

**THE HIGH COURT ON CIRCUIT****SOUTHERN CIRCUIT****Record No. 02137/2009****BETWEEN****E.G.****PLAINTIFF****AND****E.G.****DEFENDANT****JUDGMENT of Mr. Justice Edwards delivered on the 30th day of March, 2012.****Introduction:**

This matter came before this honourable Court for hearing on the 3rd and 4th November, 2011 by way of an appeal against the Order of the Circuit Court for the Southern Circuit on the 17th February, 2011.

The plaintiff, whose appeal it is, appeared in person and represented herself. The defendant was represented by both senior and junior counsel, and by solicitors instructing them.

The appeal, as is required, consisted of a complete re-hearing of the case, following which hearing judgment was reserved. The Court is now in a position to deliver its judgment.

**The Proceedings:**

The proceedings herein were commenced by Equity Civil Bill dated the 28th May, 2009. It is pleaded in the Indorsement of Claim to that Equity Civil Bill that the plaintiff is the registered owner of the property comprised in a folio of the Register of Freeholders for the relevant county. Further, it is pleaded that the defendant is the brother of the plaintiff and resides in the property aforementioned, which is located in the southern part of the country.

The Equity Civil Bill asserts that the defendant has unlawfully trespassed upon the property comprised in the folio aforesaid; that he has maintained animals thereon and that despite repeated requests and demands has refused to vacate the same.

It is further pleaded that the defendant has assaulted and intimidated the plaintiff and has put her in fear. It is also contended that the defendant has asserted an interest in the said lands and has slandered the plaintiff's title thereto.

The plaintiff claims various injunctions, an account of all rents and profits received by the defendant from the said lands in the six years prior to commencement of the proceedings, an order for accounts and enquiries (if necessary), damages for trespass, assault and slander of title, further and other relief and costs.

The defendant has filed a full defence to the plaintiff's proceedings together with a counterclaim. He admits that the plaintiff is the registered owner of the property comprised in the folio aforesaid, that he is the brother of the plaintiff and that he resides at the address stated. The remainder of his defence consists of a denial and traverse of each and every claim pleaded on behalf of the plaintiff in the Indorsement of claim to her Equity Civil Bill.

The following matters are then pleaded by way of counterclaim:

"1. The plaintiff is registered as owner of the lands comprised in the folio aforesaid further to a Deed of Transfer dated the 22nd day of April 1999. The transfer is a voluntary transfer and consequently the provisions of section 52 (2) of the Registration of Title Act, 1964 apply. This provides "Where, however, the Transfer is made without valuable consideration, it shall, so far as concerns the Transferee and persons claiming under him otherwise than for valuable consideration, be subject to all unregistered rights subject to which the Transferor held the land transferred".

2. On 28th of April 1998, the plaintiff's and the defendant's mother executed a document which was signed by the mother and the plaintiff and witnessed by a solicitor. This states:

*'Prior to making any transfer of lands to my daughter, I wish to be placed on record that any such lands transferred to her are in a part caretaker capacity as I have been unable to contact my son, who is abroad. I wish to make it clear that it is my will and intention that my son should receive half of the lands transferred by me. On transferring the lands to my daughter, I appointed as caretaker and executor of this matter.'*

3. There is a second document which is undated but signed by the plaintiff and witnessed by a solicitor which states:

*'As per the original contract with my mother, it is my intention to transfer in the region of 50% of my (and my mother's) interest in the land held in folio to my brother at no cost to him save legal fees and taxes (etc) as soon*

*as my current High Court proceedings are complete. This will be a full and final settlement of my contract with my mother is anticipation that my brother returns to farm the land with my mother in the near future. "*

4. There is subsequent and further *inter partes* correspondence acknowledging the defendant's legitimate legal interest and entitlements to the lands/and or part of the lands and hereditaments, comprising the aforesaid folio.

The defendant counterclaims for an Order vesting the lands and hereditaments, in the folio aforesaid, or part thereof, either in his sole name or alternatively in the joint names of the plaintiff and the defendant. He further claims an injunction compelling the plaintiff to provide written verification of the defendant's entitlement to avail, by virtue of him legitimately farming the said lands, of such various Department of Agriculture I European Union grants, payments and/or subsidies as the plaintiff is currently entitled to by virtue of her legal ownership. He also claims damages allegedly arising from the plaintiff's alleged failure, neglect or refusal to acknowledge and effect his legal right to the said lands, or to part thereof. In addition he claims further and other relief and the costs of the proceedings.

Although the counterclaim as it is pleaded advances, at its high water mark, a claim by the defendant to the entirety of the property comprised in the folio aforesaid, it was conceded by Senior Counsel for the defendant at the commencement of the appeal hearing that the very most that the defendant was in fact seeking was a 50% interest in that property, and also that in so far as the 50% share being claimed by the defendant is concerned the plaintiff was entitled to be re-imbursed to the extent of 50% for her outlays on stamp duty and legal fees.

#### **The Proceedings in the Circuit Court:**

Although neither party had claimed partition in their pleadings the matter appears to have been approached in the Circuit Court, without ostensible objection by either side, as a *de facto* partition suit. At the end of the case the learned trial judge made an order, presumably on foot of the claim for 'further and other relief' advanced both in the Indorsement of Claim to the Equity Civil Bill, and also in the counterclaim, effectively partitioning the lands in a manner that will be described in more detail later in this judgment. He also directed the payment of a sum of money (€30,000) by the defendant to the plaintiff. The basis for this award is not made clear in the Circuit Court order. However, it does not appear to have been an award of damages, and it may have been partly to re-imburse the plaintiff for outlays incurred by her and partly to compensate her for the fact that the portion allocated to the defendant was somewhat more valuable than the portion allocated to the plaintiff in circumstances where the property was incapable of being conveniently partitioned in equal lots.

#### **The Evidence Adduced at the Appeal:**

The Court heard detailed evidence over two days from witnesses called by both sides, as a result of which it has been able to determine the background to the matters in dispute and make certain findings of fact.

The plaintiff called the following witnesses: a partner in the firm of the plaintiff's former solicitors; a relative and purported witness to the document dated the 28th April, 1998 referred to in paragraph 2 of the counterclaim; a surgeon; another solicitor whose firm had acted for the plaintiff's late mother from early 2004 until her death; a general practitioner; a valuer; a solicitor whose firm had acted for the plaintiff's late mother up until early 2004 when she changed solicitors; the plaintiff herself; a home help who had cared for the plaintiff's late mother; a local farmer who had previously rented part of the property in the folio aforesaid; a Department of Agriculture official and; unusually, the defendant himself.

The defendant called but one witness: a valuer.

#### **The Background to the Matter:**

Based upon the evidence adduced, the Court understands the background to this case to be as follows:

The parties' late mother had been a widow for quite a number of years prior to her death, and certainly at all times material to these proceedings. She and her late husband had had three children: a son (the defendant) and two daughters (one being the plaintiff).

Up until *circa* April 1998 the late mother was both the legal and beneficial owner of a substantial farming enterprise, consisting of two farm properties. The first consisted of the farmhouse, farm buildings and c. 153 acres of land comprised in the aforesaid folio (hereinafter "the main farm"). The second consisted of c. 49 acres of land comprised in another folio (hereinafter "the outside farm"). Both farms are close together in proximity..

Over the course of 1998 and 1999 the parties' late mother divested herself of the two properties in question, while reserving certain rights for her own benefit, in what might loosely be called a family settlement. The proceedings herein arise from disputes and differences that developed between the plaintiff and her brother specifically, but more widely between all three siblings, as a consequence of that family settlement.

#### **The plaintiff's circumstances**

The plaintiff and her siblings grew up in the farmhouse on the main farm. In early adult life the plaintiff went to college, obtained a professional qualification and pursued a career in Dublin. She married and she and her husband had two children. However, tragedy was to strike in as much as in 2001 one of their children ("S") was diagnosed with a very serious illness. It was a very difficult time for those directly concerned. A second child "A" was born later in 2001 and was cared for initially by a full time nanny hired by the plaintiff and her husband so as to enable them to concentrate on providing support for "S". Then to compound an already difficult situation "A" was found to have medical problems of her own, for which she continues to receive treatment today.

In 2002 "S" was in remission following treatment but was very underdeveloped physically and mentally. She required continuous invasive and aggressive treatment which the plaintiff and her husband provided and/or administered. Both parents fought as hard as they could to save their eldest daughter.

Unfortunately, during this time the relationship between the plaintiff and her husband, who were both exhausted, deteriorated. Their marriage broke down, they separated and they became involved in fraught matrimonial litigation which went on for a number of years. The plaintiff is now divorced from her husband.

In 2003, not long after the parties separated, "S's" illness returned. The plaintiff took "S" abroad in a further desperate attempt to secure an effective treatment for her cancer. Unfortunately, and to the heartbreak of her parents, "S" died shortly afterwards.

### **The defendant's circumstances**

The evidence concerning the defendant's personal situation was a great deal less detailed. The Court was not told what the defendant's educational achievements are or whether he qualified at any particular trade, vocation or profession. It is known that he is now engaged in farming the property contained in the folio aforementioned, and that for some time prior to his mother's death in 2007 he had been farming it on her behalf. However, he had become estranged from her in the late 1990's in the circumstances described in the next paragraph of this judgment. However, the evidence of the late mother's solicitor suggests that when she consulted her previous solicitor in early 2004 she was accompanied by her son which suggests at least some degree of reconciliation between them at that stage.

The Court is not aware if the defendant had also farmed on his mother's behalf at some earlier stage. What is clear on the evidence is that his mother successfully obtained a three year barring order against him effective from the 17th June, 1998 until the 16th June, 2001 on the grounds of domestic violence, *i.e.* elder abuse perpetrated by a child upon a parent. Be that as it may, as already alluded to, the defendant and his mother were ostensibly reconciled at some point post 2001 and there appears little doubt but that he operated the farm with her acquiescence and ostensibly on her behalf in the years leading up to her death. Following her death he has continued to operate it as though it was entirely his own.

Originally the main farm was a dairy farm but that is no longer the case. Although cattle are still maintained on the main farm it is now a dry stock enterprise, the milk quota having been disposed of.

The evidence establishes that the herd number associated with the main farm was in the late mother's name, and since her death continues to be held by her estate, of which the defendant is the executor and sole beneficiary pursuant to the late mother's last will and testament dated the 13th July, 2004. However, it is clear from the evidence that the parties' late mother was in declining health from in or about 2005 and it appears that the defendant was operating the farm, ostensibly on her behalf, from in or about that time. In 2010 the defendant was appointed a herd keeper of the said herd arising out of Department of Agriculture concerns about the welfare of the animals concerned. According to the evidence of an official from the Department of Agriculture, the relevant legislation provides for the appointment or designation of a herd keeper separate from the herd owner to manage a herd on a day to day basis. The step of appointing the defendant as herd keeper of the late mother's herd was taken by the Department of Agriculture in the interests of animal welfare and, in the words of the official, "to bring him (*i.e.* the defendant) into the fold so to speak".

As previously stated, the main farm had originally had a substantial milk quota. However, according to the evidence of the plaintiff's former solicitor, this was sold for the benefit of the plaintiff's late mother (with the co-operation of the plaintiff to whom the associated lands had been transferred by that stage). While the evidence is silent as to the precise date on which this occurred, the Court has been left with the distinct impression that this occurred most probably before, but certainly not long after, the parties' late mother entered significantly declining health and the defendant began, or perhaps resumed, operating the farm on her behalf.

The parties' late mother was hospitalised for a significant period in 2006, following which she went to reside in a nursing home in November 2006. Thereafter she remained a resident of the nursing home until she died in July 2007.

### **The third sibling's circumstances**

The court received very little evidence concerning the personal circumstances of the third sibling. It is known that she also moved out of home in early adult life and that she lives in the Leinster area. Apart from that not much is known about her at all. However, the Court did receive evidence from the plaintiff that for many years she has had a difficult relationship with her sister. Notwithstanding this, it seems that the plaintiff turned to her sister for help and support following her marriage break-up and during the ensuing matrimonial litigation, and for some time lived in her sister's home. The plaintiff contends that while some support was forthcoming from her sister it was not unconditional. It appears that at least part of the reason why the plaintiff and her sister had a difficult relationship is that her sister believed that the plaintiff had instigated or encouraged her mother to seek the 1998 barring order against her brother and, further, that she considered that her brother had been unfairly treated both in that regard and also in regard to the family settlement at the heart of these proceedings, about which I will say more in a moment. According to the plaintiff, when she sought her sister's help and support, her sister would only provide this upon fulfilment of certain conditions aimed at improving the defendant's situation. Moreover, the plaintiff claims to have faced unpleasant threats from her sister as to what might happen in the event that she was unwilling to co-operate.

### **The family settlement at the heart of these proceedings**

It is not clear what prompted the parties' late mother to divest herself of the farm properties. While the Court has heard evidence from her solicitor at the time and the plaintiff's solicitor, and evidence from the plaintiff herself, no clear light has been shed on the late mother's intentions or motivation in taking this step. It seems that initially she intended to transfer both folios into the joint names of the plaintiff and her sister. The plaintiff wasn't happy with that suggested arrangement as it appears that the relationship with her sister was difficult even at that time and she was concerned about the workability of a joint tenancy arrangement. The plan was therefore changed as a result of which the third sibling received a straight transfer of the outside farm and the plaintiff received a transfer of the main farm but with rights (i) of residence in the farmhouse for life and (ii) of maintenance and support for life, reserved in favour of her mother. The transfer to the plaintiff was effected by a Deed of Transfer dated the 22nd of April 1999 and it was expressed to be in consideration of the natural love and affection which the transferor bore towards her daughter. There was also a side agreement, also expressed to be in consideration of the natural love and affection which the mother bore towards her daughter in which the plaintiff agreed with her mother (i) that no registration of any kind of disposition of the property comprised in the folio aforesaid was to be made during the life of the transferor without her consent, (ii) further providing that the mother would be entitled to the income from the property comprised in the folio aforesaid in satisfaction of the right of maintenance and support referred to in the Deed of Transfer, and (iii) providing that the right of residence granted by the Deed of Transfer would be an exclusive right of residence and that the mother would not be obliged to share the use or occupation of the property with the plaintiff or anybody else.

The plaintiff paid all legal costs in connection with the transaction, *viz.*: her own legal costs in the sum of IR£3,125.31 and those of her mother in the sum of IR£3,070.30. She also paid stamp duty on the transaction in the sum of £10,524.

There was no mention of the defendant and he received no legal interest in the property concerned. This was clearly deliberate in as much as the solicitor who acted for the plaintiff testified that his instructions were that there were difficulties at the time with the defendant and violence by the defendant. The question arises of course as to whether in the circumstances the late mother intended an unconditional gift of the main farm to the plaintiff (subject to the rights reserved in her own favour), or whether she intended the plaintiff to hold the main farm upon some form of trust for the joint benefit of herself and the defendant.

There is no evidence from any of the parties, or of the solicitors, involved at the time of the transfer to support the creation of any

express trust. The question then is whether a resulting trust jointly in favour of the plaintiff and defendant arises from the general circumstances of the transaction, alternatively a constructive trust based upon the plaintiff's own behaviour and actions.

Neither party has produced any document either pre-dating the transfer, or created at the time of the transfer, capable of shedding further light on the issue. From the plaintiff's point of view the case that she makes in legal terms is that in circumstances of a transfer from mother to daughter a *presumption of advancement* arises.

As against that it might be said, in circumstances where a family settlement was being effected involving a distribution and apportionment of the property of the settlor amongst the settlor's children and one child is excluded for unexplained reasons, that on the contrary a presumption of resulting trust arises founded on the presumed but unexpressed intention of the settlor that all of her children would benefit from the settlement. Moreover, the case in favour of such a presumption is even stronger where there are three children and property is settled upon just two of the three in disproportionate shares, as is the case here.

The plaintiff's alternative case, if the court understands it correctly, is that even if a presumption of resulting trust arises in respect of the transfer of the main farm from the late mother to the plaintiff that presumption is rebuttable and is in fact rebutted in all the circumstances of the case. In particular emphasis is laid on the fact that both the Deed of Transfer and the contemporaneous side agreement are silent as to the intention of the transferor other than stating for conformity that the transactions are in consideration of natural love and affection. The Court understands the plaintiff to be effectively making the case that in circumstances where care was taken to reserve rights in favour of the settlor at the time of the transfer, where recourse was had to a side agreement in writing, where the settlor was independently legally represented by experienced conveyancing solicitors, and where the settlor's precise intentions with respect to the excluded child could easily have been expressed at the same time, the presumption of advancement must prevail.

However, the defendant has sought to rely on a number of documents purportedly executed by the plaintiff, and in one instance also purportedly executed by the late mother, *ex post facto* in so far as the Deed of Transfer and contemporaneous side agreement are concerned, as indicating, or reflecting knowledge of, the late mother's precise intentions as settlor and transferor.

The first document relied upon by the defendant was purportedly executed by the plaintiff and her mother on the 28th April, 1998, and purportedly witnessed by a relative. This document is reproduced at paragraph 2 of the counterclaim herein and is quoted above.

The defendant also relies on the undated document purportedly signed by the plaintiff, and witnessed by a solicitor which is reproduced at paragraph 3 of the counterclaim, also quoted above.

Further, the defendant relies upon alleged acknowledgments in correspondence, by or on behalf of the plaintiff, that he is entitled to 50% of the main farm. In particular, he relies upon a letter dated the 2nd March, 2004 written on the plaintiff's behalf by her solicitor to her late mother's solicitor, which states (*inter alia*):

"We understand that the 1999 transfer was effected by your client as part of the family settlement whereby a separate farm was transferred to another daughter. No provision was made at the time, however, for your client's son, and our client has at all times acknowledged that she holds 50% of the property transferred to her in a caretaker capacity for her brother. We confirm that she is disposed to effecting a transfer of part of the property to her brother which of course would be subject to her receiving a refund of the expenses incurred by her to date, the costs that she may incur on the transfer being discharged and being indemnified in respect of any tax liabilities arising on the transfer. As your client is aware our client is currently involved in matrimonial proceedings and this proposal is accordingly subject to she being in a position to effect such transfer."

The defendant also relies upon the fact that the plaintiff apparently accepted before the Circuit Court that her brother would be entitled to a 50% interest in the main farm less appropriate allowances for legal fees and taxes both previously incurred and potentially to be incurred.

The plaintiff does not deny that she signed the document dated the 28th of April, 1998 and the subsequent undated document witnessed by her solicitor. However, she sought to disown them at the appeal hearing on the basis that she signed them under duress and at the behest of her sister. The substance of her allegations in that regard was that her sister had insisted on the plaintiff's execution of these documents as a condition for her support. She contended that her sister made a case that their brother was very depressed, that he had been barred and that it was the plaintiff's fault that he was barred. According to the plaintiff, her sister alleged that she (the plaintiff) had persuaded their mother to bar him from the property and had grabbed the land for herself. The sister wanted the plaintiff to assign some of the land that she had got to her brother. The sister was also very concerned lest what she believed was the defendant's rightful share of the main farm be unavailable by virtue of the farm being made the subject of an order for sale or a property adjustment order in the context of the plaintiff's ongoing matrimonial litigation. Against that background the sister insisted that the plaintiff should execute both the document dated the 28th April, 1998, and the undated document. However, the plaintiff contends that although the first of these documents is dated 28th April, 1998, she did not in fact execute it until 2003. The relative who purportedly witnessed the plaintiff's signature gave evidence. He was a most evasive and unsatisfactory witness, lending the Court to believe that there might indeed be substance in the plaintiff's claims as to the circumstances in which the document of the 28th April, 1998 came into being.

Be that as it may, counsel for the defendant has objected to the plaintiff putting forward a claim of duress in circumstances where she had made no such claim in the Circuit Court. Moreover, it transpired that in the course of her matrimonial proceedings the plaintiff had sought to rely on the document dated the 28th April, 1998 that she was now seeking to disown. This Court has already ruled at the appeal hearing that it could not in justice or in equity allow a claim of duress to be put forward where the other side were not previously on notice of it, where a completely different case had been made in the Circuit Court, and where the document of 28th April, 1998 in particular was previously relied on in other court proceedings. I expressed the view that it would be wholly wrong that a person could in one set of proceedings rely upon a document and in another set of proceedings seek to disown it. To do so would amount to an abuse of the process.

In any case, it seems to this Court to be academic because even if the plaintiff was in a position to legitimately disown the document dated the 28th April, 1998, and the undated document witnessed by the solicitor, on the grounds of duress, she is still left with the problem created by her solicitor's correspondence, particularly the letter dated the 2nd March, 2004, and her own subsequent acceptance before the Circuit Court, in circumstances where she was legally represented by both solicitor and counsel, that her brother would be entitled to a 50% interest in the main farm less appropriate allowances for legal fees and taxes previously incurred and potentially to be incurred. The plaintiff has put forward no satisfactory explanation for the concessions made on either occasion.

In the circumstances counsel for the defendant has submitted that the plaintiff is estopped from denying her brother's claim to the said 50% beneficial interest. In court's view this submission is well founded, and the Court finds that the plaintiff holds a 50% interest in the property (subject to her entitlement to be re-imbursed for taxes and appropriate outlays incurred by her in respect of that portion) upon a constructive trust, alternatively upon a resulting trust, for the benefit of the defendant.

### **Implications for the Plaintiff's Claim:**

#### **The claim based upon trespass**

For the plaintiff to have succeeded in her claim for an injunction requiring the defendant to deliver up possession of the lands to her, and for damages for trespass to the lands, she would have to have established that she was entitled to both the legal and beneficial ownership in the lands to the exclusion of the defendant. In circumstances where at all material times the plaintiff and the defendant held at least the beneficial interest in the lands in equal, but undivided, co-ownership no action based upon alleged trespass by the defendant is sustainable.

#### **The claim based upon failure to account.**

The effect of this Court's ruling as to beneficial ownership of the main farm is that from the date of the Deed of Transfer and the contemporaneous side agreement both the plaintiff and the defendant were jointly responsible for applying the income of the main farm towards the support and maintenance of their mother during the remainder of her life. The Court accepts the evidence of the defendant that he did run the farm ostensibly on his mother's behalf during her declining years. However, there is a deficit of evidence of any accounting by him to his mother with respect to the rents and profits or indeed as to the extent of those rents and profits. In particular legitimate concerns have been raised by the plaintiff that while the late mother was still alive cattle from her herd were sold by the defendant at a mart in another county but that the proceeds of sale were never lodged to the late mother's bank account.

Counsel for the defendant has made the valid point that the defendant is the personal representative of his late mother's estate. Any wrong committed against the late mother is only actionable at the behest of the estate. While that is true in so far as it goes, matters are not that simple. The Court received clear evidence from the plaintiff herself, and also from the late mother's home help (whose care of, and dedication towards, her elderly patient greatly impressed the Court) concerning substantial expenditure incurred by the plaintiff personally, and which was not re-imbursed by her late mother, in connection with the provision of home help, and later nursing home care, for the late mother. There was clear evidence that when the financial demands created by the situation exceeded the late mother's available funds all three siblings were called upon to contribute. However, the defendant ignored the plaintiff's correspondence and failed to do so. He admitted as much in the witness box and offered the frankly pathetic excuse that he had never received a formal bill from the plaintiff.

In the Court's view 50% of the money expended personally by the plaintiff amounted to money paid by the plaintiff for and to the use of the defendant (in as much as the plaintiff personally discharged a legal liability of the defendant to contribute appropriately towards the care of his late mother). Therefore, the plaintiff is entitled to be re-imbursed by the defendant to the extent of 50% for the expenditure that she incurred personally on behalf of her late mother in circumstances where she ought not to have had to incur that expense by virtue of her late mother's entitlement to be maintained and supported out of the income from the main farm. Although framed as a claim based on failure to account, and not specifically as a claim for money paid for and to the use of the defendant, the court is nonetheless prepared to award damages under this heading pursuant to the claim for further and other relief in order to do justice in the circumstances of the case.

The evidence from the plaintiff, and the home help, was that out of a total of €17,925 paid to the home help, the plaintiff paid €10,000 of that from her personal resources. Moreover, a further sum of €5,399 remained due and owing to the home help. In addition, the plaintiff paid a further €4,148 from her personal resources directly to the nursing home in respect of her mother's care, over and above any subvention received and any of her mother's own funds that may have been applied to that end. There was also a "kitty arrangement" within the nursing home to cover extras for residents such as physiotherapy, chiropody and so forth. The plaintiff put €900 of her own money into that kitty. Finally, as the plaintiff's late mother suffered from incontinence there was a frequent need to replace clothes and garments due to soiling. While the plaintiff was not in a position to vouch this aspect of the claim, she testified that she had expended an estimated €3000 under this heading. The plaintiff was not challenged or cross-examined on this.

The relevant figures would therefore appear to be:

$$10,000/2 = 5,000$$

$$+ 5,399/2 = 2,699$$

$$+ 4,148/2 = 2,074$$

$$+ 1,800/2 = 900$$

$$+ 3,000/2 = 1500$$

Total: €12,173

Having regard to the fact that the claim in respect of clothing is unvouched and is an estimated sum, it seems appropriate to round the total figure down slightly to an even €12,000 and the Court will award the plaintiff damages of that amount in re-imburement of outlays incurred by her that she ought not to have had to incur, and for which the defendant was in fact responsible by virtue of his entitlement to a 50% beneficial interest in the main farm.

In so far as the situation post the death of the late mother is concerned, both the plaintiff and the defendant were released from their obligation to apply the rents and profits of the main farm towards the maintenance and support of their mother. In circumstances where the defendant has treated the main farm as though it was his own he is obliged to account to the plaintiff for 50% of the rents and profits deriving therefrom from the 16th July, 2007 to date. In effect, this means that the plaintiff is entitled to 50% of all rents received during that period, 50% of the profits of any crops (including silage and hay) received during that period and 50% of any farming grants or subsidies received solely by virtue of engagement in the enterprise of farming, as opposed to being a herd-owner. The mother's cattle of course were not part of the 1998 family settlement. Only the lands were transferred. The cattle remained in the mother's ownership until her death following which they would have passed to the defendant as the beneficiary of her residual estate. However, to the extent that the defendant has used the farm facilities, and has grazed cattle on the main farm, since

his mother's death he is obliged to account to the plaintiff for 50% of the value of that benefit.

The Court has been provided with insufficient information to quantify this aspect of the plaintiff's claim. While evidence was heard from witnesses such as a farmer who rented part of the main farm from the defendant in 2007, 2008 and 2009, such evidence as was received paints only a partial picture. Moreover, almost all of the information that the court requires is within the particular knowledge of the defendant who has not provided it. The plaintiff has claimed accounts and enquiries and the Court is prepared in the circumstances to direct that accounts and enquiries be taken as to the rents and profits deriving from the property comprised in the folio aforesaid from the date of death of the late mother in July 2007 until today's date, the 30th March, 2012. The Court will adjourn finalisation of this discrete part of the plaintiff's claim until the County Registrar's report following the taking of accounts and enquiries is to hand. The County Registrar shall be at liberty, and is hereby authorised, to retain such expert assistance, including the assistance of an accountant / farm advisor / valuer, as she may require for the purpose of conducting her enquiries and preparing the necessary accounts. The overall question of the costs of the proceedings will be considered by the Court in due course. However, separate from costs generally the Court directs that the defendant shall pay all costs associated with the taking of accounts and the making of enquiries.

#### **The plaintiff's outlays**

As the defendant has conceded and admits that he is liable to the plaintiff for 50% of the stamp duty paid by her on the 1998 transfer, and that he is also liable for 50% of the associated legal costs, the court will further grant a decree in favour of the plaintiff for the euro equivalent of £8,395.81, calculated as follows:

Stamp duty: £10,524.00

Legal costs payable to mother's solicitors: £3,070.30

Legal costs payable to plaintiff's solicitors: £3,125.31

Total: £16,719.61

50% of total: £8,395.81

Post Euro conversion: €10,660.48

Accordingly there shall be a further decree in favour of the plaintiff for €10,660 in respect of outlays in respect of which she is entitled to re-imbursement.

#### **The claim based upon assault and intimidation**

The claim based upon assault and intimidation is not particularised in the Indorsement of Claim to the plaintiff's Equity Civil Bill. By the same token, no Notice of Particulars was raised by or on behalf of the defendant. It is regrettable in one sense that a Notice for Particulars was not raised, but perhaps understandable on the basis that it is patently obvious to anyone reading the plaintiff's pleadings that the main issues in this case are to do with ownership of the main farm, alleged trespass, and alleged failure to account. In so far as an unparticularised claim for damages for assault and intimidation is included, the impression is conveyed that it is a relatively minor aspect of the overall case. The defendant's side apparently assumed that the basis of this claim was an incident referred to in a letter dated 30th April, 2008 from the solicitors representing the plaintiff. This letter complains about an incident of alleged assault and intimidation on the 5th April, 2008. However, no evidence was given by the plaintiff personally at the appeal hearing concerning this incident, nor was any medical evidence adduced by her in respect of this incident. There are medical reports in the book of documentation handed up but these are not agreed medical reports and so the court cannot have regard to them. In addition, the defendant, who was called by the plaintiff, denied assaulting or intimidating the plaintiff at any time.

The plaintiff did attempt to call medical evidence from a doctor concerning an alleged assault in 1997. However, the defendant objected on the basis of lack of notice. While the Court was initially unsympathetic due to the defendant's failure to raise a Notice for Particulars the Court was eventually persuaded that the interests of justice required the Court to uphold the defendant's objection. I arrived at this view after taking the following considerations into account: first, this alleged assault was not raised in the Circuit Court; secondly, if it did happen it happened a very long time ago and the defendant could have been expected to plead the Statute of Limitations if it had been appreciated that the claim for damages for assault and intimidation pleaded in the Equity Civil Bill embraced this alleged incident; and thirdly, a plaintiff is not entitled to ambush a defendant. Accordingly, if she was intending to raise an incident of considerable antiquity she should herself have pleaded adequate particulars in her Equity Civil Bill and she had not done so.

In the circumstances the plaintiff is not entitled to recover damages for assault or intimidation.

#### **The claim based upon slander of title**

In circumstances where the Court is satisfied that the plaintiff holds a 50% beneficial interest in the property comprised in the aforementioned folio upon a constructive, alternatively a resulting, trust for the benefit of the defendant, and the defendant has limited his claim to that at the commencement of the appeal hearing, the plaintiff cannot succeed in her claim for damages for slander of title. In so far as the plaintiff has been unsuccessful thus far in obtaining a herd number, this has more to do with the fact that the lands which are in joint beneficial ownership are unpartitioned (the Circuit Court's order having been appealed), the fact that the late mother's herd number is still extant and that herd, now inherited by the defendant, is currently using the lands and the farm infrastructure, than it has to do with any excessive claim to an interest in the main farm that may in the past have been asserted by the defendant.

#### **Partition on foot of the Counterclaim:**

As pointed out earlier in this judgment, although neither the plaintiff nor the defendant expressly claimed partition in their pleadings, the learned Circuit Court judge, without ostensible objection by either party as to his jurisdiction to do so, approached the matter on the basis that partition was necessary and would provide the only workable solution to the parties' difficulties. The alternative open to him was simply to declare the extent of the parties' respective interests, in accordance with the claim made for such relief by the defendant in his counterclaim, and leave it at that. However, that would have solved nothing in circumstances where the relationship between the parties is fraught and it is exceedingly unlikely that they could agree themselves upon either a sale and division of the proceeds, alternatively on voluntary partition. The reality was that unless the learned Circuit Court judge took the further step of

decreeing partition there was going to be further litigation. This seems to have been accepted by the parties at the time, and it seems that it continues to be accepted. Nobody has asked me not to partition the lands, nor has anybody objected to this Court's jurisdiction notwithstanding that partition is not specifically claimed. Both sides have made different submissions as how an appropriate partition might be effected, but nobody has suggested that partition is inappropriate. Accordingly, this Court proposes to follow the lead of the learned Circuit Court judge and make an order for physical partition on the basis that both sides have claimed 'further and other relief'.

The Court has considered the evidence adduced on both sides respectively, including the evidence of the two valuers. The Court has taken into account the nature of the property itself, the fact that the only convenient way to physically partition the lands is along the public road which bisects the property from east to west, the fact that any partition along that line would fail to divide the property evenly, the fact that such a partition would provide for a holding of approximately 95 acres of mixed quality land north of the road with the benefit of the farmhouse and the farm infrastructure (sheds, barns, cattle crush etc), and a smaller holding of 55 acres of good quality land south of the road, but with no dwelling on it or farm infrastructure. The Court has further taken into account the fact that the defendant, being an actual *de facto* herd owner (notwithstanding that the herd number is technically still in his late mother's name and his official Dept of Agriculture status is that of herd keeper) has an immediate need for farm infrastructure facilities, whereas the plaintiff is merely an aspiring herd owner at this point in time. Further, the Court has taken into account the fact that the defendant has been living in the farmhouse, which is located in the southern part of the country, for some years, whereas the plaintiff lives in the Leinster area.

The Court has further considered the plaintiff's contention that she ought to receive the portion containing the farm-house, the farm infra-structure and the 95 acres of mixed quality land north of the road and the defendants' counter contention that he should receive the 55 acres of good quality land south of the road plus the farmhouse and the farm infrastructure north of the road. While the defendant's suggestion is superficially attractive I am satisfied that it is not a workable proposal and that it would not be easy to physically separate the farmhouse and farm infrastructure from the remainder of the property north of the road.

Having carefully considered all of the circumstances of the case I am satisfied that the partition decreed by the learned Circuit Court judge was the only practical way of partitioning the property in the circumstances of this case. I therefore uphold the portion of the learned Circuit Court judge's order awarding the farmhouse, the farm infra-structure and the 95 acres of mixed quality land north of the road to the defendant, and the 55 acres of good quality land south of the road to the plaintiff. However, this is an uneven partitioning and in the circumstances a financial adjustment requires to be made in favour of the plaintiff. Having considered the evidence of both valuers, I was more impressed with the evidence of the valuer called by the defendant and in all the circumstances of the case I will award the sum of €50,000 to the plaintiff to be paid by the defendant by way of financial adjustment, which debt is to be registered by the land registry as a burden upon the defendant's portion of the lands when giving effect to this Court's orders, and which burden is to remain upon his folio for so long as the debt remains unpaid and undischarged.

**Costs:**

The Court will hear the parties' respective submissions with respect to costs generally and with the exception of the costs associated with the taking of accounts and enquiries.