. He stated in evidence he was given two statements of dormant accounts. It is clear from the evidence that at this time there was one account (No. 40905779) with a balance of €15,635.85. There was another account (No. 46405265) with a balance of €124,452.84. The vast bulk of this amount was the proceeds of an insurance policy cashed on the 15th November, 2007.

4.5 On the 6th December, 2007, the first and second defendants signed the plaintiff out of the nursing home and brought her to the bank. The plaintiff insisted throughout her evidence that she had no recollection whatever of the visit or the events that occurred at the bank. The party arrived at the bank and the plaintiff was noted by Ms. Marie Bourke to be in good form and using a walking stick. They asked to see the manager, Ciaran Ryan, and he did so. The manager had not met either the plaintiff or the defendants before. Ms. Bourke did know the plaintiff but not well. She described her as a very independent lady who did her business and left. When they settled into the office the plaintiff told the manager she wanted to give some money to her neighbours, the first and second defendants. The manager looked at her accounts and saw €16,000 in one and €124,000 in the other. The manager could see the €124,000 was largely composed of an insurance policy cashed recently. This was obvious from the code on the account entry. She said she wanted to give them €124,000. The manager asked the defendants to leave the office to enable him speak privately with the plaintiff. He talked to her about the proposal. She said they had been very good to her and she wanted to do something for them. He advised her to give a smaller sum but she insisted. He asked her about her family and she said she had no sons or daughters and did not mention any other family. He recommended that she seek independent legal advice. She replied she understood but wanted to go ahead. He explained he would do the transaction by way of a bank draft. This meant, he explained, that once the draft was handed

over it was the defendants' money. The manager was of the view that she knew her business and knew what she wanted. He did not think she was confused nor did she "drift away" while speaking to him. He did not consider ringing her solicitor because she was a customer and she knew what she wanted to do. He told her if she was happy to go ahead he would give her the draft. The manager did not know she was living then in a nursing home and he filled in her address on the withdrawal form as Bridge Road, Portumna. When he had filled in the withdrawal form, he wrote on the form;

*"Spoke to Mary alone in relation to transaction. Happy she of sound mind and was able to carry out her expressed wish. It was clear to me she was not under duress."*

*See Ryan (?)"*

He then made out a draft in favour of the defendants. The party left the bank. Later in the day the defendants returned and deposited the draft in their account. In the defence the defendants stated (para. 19) that they "subsequently dissipated the monies or the preponderance thereof ..."

4.6 The above events came to the attention of Robert Butler, the plaintiff's nephew who visited her regularly from his home in Birmingham. He used to visit four to five times a year. In 2007 he visited about once every month. In February 2009 he became aware from Richard Bourke, another nephew, that the plaintiff had an insurance policy. He ascertained from the insurance company that this had been cashed in November 2007 and had been lodged in the plaintiff's bank in Portumna. He returned immediately and visited the plaintiff. She indicated she knew nothing about cashing the insurance policy. He went with her and his former partner, Karen, to the bank. He saw the manager who confirmed that the insurance policy had been cashed and that the full amount of it had been paid out by way of bank draft in favour of the first and second defendants. Following this visit to the bank, they visited the plaintiff's solicitors and subsequently these proceedings were issued.

## **5. The evidence**

5.1 Mary Bourke, the plaintiff, gave evidence as follows. She used to live at the Bridge, Portumna. Her father worked on the Bridge for many years. She left and got married. She had no children. On the 31st March, 1994 her husband died. She returned to the Bridge to live there with her brother who had succeeded her father on the Bridge. He died eight years ago. She continued to live in the house on her own. She knew the first and second named defendants at the time when her brother lived and worked on the Bridge. George O'Donnell used to come to the house there. He used to do messages for her or for her brother. She used to pay him for whatever he did. She stated that she did not remember being in hospital in June 2007. She did remember being in the nursing home in Killimer. She recollected that Dr. Murphy was her general practitioner. She moved from Killimer to Portumna Nursing Home on the 3rd December, 2007. Her nephew brought her. She gave the key of the house to George O'Donnell. He used to visit her in the nursing home. She said she did not remember visiting the bank in Portumna on the 6th December, 2007. She subsequently became aware of a problem with her account in Portumna. She was told that her insurance money was missing. She said her nephew told her that €124,000 was gone from the account. She said her nephew told her the money was gone. When told this first she said she could not believe it but eventually she did and she was mad. She said she had paid the O'Donnells for whatever they did. She said she never wanted to give them the money. She said she was certain she never wanted to give them any of her money.

On cross-examination by counsel for the first two defendants she stated that she had lived a mile from the O'Donnells. She agreed her nephew had brought her to Portumna Nursing Home. As to three days later and the visit to the bank, she said she did not know anything about going to the bank. She did not remember discussing her life policy with the bank manager a week before. A week before she said she was living at her own home. She said George O'Donnell did not lodge anything to her account. She agreed they had looked after her but insisted she paid them. She stated the insurance money was cashed by the O'Donnells but did not know when. She denied she had ever told them that Robert (her nephew) had enough money. She said her nephew lived in England and came home about twice a month. She remembered nothing about going to the bank. She speculated she must have been on medication at the time. She said she handed her pension into the nursing home. She did not remember if she signed the insurance policy to be cashed. She remembered investing €20,000 in the insurance policy originally. She was at that time in the bank when she met the bank adviser and the insurance policy followed.

### **Cross-examination by counsel for the third defendant**

The plaintiff said that she had one account in the bank. She never knew that the insurance money amounted to €124,000. She did not recall the car journey to the bank. Ms. Marie Bourke may well have been in the bank at the time but she did not recall meeting her, she did not recall meeting Mr. Byrne, she did not in fact remember anything about that visit to the bank. She agreed the signature on the withdrawal slip was hers. She agreed she had gone to the bank with her nephew on the 4th December, 2007 and lodged three cheques totalling €1,264.01 and withdrew €1,200. She also lodged €287 and withdrew €187. She agreed she saw her general practitioner the next day and that she was not confused then. She said her nephew told her about the dealings in the bank on the 6th December, 2007 but she did not know how. She said her nephew got Mr. Collins, solicitor, to issue proceedings. She did not remember any dealings since – she did not have any business in the bank now. She did not know whether the bank sent her statements. She agreed the bank had no reason to know she was not well.

5.2 Robert Butler gave evidence that he lived in Birmingham in the United Kingdom where he was a window fitter. He said he used to come to visit his aunt four to five times a year. In 2007 he was coming home about once every month. He knew her brother Sean very well. He was in fact there when Sean died. He thought that around 2002 she had broken her leg. He knew she was in Portiuncula Hospital and was moved into Killimer Nursing Home in June 2007. He had met the O'Donnells once. George had a key to the house. He himself had arranged her move to Killimer Nursing Home. She was in receipt of two pensions – an Old Age Pension and an Office of Public Works pension. He retrieved her OAP book from George O'Donnell. The OPW pension went to Killimer. He himself had arranged that. In July of 2007, in Portiuncula Hospital she did not know who he was. In August, she also had not a clue who he was. She seemed drugged, blank and tearful. He himself arranged her move to Portumna. He sorted it out. He thought she was very unhappy in Killimer. It was a kind of mental hospital. He sorted out the Portumna move including the change of pensions. He recollected he had collected Mary from Killimer at 9.30am. She was very chirpy and knew who he was. Portumna is a nursing home and it is located in her home town. It is very nice and he thought she would be very happy there. The Killimer Nursing Home gave him some cheques in relation to overpayments. On the 4th December, 2007 he went with Mary to the bank at about 12.30. He talked to an official. There were two accounts. Both were dormant with no transactions. There was €16,000 in each. He deposited cheques and took money out to give to Portumna. He only became aware of the current problem in February 2009. He had been talking to Richard Bourke (another nephew of Mary through her husband). He told him that he thought she had an insurance policy. He checked with the insurance company. They said it had been cashed in December 2007 in an amount of €108,000. It had been lodged in Portumna. He came straight back and saw Mary. She knew nothing about cashing the insurance policy. He went to the bank with Mary and with his then partner, Karen. He saw the manager. The manager indicated that he had no time to meet him until he mentioned the name of Mary

Bourke and then he said to come straight into his office. He confirmed there had been a bank draft in an amount of €124,000. The manager confirmed that no ID was used during the transaction. He said that he knew Mary Bourke. He confirmed that he had made no inquiries about where she was living. When asked why he wrote on the bank draft the words that he did, he said, *"I thought it might come back and bite me on the bum and it has now"*.

#### **Cross-examination by counsel for the first and second defendants**

She was not unhappy to leave Killimer. In fact she was very happy to do so. He confirmed it was himself who had pressed her on the question of where the money had gone. She did not know anything about the €108,000. He never inquired about her financial affairs.

#### **Cross-examination by counsel for the third defendant**

As to the OPW cheque, she hands both pensions to the Home she is in now. In Killimer she was very confused but getting better. Whilst she was there there was a drastic change for the better. From summer 2007 she was confused but getting better. Sometimes she was clear, other times confused. She did not like Killimer. She was strapped into a chair. He agreed she was coming round. By the 15th November, 2007 she was released by the HSE. Around November he told Mary she was going to be transferred to Portumna. Killimer is eight miles from Portumna. He wanted her to go back where she came from. He found out about the life policy by talking to her other nephew, Richard. *"We found out it had been cashed by ringing the insurance company"*. When he talked to Mary about cashing this insurance policy, she knew nothing of it. On his visit to the bank on the 4th December, 2007, he confirmed he got two statements, both of them in relation to dormant accounts. He denied that he was shown the account of €108,000. He was quite definitive that he was not shown it. In February 2009, having returned from Birmingham to meet Mary, he went to the bank with her and met the bank manager. He agreed that he was the one who was taking up the cudgels in this matter. He said he told the bank she was in a nursing home. He said he had told them this when he visited with her on the 4th December, 2007. He said he told the lady at the counter this. When challenged that this has never been mentioned before in pleadings or anywhere else, he stated that he did not mention this matter before because he did not think it relevant. He stated that he went to Mr. Collins, solicitor, in February 2009 and got a power of attorney. Through 2008 and 2009 she was getting better all the time. In July 2008 she seemed to drift but was getting better. She was a bit in and out.

#### **Re: examination**

When I went to the bank on 4th December, 2007 I had some cheques from Killimer. I lodged them. The lady looked at them. In February 2009, when I went to the bank, I was shown the withdrawal slip with writing on it. I asked the manager why he had written on the withdrawal slip that Mary was of sound mind.

#### **5.3 Dr. Sean Murphy**

Dr. Murphy stated that he had been in practice since 1971 in Portumna. He had known the plaintiff since 1978. He saw her then. The next time he saw her was in 1987. She had liver damage. 1993 was her next consultation. In 2000 she was living with her brother on the Bridge. In 2004 she was mentally ok. She called in once a month with chest infections generally. A Miss Spain from the town used to call in to help her but there was some sort of a falling out. On 5th June, 2007 she had had a fall. She was very ill and was removed to hospital. After five days she was transferred to Killimer. On 11th June, 2007 she was mentally ok. Afterwards in Killimer she became very confused. On the 16th July, he signed a restraint order. In a falls assessment dated 20th July, 2007 her mental state was noted as "intermittent confusion". This means coming and going from time to time. With him at the time she was very confused. On the 24th August, 2007 report she was confused at all times according to the nursing home records and he agreed with this assessment. On the 28th September, 2007 report of the nursing home she was confused at all times and he agreed with this also. On the 18th October, 2007 report she was described as intermittently confused. He agreed with this also. Some days she was fine and others she was confused. On the 23rd November, 2007 she was orientated at all times. She was much better in conversation. She was mainly good, sometimes confused. He agreed with this assessment also. In relation to her leaving Killimer he was surprised that she was leaving. When he saw her on the 27th November, 2007 he told her it would be nicer for her to live in Portumna. Going back in time, from the 8th August, 2007 until 24th August, 2007 she was admitted to hospital. She was under Dr. Durcan. This was not a psychiatric assessment. Dr. Durcan is a physician. Dr. Murphy noted in particular that a letter referred to from the HSE dated the 15th November, 2007 reported on her as she was on 28th September, 2007. He notes that this letter says the nursing home report states "no confusion at this time – on 28th September, 2007". In fact, the nursing home report of that date actually says *"confused at all times"*. On the third week of November 2007 she was reasonably well. He had a talk with her then. He next talked to her on the 27th November, 2007 after she heard she was leaving. She was tearful. This move had been arranged by her nephew. Her moving to Portumna Nursing Home occurred on 3rd December, 2007. He saw her on 7th December, 2007 and found her lucid. He did not actually ask her anything. He did not know what had happened in the bank. Over the following months there were no complaints in relation to her and he did not question her in depth. He said he only heard in February 2009 what had happened in the bank. Mr. Collins, solicitor, asked him to examine her with a view to executing a power of attorney. He said he was shocked to hear of the events of December 2007. He knew her nephew was her only family. One who looked out for her. He knew the O'Donnells just to say hello on the street. It was George O'Donnell who told him that he was very worried. He had said that she was very ill. He did not know of any relationship with the O'Donnells. He was aware she was a very vulnerable person. She was elderly with no family in Ireland and nobody to advise her. He stated he would automatically question her capacity to make a transaction such as occurred on the 6th December, 2007. He said had he been asked he would have said she should be assessed. The solicitor should do this. He took view because this whole area of capacity is a minefield. He stated it would be necessary to examine her at the particular time.

#### **Cross-examination by counsel for the first and second defendants**

He stated that although it was not mentioned in medical records she was always a little hard of hearing. He said he could not be sure when put to him that there was no mention in his records of her suffering from memory loss. In relation to the note of attendance of 7th December, 2007, which is to be found on the second last page of the medical reports, she was noted to be in Portumna Nursing Home, very happy and settled and with no problems. In relation to this, Dr. Murphy said that on his attendances he would stay about ten minutes and ask her if she was okay. No comments are recorded in relation to this.

### **Cross-examination by counsel on behalf of the third defendant**

Dr. Murphy said that he was just a little bit concerned by the plaintiff's move from Killimer to Portumna Nursing Home. He was consulted a week or so before her move but it had already been arranged. In relation to the entry in his notes dated 5th September, 2007, the dramatic recovery to which he referred was that which had occurred between the time of her being in hospital and the completion of her stay in Killimer Nursing Home. The recovery during that period from very serious problems was a dramatic recovery. In early December she did not present as one who was obviously ill. In his opinion in the kind of situation that existed here, questions needed to be asked to ascertain the condition of the plaintiff. Dr. Murphy agreed that when he saw her on the day following the 6th December, she seemed fine but he noted that his visit was purely routine.

### **5.4 Michael Collins – solicitor**

Mr. Collins has been a solicitor since 1992. He knew the plaintiff since the mid-1990s when he dealt with her husband's estate. In the early 2000s he dealt with her in relation to her brother, Sean's estate. He made a will for her in 2001 on the 19th June. In 2006 in relation to inquiries on an insurance policy he dealt with a letter. She seemed to him to be a careful, shrewd lady who led a simple life. She was especially careful in relation to her money. She never owned a house and her funds were her only asset. In the will her executor was her nephew. This nephew also has a brother. He is a nephew on the other side, a nephew of her late husband. In 2006 she seemed in perfectly good form. Everyone knew Mary. She was the woman who opened the Bridge at Portumna. In February 2009 the plaintiff, her nephew and his partner came into his office. Mary said her money was gone. Her nephew explained the details of their visit to the Bank of Ireland. Mr. Collins said that he was shocked. He thought that possibly there was some confusion and he rang Mr. Ryan, the bank manager. The story he was told he said made his hair stand on end. If the bank manager had telephoned him he would have said stop immediately. This was because she was an elderly client, she had no other assets, there was no logical reason for her to do this, to deprive herself of all her assets. He knew the first named defendant did not feature in any way in her will. In relation to the power of attorney, it was only when he received a certificate from a doctor that he prepared one. The plaintiff directed that her attorney should be her nephew.

### **Cross-examination by counsel for the first and second defendants**

They arrived at the office without an appointment. In February 2009 she was in a frail physical state. Mentally she was alert. Mr. Collins stated that he frequently requests the certificate from a general practitioner as to mental capacity. He confirmed the power of attorney was a general one. He has not had to use it because there are no affairs to conduct.

### **Cross-examination by counsel for the third defendant**

In answer to items 50 and 51 in the third defendant's notice for particulars, Mr. Collins had answered that the plaintiff was unable due to lack of mental capacity to execute a power of attorney. He was not trying to mislead, he considered that the question related to the transaction in question. The solicitor's duty in relation to an elderly client, in his view, was to question them carefully and to give them time especially in relation to a big decision. A decision should be treated cautiously and should be fully ventilated. Mr. Collins thought the manager should have consulted her solicitor because he was dealing with a vulnerable and elderly person. As to whether the bank knew that she was living in hospital or a nursing home, it should have known. Mrs. Bourke was coming in on a fortnightly basis. Suddenly she was no longer coming in. Someone must have said something. Someone must have known. She was a well known person. It was always her on the Bridge until four or five years ago. In relation to the power of attorney, this was an enduring power of attorney in relation to her affairs and her care. She was asked for a certificate from her doctor. This is required by law. The power of attorney has not, in fact, been registered. It has to be registered if it is to be used. She is neither mentally incapable at this moment nor becoming so. She was in Court on Monday and seemed perfectly capable. Mr. Collins had not met Mr. Butler very much. He met him on the occasion of the power of attorney and twice since. In relation to the evidence of Mr. Butler that he told the bank she was in a nursing home, he agreed that the letter from the third defendant dated the 13th March, 2009 indicated that the bank did not know she was under medical care or in a nursing home. This letter was in response to his letter dated the 26th February, 2009. The accounts had been dormant for three years. There was no mention in the letter of February 2009 of Mr. Butler having told the bank that she was in a nursing home. His evidence that the bank was told by him that she was in a nursing home is not in fact supported by anything in the replies to particulars or in his attendances on file.

### **5.5 Ciaran Ryan**

Mr. Ryan has been twenty years with the Bank of Ireland. In 2001, he became a manager. In 2006, he was posted to Portumna. Portumna is a good sized retail branch with about 2000 connections. At the time of the events in question, he lived in Ennis. They had ten staff in Portumna branch. He departed Portumna branch approximately a year and a half after the events in question. In his time as manager, he tried to meet about twenty-five per cent of the customers. He never met the plaintiff before the day of the events in question and he never met the first and second named defendants before. On the day in question, the plaintiff and the O'Donnells wanted to see him. Marie Bourke told him. She knew the plaintiff but knew nothing of the matter in question. They were brought into the manager's office. The plaintiff said she wanted to give some money to her neighbours. The manager looked at her accounts. There was €124,000 in one and €16,000 in the other. She said that she wanted to give €124,000 to the O'Donnells. The manager asked the O'Donnells to leave the office so that he could talk privately to the plaintiff. They did so. He spoke initially to her of general things. He then asked why did she want to give this money. She replied they were very good to her and that she wanted to. It was clear on examination of the accounts that she was not living out of the funds contained in those accounts. She said in answer to him that she had no sons or daughters and she did not indicate the existence of any other family. He recommended that she take independent legal advice. She said she understood this but she wanted to go ahead. He explained the process that would be involved. He would draw up a bank draft in favour of the O'Donnells and would give it to her. She seemed ok to him. She was using a walking stick and was frail. It appeared to him that she knew her business and knew what she wanted to do. She did not appear confused, she did not drift away. Asked whether he should have rung her solicitor, Mr. Ryan said she was a customer and she knew what she wanted to do. He did not think that she was being taken advantage of. There was no mention of her being in a nursing home. He said to her "if you happy to go ahead, I am ready to give you the cheque". He meant the draft. He left the office to get the draft. He said that he wrote the words on the withdrawal slip because it was necessary to have a record. By that he meant a memory aid. He stated the bank kept these slips in Head Office for six years minimum and often for much longer. The draft was also witnessed by Marie Bourke. The O'Donnells came back to the branch that day and deposited the draft in their account. He first became aware of the problem when he received a phone call in relation to the plaintiff's account. He pulled up details on his computer. The next thing Mr. Butler and the plaintiff and Mr. Butler's partner arrived at the bank. He did try to put matters back to 2.30 because he was very

busy. He did, however, see them. It was at first what he described as an amenable meeting. It was an inquiring meeting. They asked had he seen her solicitor or doctor. He tried to engage with the plaintiff but Mr. Butler in fact did most of the talking. She seemed distant and he asked himself how this lady's health could have disimproved so much. The meeting gradually became more disagreeable. He agreed that he probably did say that he thought this matter might come back to haunt him. It was only at this meeting that he became aware that she was in a nursing home at the time of the events in question.

#### **Cross-examination by counsel for the plaintiff**

He arrived in September 2006 in Portumna as manager. It is quite common to tell people to make an appointment to see the manager. It was mid-morning on the 6th December, 2007. It was definitely before lunch. Marie Bourke told him that there were three people to see him. Marie Bourke lives close to Portumna. He was in his office. He did not know or recollect whether they were in his view. Marie Bourke did not say why they wanted to see him. He did not know them at all. The plaintiff came into his office using a walking stick. She seemed fine although frail on her feet. She said she would like to give some money to her neighbours. He said ok and called up her accounts. She had two accounts. He referred to account 46405265. Up to 2007 there was little action on this account. Then on 15th November, 2007 in came €108,293.41. He did not ask the plaintiff what this lodgement was. He assumed it came from an insurance policy because of the code. He found nothing unusual in the size of the transaction. He did not ask the O'Donnells anything before they left the room. The initial small talk with the plaintiff was as would be normal. She said she lived in Portumna all her life. He did not ask any personal questions at all. He asked why she wanted to give the O'Donnells the money. She said they had always been good to her. He suggested she give less – maybe €50,000. She responded – she was adamant – she wanted to give €124,000. He asked her would she not need this in the future. She said no. He asked her if she had any sons or daughters. She said no. She said she had no family she wished to discuss this with. He asked her if she wanted to talk to a solicitor. She said no. As far as he was concerned she knew what she was doing. He had the impression the O'Donnells knew her all their lives. A bank draft was used instead of a cheque because it was a deposit account, therefore a cheque could not have been used. He did not ask anything of the O'Donnells. He agreed Marie Bourke might have been able to give more details had he asked her about the plaintiff. He agreed that perhaps he should have asked her. He agreed there had been occasions when he had refused to cash cheques. This occurred, as far as he could recollect, in relation to people who were either intoxicated or in relation to letters of guarantee. In answer to a question from the Court, Mr. Ryan stated that there are no protocols in existence to assist managers in dealing with possibly incapable customers. He stated he decided to proceed to deal with her there and then. He did not think a cooling off period would be appropriate. As to the withdrawal slip, the address was probably filled in by him from the computer. He said he told the plaintiff that once she gave them the draft and they lodged it, it was their money. He said he was anxious that she know everything as to how this transaction worked. By this he meant that she could bring the draft back. He said he took her to be a person who knew what she was doing. The notes on the back that he wrote on the withdrawal slip were to have some record of an unusual transaction. Marie Bourke was asked to witness it in case anything happened to me. He told her what had happened because it might be necessary in case some question arose. A few days before the February 2009 visit by the plaintiff, her nephew and his partner, there was a phone call. There were inquiries made. He was told of this and he looked at the screen and checked the file. He checked the documents. In February 2009 he did not know Robert Butler. Mr. Butler made it clear that he, the manager, would have to explain himself. The plaintiff sat behind at the meeting. He could not engage with her. He found this disturbing. He could not believe that the plaintiff was the same woman he had met a year before. He said that he had never before or since dealt with such a situation.

#### **Re-examination**

The transactions requiring cooling off periods relate to sale of products. No cooling off period is required in these types of transactions.

#### **5.6 Marie Bourke**

Mrs. Bourke stated she worked in Customer Service in Portumna. She was there since 1973 to 1979 and then full-time in 1992. She is from Ennis. She lives in Tynagh which is 7 miles from Portumna. She knew the plaintiff before these events. She used to cash an Old Age Pension. She knew little of her. She did not know she opened the Bridge. The plaintiff was a very private person. She did not have any knowledge of her being ill. She did not know that she was in a nursing home. It was quite normal not to know the customers. She did not notice that Mary Bourke had not been in or had been ill. She was a very independent person who just wanted to do her business and leave. She had no recollection of her coming into the branch. She definitely did not know Mary Bourke was in a nursing home. Robert Butler did not tell her that. If she had been told she probably would have remembered. She remembered them coming into the bank on the 6th December, 2007. She thought the plaintiff was in good form. She thought she had a walking stick. The O'Donnells were on either side of her. She asked the manager to see them. When she saw the docket and its contents there was no discussion. Her dealings with the plaintiff and the O'Donnells were brief but she had absolutely no concerns. She stated she would not do such a transaction without questioning. She stated she would have to have the agreement of the customer to discuss such a transaction with her solicitor or any other third party.

#### **Cross-examination**

She would not pay any attention to the fact that a person was no longer coming in. Also she would not be particularly surprised when the plaintiff did. She had no recollection of a visit on the 4th December, 2007. It would be very common to write notes on a withdrawal slip and to have it witnessed.

#### **6. Submissions of the plaintiff**

The first and second defendants in their defence at paragraphs 9 and 10 set out the close relationship that they had with the plaintiff. They conceded in the defence that the sum of money was a gift. They knew that the plaintiff was in a nursing home. They were aware of her age and of her vulnerability. They were better aware than anyone else of the fact that she had been very seriously ill over the immediate six months preceding the events in question. They were well aware she had been disorientated and confused for substantial periods of time up until quite recently before the events in question. They visited her in the nursing home more than anyone else. On the evidence there were enough facts to establish a relationship that could give rise to a presumption of undue influence. The onus therefore shifted onto the first and second defendants to rebut that presumption. This they have not done.

In relation to the third defendant, even if they did not know that she was in a home at the time of the transaction there was still a duty on them. The bank manager, Mr. Ryan, agreed that there was a duty in relation to persons who were intoxicated and others who might be obviously incapable. Here the circumstances were so bizarre he should have been alert to the possibility that she did not have the capacity to give instructions. There had been a huge deposit only three weeks before. The plaintiff relied upon the rule in *Ward v. McMaster*. There was a duty, there was the clear foreseeability of loss and there was no public policy exception. The bank should have done a lot more than they did.

## 7. Submissions from the third defendant

It would be an awful step to impose a duty not imposed on a bank before. It was conceded that this was an unusual transaction. It was because of that that the manager spoke to the client in private. Should the manager "go over" the head of a customer where the client has rejected the manager's advice? According to the medical evidence available for the date in question, or as close to it as possible, the plaintiff was orientated at all times. Everyone agreed that around the time of the 6th December, 2007, she was orientated and not incompetent. In relation to the plaintiff's submission on *Ward v. McMaster*, each relationship must be examined on its own facts. Here, the relationship is a contractual one. Any duty the manager had was met by him in his private advice to the plaintiff. There was no immediate family. She told him the O'Donnells were good friends and she wished to help them. He had no reason to know if she was ill. She refused to accept the advice to consult a solicitor. The manager realised it was an unusual situation and did all that was required. The bank went as far as it could. The plaintiff gave evidence in court that demonstrated a full capacity. She was found capable of executing a power of attorney in early 2009. The nursing home notes at the time of the transaction indicated she was no longer confused. Her GP, the day following these events, considered her to be okay. There was no reference in the documentation to any memory loss. To find incapacity would be contrary to the evidence.

## 8. Decision

8.1 The case against the first and second named defendants essentially is that, due to the relationship that existed between them and the plaintiff, a presumption of undue influence over the plaintiff arises that has not been rebutted. In the result, the court should set aside the transaction impugned herein.

8.2 The doctrine of undue influence enables a court to set aside transfers of property *inter vivos* whenever it appears that one party has not freely consented to the transaction. The law assumes that certain relationships of their very nature give rise to a presumption of undue influence and where this occurs the burden of proof shifts and the onus falls upon the party seeking to uphold a transaction to show the other party freely consented to it. The Court of Appeal of Northern Ireland in *R. (Proctor) v. Hutton, re Founds Estate* [1978] N.I. 139, in considering the doctrine explained it as follows:-

*"The presumption of undue influence may arise in two sorts of cases. The evidence may show a particular relationship, for example, that of solicitor and client, trustee and cestui que trust, doctor and patient or religious advisor and pupil. Those cases, or some of them, depending on the facts, may of themselves raise the presumption. Such examples, as regards undue influence, have much in common with the doctrine of res ipsa loquitur in relation to negligence. But then there is the other sort of case, the precise range of which is indeterminate, in which the whole evidence, when meticulously considered, may disclose facts from which it should be inferred that a relationship is disclosed with justifies a finding that there is a presumption of undue influence. In other words, the presumption enables a party to achieve justice by bridging a gap in the evidence where there is a gap because the evidence is impossible to come by."*

Lord Lowry, L.C.J., agreed:-

*"The relationships which raise the presumption are left unlimited by definition, wide open for identification on the facts and in all the circumstances of each particular case as it arises . . . it is a common but not a necessary feature of the relationship that the person on whose part undue influence is alleged assumed a responsibility for advising the donor even managing his property. There are certain relationships which are recognised as giving rise to the presumption, but there are also those which, upon a consideration of the particular facts, may raise the same presumption."*

This approach, and notably the speech of Lord Lowry, was approved in this jurisdiction by Barr J. in *McGonigle v. Black* (Unreported, High Court, 14th November, 1988). An elderly farmer living alone following the death of relatives, contracted to sell his property to a near neighbour. The transaction was set aside. Having examined all the facts, Barr J. concluded the sale was:

*"A grossly improvident transaction which was brought about by undue influence persistently exercised by the defendant over Mr. McGonigle who, because of a combination of bereavement, inability to cope, loneliness, alcoholism and ill-health was vulnerable to manipulation and was so manipulated by the defendant to the vendor's obvious disadvantage."*

The actual fact of the transaction and the circumstances surrounding it was such as could be relied on as well as the relationship itself to raise the presumption. Moreover, it is not necessary that the court find a wrongful act. Where the presumption arises, the court intervenes in order to prevent an abuse of influence possessed by one over the other - see *Carroll v. Carroll* [2000] 1 I.L.R.M. 210.

8.3 In this case, it is clear there was a long-term relationship in existence between the plaintiff and the first and second defendants. It was a relationship in which the plaintiff was dependent to varying degrees at different times on these defendants. They called to see her - minded her house - had possession of her old age pension book. The nursing home notes show that they were the most frequent visitors to her in the nursing home. Although her nephew visited four/five times a year, these defendants were, in reality, her only link to the world outside the nursing home. She had been very seriously ill in the six months prior to the transaction. Her illness, as the defendants well knew, involved long periods of confusion and disorientation. She was a highly vulnerable, elderly lady. The transaction itself was wholly improvident. She was divesting herself of the large bulk of her assets for no return whatever. Taking all of these circumstances, including the fact of the transaction itself into account, it is clear, upon the basis of the law outlined above, that a presumption of undue influence arises. The first and second defendants chose not to give any evidence and consequently I find the presumption is unrebutted and the transaction will be set aside.

8.4 The case against the third defendant is brought on an entirely different basis. The plaintiff pleads that the bank was negligence in breach of its duty of care and of its fiduciary duty and that it acted in breach of its contract with the plaintiff. It seems to me that the claim better belongs in this last category of claim - it is a claim in contract. That claim essentially is that the bank breached an implied term of its contract with the plaintiff. That term was that it would not act upon instructions from its customer, the plaintiff,

when she did not have the capacity to give instructions, not being, at the time, in possession of all her faculties. The submission on behalf of the plaintiff in this regard was that the circumstances of this transaction were so bizarre - i.e. the huge deposit in November 2007, followed three weeks later by a withdrawal of all this deposit plus all else in that particular account, by an elderly lady, to a much younger couple who had accompanied her into the bank, almost all her cash assets - that the bank ought to have enquired further to satisfy itself that their customer had the capacity to issue instructions. The questions for the court, therefore, are, firstly, was the plaintiff at the time labouring under an incapacity to give instructions to the bank to effect the transaction. Secondly, does the bank, in such circumstances, have a duty to ascertain the capacity of its customer to give instructions.

### 8.5 The bank's contractual duty to the plaintiff

In its submissions, written and oral, the bank pleads its contractual obligation is to repay to its customers the sums lodged thereby. *Foley v. Hill* [1848] 2 H.L. Cas. 28 at p. 1,006:-

*"... he (the banker) is of course answerable for the amount, because he has contracted, having received that money, to repay to the principle, when demanded, a sum equivalent to that paid into his hands."*

The underlying basis of the relationship is debtor and creditor. Failure to honour its customers' instructions may redound to the discredit of its customer. There is nothing in the contract express or implied that requires a banker to consider the commercial wisdom of a particular transaction. *Lipkin Gorman v. Karpnale Ltd.* [1989] 1 W.L.R. 1340, at p. 1352.

In the absence of knowledge of her incapacity, the bank was obliged to comply with the plaintiff's instructions. Paget's '*Law of Banking*' (13th Ed.) at p. 202, makes it clear that the banker must have knowledge of the alleged mental incapacity before he can treat the customer's mandate as having been withdrawn or otherwise being void:-

*"Where a person is mentally incapacitated and the banker knows of it, he has no mandate on which to act . . ."*

The requirement for knowledge of the alleged mental incapacity on the part of the bank is crucial. Clearly, the bank cannot treat every elderly customer as being unable to give instructions in relation to their accounts merely because of their age. Further, although the bank had no knowledge of the fact that the plaintiff had been ill and was now living in fulltime residential care, even if it had, that fact alone would not have been sufficient for the bank to assume that she lacked mental capacity as opposed to being physically infirm. Paget states further at p. 478, in relation to mental disorder and contractual incapacity:-

*"If the customer becomes mentally disordered or otherwise loses contractual capacity, the bank should not honour his cheques. If the state of the customer's mind is such that he does not know what he is doing, he can give no mandate and any existing mandate is revoked. But if the bank has no knowledge and no reason to suspect, then the mandate is operative. What is sufficient to entitle a banker to refuse to obey his customer's mandate, on the ground that he is suffering from a mental disorder depriving him of mental capacity, is not easy to define. The opinion of the customer's medical practitioner would be a guide, but not conclusive, though if he advised positively that his customer was of sound mind, the banker would normally be justified in paying. Entry into hospital for observation or treatment is not in itself enough."*

McLoughlin J. held in *Bank of Ireland v. Hussey* [1965] I.R. 46, at p. 55:-

*"It is also the position that it is not the death or insanity of the customer that amounts to a withdrawal of authority but the notice of the customer's death or insanity."*

As the bank had no notice of any incapacity, it was obliged to act on instructions.

8.6 I accept that the bank has no duty to advise on the wisdom of carrying through what the customer wishes and instructs. I accept that, in the circumstances of this case, any fiduciary duty the bank might have does not arise. I accept further that the bank must follow the instructions of its customer until it has knowledge of the customer's incapacity. When it has such knowledge, the mandate is revoked. Until it has such knowledge, the mandate is operative. It seems to me to follow from this that where there are circumstances attendant upon a transaction that clearly raise substantial grounds to doubt the capacity of its customer to give instructions, the bank has a duty to make enquiry. It is obvious that such a situation would be rare. Certainly, the mere fact that a customer is elderly could not give rise to such a duty. Something more would have to be present in the mix of circumstances.

8.7 In this case, I consider that the evidence given by the plaintiff was telling. She presented as an elderly lady, a little infirm and very hard of hearing. She answered clearly and firmly, albeit at times a little confused. She was emphatic that she never intended to give her money to the first and second defendants. This, above all else, was clear in her mind and I have no doubt there was no confusion in this regard. I accept her evidence. She had been, during six months before the transaction, in very frail health. In particular, until relatively shortly before, she had been in various stages of confusion and disorientation. It appears to me, on the evidence, that on the balance of probabilities, the plaintiff, at the time of this transaction, was so mentally disordered as to have lost her contractual capacity. The fact she may have been under no such incapacity before or after the transaction does not render such a finding inconsistent with the evidence. The medical evidence clearly shows that, as her General Practitioner stated - "*she was coming and going from time to time*". As late as 23rd November, 2007, she was reported, and her GP agreed, as "*sometimes confused*". This was only two weeks before the transaction.

8.8 The bank had, I accept, no direct notice of this incapacity. The only thing, in my view, that could engage the bank's duty would be that the circumstances of the transaction itself were such as should have raised substantial doubt as to the plaintiff's capacity to give instructions. I have considerable sympathy with the bank manager. He gave frank and direct answers to all questions asked. He agreed it was an unusual transaction. He had not before or since come across another like it. There were no written protocols in existence to guide him. He clearly had reservations at the time and did his best as he saw it. I can only look to the facts that presented themselves to him at that time. He had before him an elderly, but apparently capable lady. She was a customer. He owed her the respect due to her status, both as a customer and a senior citizen. I find that he did not know she was in a nursing home nor did he know she had been ill. Yet the requested transaction was a bizarre one. He himself agreed with that. As far as his knowledge of her assets went, she was proposing to divest herself almost entirely and for no consideration whatever. It seems to me that these circumstances alone raise substantial doubts that ought to have been investigated further and resolved. There was no suggestion made of any need for urgency. The manager might have temporised. He might have asked for a medical certificate. He might have insisted on only dealing with her in the company of her solicitor unless she produced such a medical certificate. There may have been other ways in which the process could have been delayed to allow some further investigation or cooling off period. I would consider there should be written protocols to assist managers in such a situation.

It seems to me that there were substantial grounds arising from the circumstances herein to doubt the capacity of the plaintiff to give instructions. The manager, in the absence of any protocols to guide him in this most unusual transaction, did not make any real enquiry as to her capacity. His questions to her were only to elicit her intentions and to advise she give less and also that she see a solicitor. Any further enquiry would have elicited the information that she was living in a nursing home, that she had a nephew who looked out for her and that she had been ill in a way that gave rise to very serious questions about her mental capacity. In my view, the bank breached a duty to enquire as to their customer's capacity where substantial grounds to doubt existed.

## **9. Judgment**

For the reasons set out, there will be judgment in favour of the plaintiff against each of the defendants jointly and severally in the sum of €124,000.