

THE HIGH COURT

2014 No. 10908 P

BETWEEN

JEAN CONNORS

PLAINTIFF

AND

DANIEL KINSELLA

DAVID TARRANT AND ANDREW TARRANT

(PRACTISING AS TARRANT AND TARRANT SOLICITORS)

DEFENDANTS

JUDGMENT of Mr Justice Garrett Simons delivered on 21 June 2019.**INTRODUCTION**

1. This judgment is delivered in respect of an application to strike out proceedings as frivolous and vexatious and/or as an abuse of process. The application is moved by the first named defendant, Mr Daniel Kinsella. The plaintiff and the first named defendant are sister and brother. The underlying dispute between the parties concerns the validity of a transaction whereby their mother transferred ownership of the family home to the first named defendant. The mother has since deceased, and the plaintiff, as personal representative, seeks to have the transaction set aside.

2. Counsel on behalf of the first named defendant, Mr Sam Deasy, BL, very properly accepts that the threshold to strike out proceedings is a high one, but submits that the case is in the nature of a "documents case". In particular, counsel submits that the resolution of the proceedings will turn to a large extent on the legal effect of a written agreement entered into between certain of the family members on 26 March 1996. Counsel relies, therefore, on the principle that the court is entitled to exercise its jurisdiction to strike out proceedings where the legal rights and obligations of the parties are governed by documents. Separately, Mr Deasy objects that no case of undue influence has been properly pleaded.

3. In response, counsel on behalf of the plaintiff, Mr Stephen Donnelly, BL, submits that the agreement of 26 March 1996 is ambiguous. Counsel further submits that the case can only properly be resolved by way of oral evidence, and, in particular, by cross-examination. Insofar as the pleadings are concerned, Mr Donnelly relies on the various replies to particulars furnished by the plaintiff as amplifying the otherwise sparse pleadings. Mr Donnelly also says that, if necessary, an application to amend the pleadings will be made.

4. For the reasons set out herein, I have concluded that the high threshold for striking out proceedings has not been reached in this case. It is apparent even from the limited affidavits which have been filed on this motion that there are significant factual disputes between the parties. Whereas there is documentation in existence which will certainly have to be considered in the determination of the proceedings, I am not satisfied that the case can be resolved solely by reference to this documentation. The dispute is a dispute between family members, and such documentation as exists is limited. Unlike a commercial dispute, it cannot be assumed that the documentation will be exhaustive of the dealings between the parties.

5. The principal document relied upon, namely the agreement of 26 March 1996, predates the impugned transaction by some seventeen years. It cannot be assumed, therefore, that the agreement is conclusive. Moreover, the terms of the agreement are in any event ambiguous.

THE CASE AS PLEADED

6. The proceedings were instituted by way of plenary summons issued on 23 December 2014. The General Endorsement of Claim reads as follows.

"The Plaintiff's claim as the Administrator of the Estate of the late Frances Kinsella of 10 Casement Park, Bray, County Wicklow is to set aside the voluntary conveyance of a property owned by the said Frances Kinsella and located at 10 Casement Park, Bray, County Wicklow Folio No. 16566F of the Registrar of Freeholders, Co. Wicklow and transferred during her lifetime to Daniel Kinsella, and made on the 7th day of August 2013 due to the undue influence and/or duress of the First Named Defendant and the professional negligence of the Second Named Defendant who acted on behalf of both parties to the said voluntary conveyance."

7. As appears therefrom, the principal relief sought is an order setting aside the transaction of 7 August 2013. This relief is predicated on an allegation of "undue influence" and/or "duress" on the part of Mr Kinsella.

8. A statement of claim was delivered in the proceedings on 8 February 2016. Much of the content of the statement of claim is directed to the conduct of the second and third named defendants. There is very little said as against the first named defendant, Mr Kinsella. It should be explained that the second and third named defendants are solicitors practising as "Tarrant and Tarrant Solicitors". The allegation made against this firm is that (i) the firm acted for both the transferor and transferee in the impugned transaction; and (ii) that this gave rise to a conflict of interest. Although not expressly pleaded, the implication of the statement of claim seems to be that this alleged conflict of interest vitiated the transfer of the dwelling house.

9. This judgment is concerned solely with the application of the first named defendant, Mr Kinsella, to strike out the proceedings as against him. Accordingly, the position of the second and third named defendants will not be considered further in this judgment. In fairness to those defendants, however, it should be recorded that Mr Kinsella has averred on affidavit that the firm of solicitors only acted on his behalf in the impugned transaction, and that his late mother had had independent legal advice from *another* firm. It will ultimately be a matter for the trial judge to determine this aspect of the dispute. As I say, however, it forms no part of the application the subject-matter of this judgment.

10. The principal plea made against the first named defendant is as follows.

"14. The *first and second named Defendants** were aware, at all material times that the late Frances Kinsella was an elderly lady and vulnerable to undue persuasion and/or duress in and about the management of her affairs and that there were other children of Frances Kinsella who would be affected by their acting for both parties."

*Emphasis (italics) added.

11. It is not clear that this plea is, in fact, intended to refer to Mr Kinsella at all. The allegations made are ones which more obviously lie against the two solicitors rather than Mr Kinsella. The allegation of "their acting for both parties" only makes sense if it is intended to refer to the two solicitors. The paragraph may have been intended to refer to the "second and third named" defendants, and the reference to the "first" named defendant may be a clerical error.

12. Certainly, it is not apparent from the statement of claim what precise case is being made against Mr Kinsella. On one reading of the pleadings, it seems that the gravamen of the plaintiff's case involves an allegation of professional negligence as against the solicitors, and that Mr Kinsella may only have been joined to the proceedings as a party who would be directly affected by any order setting aside the transaction transferring ownership of the dwelling house to him. If and insofar as it was intended to allege that Mr Kinsella had exercised undue influence over his late mother, this had not been properly pleaded. Under Order 19, rule 5 of the Rules of the Superior Courts, there is an obligation in all cases alleging undue influence to set out particulars (with dates and items if necessary) in the pleadings. See also *Behan v. McGinley* [2008] IEHC 18 (at page 36).

13. The solicitors then acting on behalf of Mr Kinsella served a request for further particulars on the solicitors acting on behalf of the plaintiff on 22 February 2017. Tellingly, the terms of the request suggest that the solicitors understood the statement of claim as involving some form of claim for undue influence.

"2. Detailed particulars of all or any allegation of acts of undue persuasion and/or duress exerted by the First Named Defendant on the late Frances Kinsella as pleaded in paragraph 14 of the Statement of Claim delivered on the 10th day of February 2016.

3. Detailed particulars of all or any acts carried out by the First Named Defendant to induce the late Frances Kinsella to voluntarily convey her property to the first named defendant as alleged in paragraph 15, and repeated at paragraph 10 in the particulars of Negligence and Breach of Duty of the statement of claim delivered on the 10th day of February 2016."

14. The initial response on behalf of the plaintiff had been to say, unhelpfully, that the particulars sought were "matters for evidence at the hearing of the action". An application was subsequently made to court on behalf of Mr Kinsella for an order directing proper replies to particulars. A more detailed set of replies to particulars were delivered on 27 April 2017.

15. By letter dated 2 May 2017, the solicitors then acting on behalf of Mr Kinsella sought further and better particulars. The letter stated as follows in respect of the replies received.

"Please note that the replies furnished do not address what exactly these acts of undue influence where and as such do not address the requirements of the Rules of the Superior Courts.

We must therefore repeat our request that full particulars of the allegations of undue influence including the nature of the conduct alleged to constitute the undue influence, and the date upon which the act alleged to constitute undue influence were exercised. As set out above the replies furnished do not address any of the central issues."

16. A further set of replies was delivered on 11 October 2017. This is a comprehensive document running to some eight pages. A sense of the allegations now being made against Mr Kinsella can be gleaned from the following paragraphs.

"(6) The Plaintiff pleads that upon the death of her Late Husband on 19 August 2012 the late Frances Kinsella then became the sole legal, beneficial and equitable owner of the property the First Named Defendant, induced his late mother and father to accept a gift to allow the[m] purchase the property, which gift they accepted, with the First Named Defendant, having waited until the death of his late father, did deliberately, intentionally and knowingly use the family relationship and the trust and confidence the late Frances Kinsella placed in him as an opportunity to gain dominance over his late mother, which she availed of, and by reason of a campaign of bullying, cajoling, harassing and manipulation of his late mother he unduly influenced his late mother to transfer her only real asset to the First Named Defendant.

(7) The Plaintiff pleads that the First Named Defendant induced his parents to accept a gift of the purchase monies of the property the subject matter of the within proceedings and subsequent to the death of his late father on 19 August 2012 the First Named Defendant therein began a concerted campaign of bullying, cajoling, harassing and grossly manipulating the late Frances Kinsella for the purposes of unduly influencing her to transfer the property to the First Named Defendant for a right of sole and exclusive residence without a right of maintenance and support, without security for her personal care or medical care, at gross undervalue, with no financial consideration and without reserving to herself a means of living.

(8) The Plaintiff pleads that subsequent to the death of the Late Husband of Frances Kinsella, the First Named Defendant, who resides out of the jurisdiction, knowing his mother was vulnerable to undue influence and/or duress and/or gross manipulation given her age, infirmity, ill-health, recent diagnosis and devastation at the recent death of her beloved husband ultimately sought to take advantage of his late mother and did take advantage of his late mother by contacting his late mother after the death of her beloved husband by way of telephone, attending and staying at the family home whilst he was home from the United States and visiting his late mother whilst she was an in-patient in hospital given her aforementioned extreme ill health and therein began systematic campaign of bullying, cajoling, coercing, harassing and manipulating his late mother into transferring her only real asset, that is, the property the subject matter of the within proceedings to the First Named Defendant."

APPLICATION TO STRIKE OUT PROCEEDINGS

17. An application on behalf of Mr Kinsella to strike out the proceedings was brought by way of Notice of Motion issued 15 July 2018. The application is grounded on an affidavit sworn by Mr Kinsella on 10 July 2018. In this affidavit, Mr Kinsella advances two principal objections to the proceedings as follows. First, a complaint is made as to the form of the proceedings and, in particular, it is alleged that the statement of claim fails to plead that the impugned transaction was, in fact, due to undue influence and/or duress.

Secondly, it is alleged that the plaintiff has advanced no grounds to support the relief sought; that the proceedings are incapable of being proved; and that the plaintiff has instead used the proceedings as a vehicle to make "scandalous and unsubstantiated allegations of impropriety" against Mr Kinsella.

18. It seems that Mr Kinsella's contention that the proceedings are incapable of being proved is based on a written agreement of 26 March 1996. Mr Kinsella alleges that the dwelling house the subject-matter of these proceedings was purchased by him for £23,600 on 19 October 1995 from Bray Urban District Council and vested in his parents, Daniel Kinsella Senior and Frances Kinsella. Mr Kinsella described the agreement as allowing his parents to take a lifetime tenancy in the dwelling house which he had purchased, and which would revert to him in the event of their death. Mr Kinsella has exhibited the agreement of 26 March 1996. I will return to consider the terms of that agreement in detail under the next heading below.

19. The plaintiff has sworn an affidavit in response to the application to strike out. This affidavit is dated 4 December 2018. A letter is exhibited as part of this affidavit purporting to be a letter from Mr Kinsella to Bray Urban District Council. This document states that the author, Mr Kinsella, is

"thinking of buying 10 Roger Casement Pk as a gift for my parents who have lived there since 1968, but I am disagreeing with the Council on price [...]"

20. A further affidavit has been sworn on behalf of Mr Kinsella on 6 February 2019. This affidavit purports to exhibit a letter dated 20 July 2016 sent on behalf of Mr Kinsella's other siblings making a complaint against the plaintiff to the Law Society. (The plaintiff is, apparently, a practising solicitor). The signature endorsed on the exhibited letter, however, indicates that it was sworn a number of months *earlier* than the date of the affidavit. Counsel on behalf of Mr Kinsella confirmed that his solicitor was in a position to give an undertaking to the court to have an affidavit in proper form sworn and filed by close of business on 19 June 2019. At all events, I do not think that anything turns on this second affidavit or the exhibit for the purposes of the present application to strike out the proceedings.

AGREEMENT OF 26 MARCH 1996

21. As explained above, Mr Kinsella has exhibited a copy of an agreement which he says had been entered into by certain family members on 26 March 1996. In circumstances where the application to strike out the proceedings is based, in large part, on an argument that this is a "documents case", it is necessary to set out the terms of the agreement in full.

"Agreement for 10 Casement Park, Bray, Co. Wicklow, Ireland.

We, the undersigned, Frances Kinsella, Daniel Kinsella Senior and Daniel Kinsella, being of sound mind and body, are in complete understanding of this agreement on this day of 26 March 1996.

I, Daniel Kinsella, born the 26th day of October, 1965, am buying the house and property at 10 Casement Park, Bray, Co. Wicklow, Ireland, on behalf of my parents. The reason being is this is a tenant scheme purchase program and since the house is in my father's name it doesn't legally give me the right to purchase the property in my name. This is considered a present to my parents. I am buying the property for myself, but in my parents name, who have lifetime tenancy. This agreement cannot be overwritten by anyone's will.

TERMS

A: My parents have lifetime tenancy until they are deceased, if I predecease my parents, this will not change.

B: Alan Kinsella and David Kinsella shall have the option to live in the house until they each reach forty-five (45) years of age. If they should marry, they and their spouses have until four (4) years from the date of the wedding to find their own home. Should they bring a common-law wife into the home, my parents and myself have the option to put a time limit on this if desired, but it will not exceed four (4) years, from date of moving in.

C: If Alan and David are without a home of their own by the age of forty-five (45), my parents and I will renegotiate terms C of this agreement only.

D. Maintenance of the house and property shall be as always. The house and property shall be maintained by my parents as it has been maintained as when the County Council owned it.

E: Ten (10) pounds per week as the rent. Deposited in the bank each week, the yearly total being five hundred and twenty (520) pounds. This rent shall never increase nor decrease for my parents. Of this five hundred and twenty (520) pounds, two hundred and sixty (260) pounds shall go towards house and property maintenance only. The remaining two hundred and sixty (260) pounds is for my parents to do what with what they wish.

F: All the windows shall be replaced by Daniel Kinsella within the next two years from the purchase date of the house and property.

G: Household maintenance that in the past has been covered by the County Council shall now be covered by the two hundred and sixty (260) pounds yearly maintenance allowance. For example: roof and plumbing repair and major electrical (if the copper tanks need replacing or and the exterior door)

All Signatures (*sic*) below have read and understood this agreement."

22. The Agreement is stated to have been signed by Daniel Kinsella Senior, Frances Kinsella, Daniel Kinsella, Alan Kinsella, Sandra McGrath and David Kinsella.

23. Mr Kinsella in his first affidavit has also exhibited a copy of the transfer order of Bray Urban District Council dated 19 October 1995. The following clauses are potentially relevant to the underlying dispute in these proceedings. The transfer order identifies Daniel and Frances Kinsella of 10 Roger Casement Park, Bray, as "the Purchaser". Ownership of the dwelling is vested in the purchaser in fee simple subject to conditions. Clause 3 provides as follows.

"3. The following special conditions shall apply to the dwelling for a period of twenty five years* from the date of the vesting of the dwelling:

(a) the dwelling shall, unless the housing authority otherwise allow, be occupied as a normal place of residence by the purchaser or the purchaser's successor in title or by a member of the purchaser's family or the family of his successor in title;

(b) the dwelling or any part thereof shall not, without the consent of the housing authority, be mortgaged, charged, or alienated otherwise than by devise or operation of law."

* The word "five" has been struck through in the original.

24. It appears from the foregoing that notwithstanding the terms of the family arrangement of 26 March 1996, Mr Kinsella's parents would not have been able to transfer ownership of the dwelling to him without the consent of the Local Authority.

DISCUSSION

25. For the reasons explained by the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21, [2014] 2 I.R. 301, [16] to [18], it is important to distinguish between the jurisdiction to strike out and/or dismiss proceedings pursuant to (i) Order 19 of the Rules of the Superior Courts, and (ii) the court's inherent jurisdiction. An application under the Rules of the Superior Courts is designed to deal with circumstances where the case as pleaded does not disclose any cause of action. For this exercise, the court must assume that the facts—however unlikely that they might appear—are as asserted in the pleadings.

26. By contrast, in an application pursuant to the court's inherent jurisdiction, the court may—albeit to a very limited extent—consider the merits of the case. If it can be established that there is no credible basis for suggesting that the facts are as asserted, and that the proceedings are bound to fail on the merits, then the proceedings can be dismissed as an abuse of process. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings.

27. I propose to address the present case by reference to each of these two tests.

(1). Whether statement of claim discloses a cause of action

28. The gravamen of the case as pleaded in the statement of claim is that the deceased did not have the benefit of independent legal advice at the time she entered into the transaction to transfer the ownership of the dwelling house to her son, Mr Kinsella. It is alleged that the second and third named defendants improperly acted as solicitors for both parties to the transaction. (As noted at paragraph 9 above, Mr Kinsella has denied this on affidavit).

29. If one assumes for the purpose of argument that the facts as pleaded are correct, then the statement of claim does disclose a cause of action. The pleadings allege that the deceased was vulnerable and that she did not have the benefit of independent legal advice. The courts have an equitable jurisdiction to set aside transactions on the grounds of undue influence or improvident bargain. An evidential presumption of undue influence arises in cases where (i) the nature of the relationship between the parties give rise to a presumption of influence, and (ii) the nature of the transaction is such as to call for an explanation. This is a rebuttable presumption. One of the factors to be considered in determining whether the presumption has been rebutted is whether the donor had the benefit of independent legal advice. A solicitor who acts for both parties in a transaction cannot be regarded as independent for this purpose. See, for example, *Carroll v. Carroll* [1999] 4 I.R. 241.

30. The statement of claim does not provide proper particulars of the claim. This deficiency has, however, been remedied by the two sets of replies to particulars furnished on 27 April 2017 and 11 October 2017.

31. One of the criticisms which has been advanced on behalf of Mr Kinsella as against the plaintiff is that—to adopt the language of counsel—the "goal posts keep changing". In this regard, counsel drew my attention to the fact that the precise formulation of the claim differs as between the endorsement of claim in the plenary summons, the statement of claim, and the various replies to particulars.

32. There is some merit in this argument. However, I am satisfied that when one considers the totality of the pleadings and the replies to particulars, it becomes clear that a case of *inter alia* undue influence is being pursued against Mr Kinsella.

33. A nice question arises as to whether the pleadings should be amended so as to ensure that this claim is set out in the formal pleadings rather than by way of replies to particulars. This is especially so where, on one reading, the case as pleaded in the statement of claim is directed principally to the position of the two solicitors.

34. It is sufficient for the purposes of disposing of this application to strike out the proceedings to note that—even if the case has not been fully and properly pleaded in the statement of claim—it is certainly capable of being rescued by way of amendment. It is well established that one of the matters to be considered by a court when hearing an application to dismiss proceedings is as to whether the proceedings might be rescued or saved by an amendment to the pleadings. This is set out, for example, in *Sun Fat Chan v. Ossa Ltd* [1992] 1 I.R. 425 at 428.

35. Counsel for the plaintiff did, however, formally request leave to amend the pleadings. Generally, a party who wishes to amend his or her pleadings is expected to provide the other side, and the court, with a draft setting out the amendments which it is sought to make to the pleadings. In the event that the other side object to the amendments, an application will have to be made to the court for leave to amend. The court will then have to consider whether the amendments are necessary for the purpose of determining the real questions in controversy between the parties. To date, the plaintiff has not indicated the nature of the amendments which she wishes to make.

36. I propose to allow the plaintiff to issue a motion seeking leave to amend pursuant to Order 28, rule 1 of the Rules of the Superior Courts within four weeks of the date of this judgment. The proposed amendments are to be exhibited as part of the grounding affidavit. It will be a matter for the judge hearing the motion to determine whether the amendments should be allowed. Factors to be considered in this regard will, obviously, include the delay in seeking leave to amend, and the extent to which this delay is mitigated by the fact that the nature of the case being made against Mr Kinsella has been set out in the replies to particulars.

(2). Inherent jurisdiction

37. The principal argument advanced in support of the application to strike out and/or dismiss the proceedings in the present case is that there is no credible basis for the plaintiff's claim. This argument is one which falls to be assessed by reference to the court's inherent jurisdiction.

38. Much emphasis is placed in this regard on the transfer from the Local Authority on 19 October 1995 and on the family arrangement recorded in the agreement of 26 March 1996. In effect, Mr Kinsella maintains the position that he had purchased the dwelling house in 1996, and that the subsequent transfer of ownership to his name on 7 August 2013 was largely a formality.

39. Whereas it is correct to say that—in the context of an application made pursuant to the court's inherent jurisdiction—it is open to the court to consider the *credibility* of the plaintiff's case to a limited extent, the court is not entitled to determine disputed questions of fact.

40. The limitation on the assessment of credibility has been explained as follows by the Supreme Court in *Lopes v. Minister for Justice Equality and Law Reform* [2014] IESC 21, [2014] 2 I.R. 301.

"[19] It is also important to remember that a plaintiff does not necessarily have to prove by evidence all of the facts asserted in resisting an application to dismiss as being bound to fail. It must be recalled that a plaintiff, like any other party, has available the range of procedures provided for in the RSC to assist in establishing the facts at trial. Documents can be discovered both from opposing parties and, indeed, third parties. Interrogatories can be delivered. Witnesses can be subpoenaed and can, if appropriate, be required to bring their documents with them. Other devices may be available in particular types of cases. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in *Sun Fat Chan v. Osseous Ltd.* [1992] I.R. 425, at p. 428, that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance."

41. The judgment in *Lopes* went on then to address the position of what might be described as "document cases" as follows.

"[20] At the same time, it is clear that certain types of cases are more amenable to an assessment of the facts at an early stage than others. Where the case is wholly, or significantly, dependent on documents, then it may be much easier for a court to reach an assessment as to whether the proceedings are bound to fail within the confines of a motion to dismiss. In that context, it is important to keep in mind the distinction, which I sought to analyse in *Salthill Properties Ltd. v. Royal Bank of Scotland plc* [2009] IEHC 207, (Unreported, High Court, Clarke J., 30th April, 2009), between cases which are dependent in themselves on documents and cases where documents may form an important part of the evidence but where there is likely to be significant and potentially influential other evidence as well."

42. The Supreme Court, *per* Clarke J., subsequently elaborated upon this theme in *Keohane v Hynes* [2014] IESC 66 as follows.

"6.8 In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred.

6.10 It is an abuse of process to bring a claim based on a breach of rights or failure to observe obligations where those rights and obligations are defined by documents and where there is no reasonable basis for suggesting that the relevant documents could establish the rights and obligations asserted. Likewise, it is an abuse of process to maintain a claim based on facts which can only be established by a documentary record and where that record could not sustain any necessary part of the factual assertions which underlie the case. Finally, it is an abuse of process to maintain a claim based on a factual assertion in circumstances where there is no evidence available for that assertion and, importantly, where there is no reasonable basis for believing that evidence could become available at the trial to substantiate the relevant assertion. However, the bringing of a claim based on a factual assertion for which there is or may be evidence (even if the defendant can point to many reasons why it might be argued that a successful challenge could be mounted to the credibility of the evidence concerned) is not an abuse of process. It is for that reason that a court cannot properly engage with the credibility of evidence on a motion to dismiss as being bound to fail and it is for that reason that the very significant limitations which I have sought to identify exist in relation to the extent to which a court can properly engage with the facts on such an application."

43. Applying these principles to the present case, I do not think that it can be characterised as a "documents case". The principal document relied upon by Mr Kinsella is the agreement of 26 March 1996. It cannot be said that the meaning and effect of this document is so obvious that its existence is determinative of the issues in these proceedings. The document does not purport to have the legal effect of transferring ownership of the dwelling house to Mr Kinsella. Rather, it is expressly acknowledged that Mr Kinsella did not have the right to purchase the property in his name in circumstances where it was subject to a tenant scheme purchase programme. This would appear to be entirely consistent with the terms of the Transfer Order from Bray Urban District Council to Mr Daniel Kinsella Senior and Mrs Frances Kinsella on 19 October 1995. This was subject to the special condition set out earlier which limited the alienation of the dwelling house.

44. The legal position as of 26 March 1996, therefore, was that ownership of the dwelling house remained with Mr Daniel Kinsella Senior and Mrs Frances Kinsella. Mr Kinsella himself did not acquire a legal interest in the dwelling house until 7 August 2013.

45. The plaintiff has alleged that the transfer of 7 August 2013 was procured as a result of the undue influence of Mr Kinsella.

Particulars of the alleged undue influence have been set out in the various replies for particulars furnished on behalf of the plaintiff. Further, the plaintiff has averred on affidavit to the truth of these allegations. Mr Kinsella strenuously denies these allegations, and has filed a full defence to the proceedings.

46. It is simply not possible to resolve the factual disputes between the parties at this stage, in advance of a full hearing and the cross-examination of witnesses. Certainly, the existence of the agreement of 26 March 1996 is not decisive. At its very height, the agreement of 26 March 1996 *might* be regarded by the trial judge as documentary evidence of the existence as of 1996 of some sort of an agreement between certain family members as to the future ownership of the dwelling house. It is not at all clear, however, as to whether this agreement would be legally enforceable. It also appears that the plaintiff has suggested on affidavit that Mr Kinsella did not, in fact, provide the maintenance and support referred to in the agreement and this might constitute a breach which would vitiate the agreement even if it had been enforceable.

47. At all events, the transaction which is impugned in the legal proceedings, namely the transfer of ownership from Mr Kinsella's mother to Mr Kinsella, did not occur for another seventeen years (7 August 2013), and occurred against a background whereby one of the signatories to that agreement, Mr Kinsella Senior, had since deceased, and where Mrs Kinsella was elderly and in poor health.

48. The essence of the case against Mr Kinsella, as amplified in the replies for particulars, is a claim of undue influence. It cannot be said—on the basis of the materials before the court at this stage—that this claim is not credible and is bound to fail. It appears to be common case that, as of the date upon which she executed the transfer of the dwelling house, the deceased was of advanced age and in poor health. It is also a fact that her husband (the protagonists' father) had recently died. Further, on the face of it, the transaction conferred a substantial benefit on Mr Kinsella: the ownership of the dwelling house was transferred into his sole name without any acknowledged payment on his part. A trial judge hearing this case might well determine that the circumstances are such to give rise to a presumption of undue influence. Mr Kinsella may well be in a position to rebut any such presumption, and might, for example, persuade the trial judge that he had provided valuable consideration for the transfer at the time of the family arrangement of 1996. However, in order to resist the application to strike out proceedings, all that the plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted, and which are necessary for success in the proceedings. The *undisputed facts* (above) are such that the plaintiff has met this threshold. There is at least an arguable case that the circumstances give rise to a rebuttable presumption of undue influence.

49. In the premises, it cannot be said that the claims made by the plaintiff are not credible. This is not to suggest, for a moment, that the plaintiff will necessarily succeed at the trial of the action. Rather it is intended to indicate that the high threshold for striking out and/or dismissing proceedings has not been met. It is simply not possible for this court, on the basis of the affidavit evidence and documentary evidence before it, to say that the claim is bound to fail. The dispute between the parties can only be resolved on oral evidence.

PROPOSED ORDERS

50. The application to strike out and/or dismiss the proceedings is refused.

51. I propose to allow the plaintiff to issue a motion seeking leave to amend pursuant to Order 28, rule 1 of the Rules of the Superior Courts within four weeks of the date of this judgment. The proposed amendments are to be exhibited as part of the grounding affidavit.