THE HIGH COURT

[2013 No. 7394 P.]

IN THE MATTER OF THE ESTATE OF K, DECEASED,

AND IN THE MATTER OF SECTION 117 OF THE SUCESSION ACT 1965

BETWEEN

K

PLAINTIFF

AND

K

DEFENDANT

JUDGMENT of Mr. Justice Denis McDonald delivered on the 7th day of November, 2018

Introduction

1. The plaintiff and the defendant in these proceedings are brothers. They have four other siblings, namely three sisters and one brother. The plaintiff is the second eldest in the family. He is the eldest male but he has one sister who is older than him. He was born in 1965. He is married and has two children and he currently works as a self-employed hackney driver.

2. The defendant (who is also married) is the executor and personal representative of the late mother of both parties. In this judgment I will refer to their mother as "the deceased". In circumstances where the proceedings involve a claim under s. 117 of the Succession Act 1965 (the 1965 act) it is important that I do not reveal any detail in this judgment which would identify any of the parties. I will therefore refer to the parties themselves as "*plaintiff*" and "*defendant*" respectively and I will refer to all other persons and any relevant place names by reference to a letter of the alphabet or by some other mechanism which avoids use of their actual names. I sincerely hope that the *in camera* rule which applies to these proceedings will assist the parties (and the other members of the K family) in maintaining their privacy in relation to the events described in this judgment. Regrettably, it will be necessary in this judgment to consider many aspects of the life of this family which, in the absence of a court hearing, would remain entirely private.

The Will of the deceased

3. While there were earlier wills executed by her (and while a number of draft wills were prepared on her behalf during her lifetime) the last will and testament of the deceased was executed in August 2011. The deceased subsequently died in 2013. The defendant thereafter took out a grant of probate in January 2015.

4. Under her will, the deceased left her china, delph and cutlery to her three daughters. Each of the daughters are also to receive a bequest of €5,000 each. Both the defendant and the remaining son are to receive substantial gifts of land which formed part of the family farm built up by the deceased's late husband (the father of all five children) and his brother (who I shall refer to as "the uncle").

5. The plaintiff is also to receive a gift of lands. However, in his case, the lands extend to no more than 3.5 acres. In the Inland Revenue affidavit, the value of these lands as of the date of death of the deceased was €42,000. While the value of the gifts to each of the three daughters of the deceased is also modest, the value of the gift to the plaintiff contrasts starkly with the value of the gifts to the defendant and the remaining brother. In the Inland Revenue affidavit, the value of the gifts to the defendant (including any benefits passing by survivorship) was given as €3,006,365 while the value of the gifts, (again including any benefits passing by survivorship) to the remaining brother was €748,547.

The plaintiff's claim

6. The plaintiff makes a number of claims which can broadly be summarised as follows: -

> (a) the plaintiff makes a claim based on promissory estoppel, proprietary estoppel and/or legitimate expectation that a particular parcel comprising 90 acres of the family farm, is held by the defendant as trustee for the benefit of the plaintiff. This claim is advanced on the basis of a number of alleged representations which the plaintiff claims were made to him during their respective lifetimes by his late father, the uncle and the deceased. As explained in more detail below, the plaintiff claims that, acting on foot of these representations, he left school at an early age and thereafter devoted his life to the family farm;
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> (b) Alternatively, the plaintiff claims that he is entitled to the parcel of lands in question on the basis of a testamentary contract made between him and the deceased under which (so he claims) the deceased agreed to devise to the plaintiff those lands in her will and he seeks specific performance of that testamentary contract;
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> (c) In the alternative, the plaintiff seeks a declaration pursuant to s. 117 of the 1965 act that the deceased failed in her moral duty to make proper provision for the plaintiff in accordance with her means. In the course of the hearing, the case made by the plaintiff was that the parcel of 90 acres described above would constitute such proper provision;
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> (d) At one point, the plaintiff also advanced a claim based on a *quantum meruit*. However, in the course of the hearing, it was accepted by his counsel that he was no longer advancing such a claim.

7. In his statement of claim, the plaintiff contends that it was always envisaged by the deceased, her husband, the plaintiff and the uncle that the plaintiff would inherit one-third of the farm. It is alleged that after the plaintiff left school at fifteen years of age in 1980 to work on the farm, he worked long days and nights on the farm to generate income to repay a large indebtedness owed to a bank arising from the purchase of part of the farm. He did not receive any wage for his work as his father often stated "*You're doing it for yourself, sure I can't take it with me*". In contrast, it is alleged that the plaintiff's brothers (namely the defendant and remaining brother) worked only occasionally on the home farm and did not show the same interest in farming as was shown by the plaintiff. The plaintiff also makes the following allegations in the statement of claim: -

> (a) The plaintiff refers to his father's will of 11 February 1993 under which he left his entire estate (save for some small legacies to his daughters) to the deceased. However, the plaintiff contends that the estate was left to the deceased on

this basis on the understanding that it would be shared equally between the plaintiff and his two brothers after her lifetime.

(b) The plaintiff also contends that, following his father's death in 1996, it was specifically represented to him by the deceased that he would get the 90 acres of land described above under her Will.

(c) It is also alleged that in 1997 the deceased, the plaintiff, the defendant and the remaining brother started a sand and gravel business on the family farm and that the plaintiff purchased the first lorry and trailer for that business in 1999. This subsequently developed into a concrete business which was very successful.

(d) The plaintiff contends that in 2002 the deceased had a dispute over a piece of property with a neighbour (who was also a relation). The case went to court and the plaintiff's father in law was called as a witness by the claimant. The case resulted in the claimant getting adverse possession of the piece of property in question. It is contended that this infuriated the deceased and other members of the family who "*in time, turned against the plaintiff and his wife*". It is also alleged that the defendant gradually took over control of the businesses and the farm and the plaintiff was pushed and "bullied out of both businesses and the farm".

(e) It is alleged that on 1 August 2007 the deceased came into the plaintiff's home and stated that things were not working out between the defendant and the plaintiff such that the plaintiff was "*going to have to find something else to do with his life*". At that point, the plaintiff was 42 years of age. He was paid until Christmas 2007 but then his wages stopped and he was dismissed from the businesses which he contends had been created with the assistance of his input and efforts.

(f) The plaintiff says that he was induced by the deceased, his father and the uncle to believe that by working on the farm he would ultimately become the owner of the 90 acres described above and that he shaped his life around the farm in reliance on this inducement

(g) At the time of the deceased's death, the plaintiff said that his outgoings were approximately €20,000 per annum. He earned approximately €46,000 per annum, his family home was valued at €195,000 and he had savings in the amount of €3,000.

The defence of the defendant

8. It is not necessary, at this point, to set out every aspect of the defence advanced on behalf of the defendant. However, the following aspects of the defence should be noted: -

(a) The case is made that all of the children of the family worked on the family farm from a young age and that the plaintiff's contribution was no greater than that of his siblings and was less than that of the defendant and the remaining brother;

(b) While it is admitted that the plaintiff left school at the age of fifteen, it is denied that he did so to work full time on the farm and it is also denied that he worked full time on the farm;

(c) All of the representations alleged by the plaintiff are denied;

(d) It is alleged that the plaintiff showed little interest in farming and that he provided only minimal assistance (which was "*comfortably surpassed by his brothers' contribution"* with the farming activities of the family and was "*rarely (if ever) called upon to do so*". It is expressly alleged that the plaintiff commenced a haulage business at the age of nineteen and that he had little or no involvement with the farm thereafter;

(e) Attention is drawn in the defence to the fact that in 1994, on the marriage of the plaintiff, a property in the local town was transferred to the plaintiff at a small consideration by the plaintiff's late father and by the uncle. While the plaintiff was obliged to pay the uncle for his half share, the father's share in the property was transferred to the plaintiff by gift;

(f) All of the family assisted in refurbishing the property transferred to the plaintiff;

(g) The deceased contributed regularly to the plaintiff's loan repayments in respect of the half share transferred to him by the uncle and repaid the final balance of the loan (€10,000 approximately) in 2004;

(h) With regard to the sand and gravel business, it is alleged that this was commenced by way of joint venture with a local man and that it was commenced by the deceased together with the defendant and the remaining brother. It is alleged that the plaintiff commenced working as an employee in that business in 1999, and that he contributed to the business by the use of a lorry and trailer that he had acquired with some financial assistance from the deceased. It is alleged that the plaintiff's contribution to that business *"although tolerated for several years, was erratic and disruptive".*

(i) It is also alleged that from the commencement of this business, the farming activities of the deceased and the rest of the family on the family farm were minimal, and the farm did not generate a profit;

(j) It is denied that the plaintiff was pushed out of the family business and it is also alleged that the farming activities of the family were insufficient to be described as a business.

(k) The defendant makes the case that the plaintiff left the "*family enterprise*" in 2007 "*of his own volition*". The defendant contends that this arose in circumstances where the plaintiff allegedly became irate with the deceased following his discovery that she had sold certain land without consulting him. It is alleged that he verbally abused the deceased and placed her in fear for her own safety. It is also alleged that the plaintiff attempted to assault the defendant. Following this alleged assault, the defence pleads that the deceased, accompanied by her second eldest daughter (who I shall refer to as M) visited the plaintiff at his home and offered to support him in another business venture of his choice but he rejected this.

(l) It is contended that subsequent to this meeting, the plaintiff's relationship with the deceased was characterised by "*open and demonstrative hostility on his part. When he encountered her, he shouted at her, and his demeanour toward her was generally threatening*". It is also alleged that the plaintiff has a volatile temper and a history of violence and that the deceased "*lived in fear of him and used her best endeavours to avoid him".*

(m) With regard to the plaintiff's contribution to the business, it is alleged that this was "*problematical*" in that he had neglected on a consistent basis to return delivery dockets (as all drivers were required to do) and that he was in the habit of retaining the phone of the business and not answering it when customers called or that he otherwise failed or refused to facilitate customers "*so that many of them turned to other suppliers*". It is alleged that these difficulties had been the subject of numerous disputes with the deceased and that during the course of one of those interactions the plaintiff had thrown a heavy wooden plank at the deceased.

(n) The testamentary contract is denied;

(o) With regard to the farm business, it is alleged that the plaintiff's father attended to the running of the farm during his lifetime and retained farm labourers to assist him in doing so and that following his death the farming activities of the family were significantly reduced, which included the sale of livestock and the letting of approximately 40 acres of land.

(p) With regard to the estoppel claim, not only is that claim denied but the defendant contends that he had, with assistance from the remaining brother, carried out significant and extensive improvements to the lands the subject matter of the plaintiff's claim. In particular, the defendant claims that: -

(i) In June 2003 he retained contractors to clear five fields (comprising 40 acres) of trees and hedges, so as to create one large field;

(ii) in 2008 the defendant and the remaining brother carried out reclamation and drainage works to approximately fifteen acres of the land;

(iii) In 2009 the defendant carried out work to two fields, comprising approximately fourteen acres – again consisting of the removal of trees and shrubs, land drainage, the laying of drains, ploughing, cultivation and seeding.

(q) It is contended that at the date of the death of the deceased, she owed no moral duty to the plaintiff. It is contended that having regard to his situation in life, the extent of his assets and income and the provision made for him by his father during his lifetime, he had no need for provision. Without prejudice to that contention, it is alleged that any such need was met by the provision for the plaintiff contained in the last will of the deceased.

(r) It is also alleged that the plaintiff is guilty of laches and delay in failing to make the case now made in these proceedings during the lifetime of the deceased. It is alleged that by proceeding in this way, the plaintiff has deprived the defendant of the evidence of "*the only person in a position to give direct evidence in contradiction of the plaintiff's claim and is thereby severely and fundamentally prejudiced the defence of the within action*".

(s) It is also alleged that the plaintiff's decision to await the death of the deceased before advancing his claims was "*conscious, deliberate and self-serving, and was calculated to remove the evidence of the deceased from the adjudication of his claim. The plaintiff has. . not acted fairly and has not come to equity with clean hands".*

(t) It is also alleged the conduct of the plaintiff in not commencing proceedings previously "*invites the inference that he knew or believed or apprehended that the deceased's evidence would contradict his own".*

9. It should be noted that, notwithstanding the allegations of delay on the plaintiff's part, there is no attempt in the defence to rely on the Statute of Limitations 1957, or insofar as the equitable relief sought by the plaintiff is concerned, to rely on it by analogy. Furthermore, there is no reliance on the Statute of Frauds (Ireland) 1695 in relation to the plaintiff's claim based upon a testamentary contract.

Dealings between the parties subsequent to the death of the deceased

10. Unfortunately, there are very deep divisions within the family. It was manifest during the course of the trial that, with the exception of M., the plaintiff and his siblings are not on speaking terms. Regrettably, the atmosphere between the parties was not improved by the manner in which the defendant has chosen to deal with the plaintiff's claim. Thus, for example, following the death of the deceased, the solicitors acting on behalf of the plaintiff sought a copy of the will of the deceased (which had previously been read to all members of the family at a family meeting following the death of the deceased). By letter dated 10 May 2013 the solicitors then acting on behalf of the defendant responded to this request in the following terms: -

"We understand a reading of the Will was undertaken by the Executor to all family members last weekend. The full content of the Will was revealed at such time and the Executor is not of a mind to provide copies at this time.

Our client has suggested to your client that if he wishes to attend with our client at our offices . . . then a further reading of the Will can occur".

11. A further request for the Will was made in September 2004. On 18 September 2004, the defendant's solicitors informed the solicitors acting for the plaintiff that:

"Our client has instructed us not to issue a copy of the deceased's Will yet."

I cannot understand the basis on which the defendant thought it appropriate to give such instructions. When he came to give evidence at the trial, he had no explanation as to why such instructions had been given.

12. In January 2015, a request was made by the solicitors acting for the plaintiff for a copy of the Inland Revenue affidavit, together with a copy of the grant of probate and the entire Will including the map which was attached to the Will. On 29th January 2015, the solicitors then acting for the defendant indicated that they had requested the defendant's instructions. The request for a copy of the Inland Revenue affidavit and associated documents was repeated in a letter dated 6 February 2015. On 12 February 2015, the

solicitors previously acting on behalf of the defendant in relation to the administration of the deceased's estate wrote the plaintiff's solicitors to say that a new firm of solicitors had been appointed to act in these proceedings and it was suggested that contact should be made with them. Ultimately, it appears that a version of the Inland Revenue affidavit was provided but it was incomplete. I have to say that I find it difficult to understand why documents of this kind would not be made available to a party in the position of the plaintiff. At no stage - either in the course of the correspondence or in the course of the hearing - was any plausible explanation offered as to why the defendant was reluctant to provide copies of such documents to the plaintiff. As it transpired, a full copy of the Inland Revenue affidavit was not made available until after the trial had commenced. I glean that there may have been concerns that the Inland Revenue affidavit contained personal data relating to persons who are not parties to the proceedings (namely the other siblings of the parties). However, the Inland Revenue affidavit is an essential document in any case of this kind and under the Data Protection Acts, the processing of personal data is permissible where it is required (inter alia) for the purposes of, or in connection with, legal proceedings. Thus, if there was such a concern about the provision of the full copy Inland Revenue affidavit, it does not seem to me to have been a justifiable concern.

13. It is also deeply disappointing that, in a case of this kind, the defendant expressly refused to engage in mediation. In this context, prior to the service of the notice of trial, the plaintiff's solicitors by later dated 14 October 2016 invited the defendant to engage in mediation. Reminders were sent on 17 October and on 4 November 2016. Subsequently, on 16 November 2016, the defendant's solicitors wrote to say that: -

> *"Our client has instructed us that he will not engage in Mediation in relation to this matter."*

In my view, mediation is particularly appropriate in a dispute of this kind, since it provides an opportunity for members of a family to reach an amicable resolution of a dispute which, if it airs in court, will involve discussion of deeply private matters (including the private life of the deceased) in a starkly adversarial way.

14. Thereafter, the notice of trial was served. Sadly, this was a missed opportunity to explore whether these proceedings could be resolved on an amicable basis and to avoid the inevitable trauma and unhappiness that would be engendered by airing the grievances felt by both sides to this dispute in the course of an adversarial hearing. The opportunity was also lost to achieve a significant saving in costs.

15. For completeness, it should be noted that on the evening before the fifth day of the trial – namely on 26 June 2018 - an open offer was made by the defendant to settle the proceedings on certain terms which involved the transfer of some lands to the plaintiff over and above those devised to him under the terms of the deceased's Will. However, that offer was severely criticised by counsel for the plaintiff. In particular, he drew attention to the way in which the offer was sent late in the day, at 4:07 p.m., and yet was only to remain open until close of business on the same day. He also drew attention to the way in which the offer referred to a 2009 Will which had never been discovered by the defendant and which was provided by means of a faxed copy, so that it was impossible to understand (without reference to colour copies of maps) what precisely were the terms of the offer. Counsel also severely criticised the terms of the offer under which it was stated that if the offer was not accepted before close of business on 25 June, there could be costs consequences.

The hearing

16. The hearing of these proceedings took place over the course of six days, namely 19 – 22 June and 27 – 28 June. It is regrettable that a family dispute of this kind could not be resolved out of court. On several occasions, I urged the parties during the course of the hearing to take steps to resolve this dispute amicably. I explained to the parties that I have to base my decision solely on the evidence which I have heard in court. Save to the extent of that evidence, I have no familiarity with any of their family history or the connection which they have with the lands (or any specific part of the lands) comprised in the family farm. I sought to explain that a negotiated settlement is a significantly preferable outcome to a finding imposed by the court. Regrettably, any finding imposed by the court is likely to give rise to ongoing bitterness and a deep sense of grievance on one side or the other.

17. Notwithstanding the observations made by me during the course of the hearing, the case proceeded. Sadly, the *animus* between the parties was palpable during the hearing. As noted earlier, it became clear that none of the members of the family are on speaking terms with the plaintiff save for his sister M. However, even she gave evidence against the plaintiff and it was clear from her demeanour in the witness box that, to some extent at least, she shared the animus against the plaintiff.

18. During the course of the hearing, I heard evidence from the following witnesses: -

(a) the plaintiff;

(b) the aunt of the parties (who I shall refer to as "the aunt"). The aunt was a sister of the late father of the parties. She gave evidence on behalf of the plaintiff;

(c) a retired mechanic who gave evidence on behalf of the plaintiff and who has known the family for 35 years. Although he was briefly cross-examined his evidence, was not, in substance, challenged. I will refer to this witness as "Mr. M.".

(d) a retired nurse (who I shall refer to as "Ms. W") also gave evidence on behalf of the plaintiff. She also knew the family for many years and in particular knew the deceased, her late husband and the uncle. While she was also cross-examined, her evidence was, again, not challenged in substance;

(e) the plaintiff's wife (who I shall refer to as "Mrs. K.");

(f) the defendant;

(g) M, the sister of the parties, M. gave evidence on behalf of the defendant.

(h) the fourth child and third daughter of the deceased who I shall refer to as "P". She also gave evidence on behalf of the defendant

(i) The remaining brother also gave evidence on behalf of the defendant.

(j) The solicitor who was instructed by the deceased in relation to the preparation of her last will and testament. His firm also acted for the defendant in the administration of the estate of the deceased. The solicitor was called as a witness by the defendant on Day 5 of the hearing. Just before the solicitor was called I was informed that there were a number of

additional testamentary documents that had not been discovered which included the 2009 Will mentioned in para. 15 above. In circumstances where these documents had not been discovered, counsel for the plaintiff objected strongly to their admission. No adequate explanation was proffered as to why these documents had not been discovered. In the circumstances, I took the view that it would plainly be unfair to admit them at such a late stage in the hearing in circumstances where the defendant had an obligation to make discovery of these documents and where there was a very clear failure to disclose the documents as part of the defendant's discovery;

(k) A certified public accountant who was called as a witness by the defendant. She was the accountant for both the deceased and the family company which ran the family concrete business. She had acted as the accountant since 2009. She also assisted in providing figures in respect of some of the financial information contained in the Inland Revenue affidavit.

The evidence

19. Before addressing the claim of the plaintiff in relation to the alleged representations and the alleged testamentary contract, it may be helpful in the first instance to consider the overall history. It should be noted, at this point, that significant elements of the evidence of the plaintiff were not challenged by the defendant. For example, it was not challenged that at the date of death of the deceased, the plaintiff was 48, he was a hackney driver, his earnings at the date of death were about €20,000 after expenses and €16,000 after tax. He has no pension. He is married with two sons. At the time of the death of the deceased, both boys were still in school. One of them is now an apprentice mechanic earning about €300 per week and the younger son is still at school. At the date of the deceased's death, the plaintiff's wife was living at home, having given up her previous employment. At that date, the plaintiff had two hackney cars that were between 13 – 15 years old with a value of approximately €7,000 or €8,000. No formal valuation was provided in relation to this but the figures were not challenged. The principal asset owned by him at that time was the house in the local village which he said was valued at €225,000. (For completeness, it should be noted that in the course of the hearing it was agreed that the value of this house as at June 2018 was €300,000). The plaintiff also had about €3,000 in savings.

20. Insofar as his earnings were concerned, the plaintiff gave more definite evidence by reference to his tax returns for 2013 that his total income for that year was €21,099 and his total taxable income was €19,751. In the following year, his taxable income was €18,507. At the time of his mother's death, his sole income was derived from the hackney car business.

21. There is no dispute that the plaintiff left school at fifteen. According to the plaintiff's evidence, his father wanted him at home:

> *"To give him a hand to help him out on the land because there was debt there and it was getting out of control with him. I stayed at home . . . to farm and to help him keep the land . . ."*

(As recorded in the transcript on Day 1 at p. 7, lines 5 – 9.)

22. At that time, the uncle was also alive. The plaintiff described his work as including: -

> *"All sorts of farming, like looking after the cows, calving the cows, lambing the ewes, making hay, dipping and dosing and all, everything in general to do with the stock".*

(Day 1 at pp. 7 – 8). The plaintiff also gave extensive evidence on Day 2 (at pp. 6 – 23 of the transcript) of the work undertaken by him on the farm. In summary, the work undertaken by the plaintiff was labour intensive and largely manual, involved long hours (often from 7.30 a.m. to 8.00 or 9.00 p.m.), extended to the care of cattle, sheep and horses, the cultivation of barley, oats and fodder beet, the making of hay and silage, the milking and calving of cows, the lambing and shearing of sheep, the breaking in of horses, and the buying and sale of farm animals at local marts. It is noteworthy that no equivalent evidence was given by either the defendant or the remaining brother of any work on the farm which came near to the level of work described by the plaintiff in his evidence on Day 2.

23. As noted above, it was alleged in the defence that the plaintiff showed little interest in farming and that he provided only minimal assistance with the farming activities of the family which was surpassed by his brothers' contribution. It was also expressly alleged in the defence that the plaintiff commenced a haulage business at the age of nineteen and that he had little or no involvement with the farm thereafter. However, none of this was substantiated at the hearing.

24. Notwithstanding what was alleged in the statement of claim, the plaintiff, in his evidence, did not go so far as to say that he was forced to leave school at fifteen. The impression I have from his evidence is that he was quite happy to leave school at that stage. Furthermore, under cross-examination, the plaintiff acknowledged that both of his brothers also left school at the same age. However, it was not put to the plaintiff on cross-examination that the plaintiff showed little interest in farming or that he provided only minimal assistance, or that his assistance was surpassed by his brothers' contributions. Nor was it put to him that from age nineteen onwards that he had little or no involvement with the farm. What was put to the plaintiff (on Day 2 at p. 67) was that both of the plaintiff's brothers worked long and hard hours on the farm. The plaintiff's response was that this was not true. The plaintiff explained (at p. 63 of the transcript on Day 2), that when the remaining brother left school, he worked at a local mill owned by a relation in a nearby town for two years. He then went away working cutting timber for a while, and he subsequently took over a pony – riding business from his sister M. The plaintiff acknowledged that the remaining brother bought a shearing machine and that he and his remaining brother sheared the sheep between them but that the remaining brother then hired out the shearing machine and undertook work on behalf of local farmers. The plaintiff acknowledged that the remaining brother did some work on the farm but he said this was not substantial. His evidence to this effect was not challenged further on cross-examination.

25. With regard to the defendant, the plaintiff said that when he left school, he went to work with a local farmer milking cows and he stayed there for two years. He then went to work for another farmer and he was being paid for this work. He then started up a contract fencing business "*with which he was gone most days*". (Day 2 at p. 66). The plaintiff also said that the remaining brother worked in this fencing business. While it was put to the plaintiff that the defendant also milked the cows on the family farm, the plaintiff's evidence in relation to the defendant's involvement in the fencing business was not seriously challenged in cross-examination save that it was suggested that the defendant and the remaining brother were not fencing all the time.

26. The fact that the plaintiff was working extensively on the family farm from age fifteen was corroborated by the aunt who gave evidence that she was surprised that the plaintiff was allowed to remain in school until age fifteen and that the purpose of his leaving school was to work on the farm. She gave evidence that if she called over to the farm, both of her brothers (namely the plaintiff's father and the uncle) and the plaintiff would always be out working on the farm as would two of the sisters. She also emphasised

that, in those days, farm work was more labour intensive than today. In the early years, there was no silage. Hay had to be made, then had to be carried and long days had to be worked. She said that her brothers did not know Sunday from Monday, "*It was just work/work*".

27. The aunt gave evidence that both the defendant and the remaining brother also worked on the farm, but that the defendant also carried on a fencing business. She did not suggest that the work carried on by them came anywhere near that of the plaintiff.

28. The extent of the work undertaken by the plaintiff on the farm was also corroborated to some extent by Mr. M. who visited the farm from time to time principally to obtain advice from the plaintiff's father in relation to the care of his horses. His evidence was that the plaintiff was the "*person there*" (meaning the person on the farm). He did not see the defendant or the remaining brother at work on the farm but he saw the plaintiff at work – in particular breaking horses. It has to be said that his evidence on this issue was quite limited and he was not challenged on it on cross-examination. Nonetheless, it does provide some corroboration for the plaintiff's evidence which, as noted above, has already been corroborated significantly by the evidence given by the plaintiff's aunt.

29. The plaintiff's evidence in relation to the work done by him on the farm was also corroborated by Mrs. W, who gave evidence that she and her husband (who farmed lands within a few kilometres of the family farm) regularly obtained assistance from the plaintiff's father, uncle and the plaintiff. Mrs. W. gave evidence that she accompanied her late husband to the family farm and that on visits to the farm the plaintiff was always there working on the farm. However, Mrs. W. could only give evidence in relation to the period up to 1996 when the father of the plaintiff died. Thereafter her visits to the farm more or less ceased. However, the period subsequent to 1996 is dealt with in the evidence given by the plaintiff's wife. She married the plaintiff in September 1994. She gave very clear evidence (on Day 3 at p. 75) that the plaintiff worked extensively on the farm. She stressed that this was not a nine to five job. There were long hours. The plaintiff was required to work for however long he was needed. There were sheep, horses and cattle on the lands at that time. She explained that the father and uncle and the plaintiff all worked on the farm. She had no knowledge of the work undertaken by the defendant or the remaining brother. She also described that the plaintiff had a very close relationship with his father and the uncle. This evidence was not challenged on cross-examination.

30. When the defendant came to give evidence, he confirmed that when he left school at fifteen, he went to work for a local farmer and that subsequently in 1994, he started a fencing business which took up on average about two days a week. In relation to the work undertaken by him on the farm, his evidence was that: - "*I helped out, anything we were asked to do we done it*." (Day 3 p. 135). When asked how many hours a week he worked on the farm, he said that it would: - "*Be hard to say . . .*" (Day 3 p. 140). In relation to the work undertaken by the plaintiff, the defendant sought to give evidence that it was not correct to say that the plaintiff had undertaken the bulk of the work on the farm in the early days and that in fact it was his father and the remaining brother who principally carried out the work. However, objection was taken to that evidence by the defendant in circumstances where this was never put to the plaintiff on cross-examination. This was against a background where previously, at the end of Day 2 of the hearing, I indicated the importance of putting to the plaintiff on cross-examination the evidence that was proposed to be given on behalf of the defendant. The cross-examination of the plaintiff continued into Day 3 and there was therefore every opportunity for the defendant and his witnesses to ensure that all relevant material was made available to the defendant's counsel for the purposes of the continued cross-examination so that anything material could be put to the plaintiff. In light of the above objection made by counsel for the plaintiff, counsel for the defendant did not pursue this line of evidence with the defendant on Day 3.

31. When the plaintiff's sister M. came to give evidence (on behalf of the defendant) she said that all of the members of the family "*did their bit*" but she also gave evidence (consistent with the evidence given on behalf of the plaintiff) in relation to the work done by the plaintiff. She said (Day 4 at p. 97): -

> *"[The plaintiff] would have been feeding the cattle, there was cows calving. He would have had to put fodder in; scrap the yard; bed down the shed; moving sheep, anything that had to be done that way, he would have done it. Brought cattle to the mart or, you know, to the factories. The same with sheep."*

32. M. did, however, make clear that, in her view, the plaintiff stopped going to school because this is what he wanted. She said that he had the option, (had he wished to do so) to remain on in school. She also said that there were farmhands employed on the farm but, importantly, she also said that once the plaintiff left school, he took over from the farmhands. This strongly reinforces the conclusion that the work undertaken by the plaintiff was substantial. She said (Day 4 at p. 100): -

> *"And when [the plaintiff] comes of age that he was able to handle the tractor, yes, he drove the tractor. He did the jobs, putting in bales, more efficient and stuff like that. But there were lads there to do work up until the time when they weren't – my parents weren't - able to afford really anybody and [the plaintiff] was there because he had left school and he was able to do work like that".*

33. On the other hand, she confirmed that both the defendant and the remaining brother also did some work on the farm. She said that the plaintiff was there: -

> *"but yet the boys would have done a fair bit as well. You couldn't really say one did really over the other."*

34. M. also gave evidence that, in contrast to the plaintiff, neither the defendant nor the remaining brother were allowed to leave school until they had secured work for themselves elsewhere. This seems to me to further corroborate the evidence given on behalf of the plaintiff that the plaintiff was the person principally involved in work on the family farm. If the defendant and the remaining brother had to work elsewhere, it follows that they were not available to work on the farm to the same extent as the plaintiff.

35. Having regard to the evidence which I heard in relation to this issue, it appears to me to be clear that in the period up to the death of the plaintiff's father in 1996, the plaintiff was working extensively on the family farm and had been doing so since leaving school at age fifteen. There is no evidence before the court to substantiate the contention made in the defence that the plaintiffs contribution was less than that of the defendant and his remaining brother or that he provided only minimal assistance at the farm which was surpassed by the contribution made by his brothers. I accept fully that both the defendant and the remaining brother did work on the farm also, but on the basis of the evidence before the court, I find as a fact that the plaintiff's contribution in the period up to his father's death was significantly more extensive than that of his brothers and moreover, subject to the haulage business described below, was the plaintiff's sole source of income.

36. Insofar as the haulage business of the plaintiff is concerned, his evidence was that he had a livestock truck which he used to do a few runs every week to the local marts and that it was "*just pocket money more so than anything*" (Day 1, p. 23) His evidence was that the truck was principally used on the family farm but that he also used to do a few "*runs*" with it to local marts on behalf of other farmers and that he might get something of the order of €100 - €200 per week when carrying out such runs. Such work did not,

however, arise on a consistent basis. It arose on a relatively piecemeal basis. This commenced in 1985. On Day 3, p. 19 it was put to the plaintiff on cross-examination that the defendant would say that the plaintiff was largely involved in the haulage business and not the farming business but his answer was that he never took out a haulage license and that it was: - "*just a bit of local livestock is all I was doing*". This line of cross-examination was not thereafter pursued. Moreover, when the defendant came to give evidence, he did not say that the plaintiff was more involved in his haulage business than with the farm. The plaintiff's commitment to haulage work outside the farm was also dealt with by the remaining brother (who I shall refer to hereafter as "J") when he came to give evidence. On Day 4 at p. 148, he said that on some days the plaintiff would be "*away on the lorry and whoever was there would have to fill in*". I understood the reference to "*whoever was there*" was a reference to himself or to the defendant. On the same page, J. also said that "*the lorry job could go on for a couple of days at a time*." This evidence was given in the context of questions put to him by the defendant's counsel as to whether there was any difference in workload between J., the plaintiff and the defendant. The clear impression which I am left with, as a consequence of this evidence, is that while there were days when the plaintiff's involvement in the haulage business would mean that the plaintiff was not present on the farm (or at least not present for a full day) he was otherwise present on the farm and it is noteworthy that J. did not give evidence (in answer to the question put to him at p. 148 on Day 4) to support the contention made in the defence that the plaintiff was more concerned with the haulage business than the farming business. On the contrary, the evidence given by J. is, in fact consistent with the evidence given by the plaintiff (as summarised above) to the effect that the haulage work undertaken by him arose essentially from time to time. It was by no means a consistent or regular activity.

37. As noted above, the plaintiff's father died in 1996. By that time, the uncle had also died. Following her husband's death, the deceased was clearly very concerned about the level of bank debt which had accrued which was partly attributable to the acquisition of land during the lifetime of her husband and her brother in law. Based on the evidence which I have heard, it appears that the deceased was determined to find an additional source of income and that, as a consequence, she decided to exploit a sandpit on the family farm. According to the plaintiff, the family started the sandpit in 1997/1998. From then on, a significant part of the plaintiff's work was concerned with delivering material from the sandpit business. In order to facilitate this new business, the flock of sheep on the farm was sold but cattle were still kept on the farm. The plaintiff gave evidence (on Day 2 at p. 24) that between his work arising from the exploitation of the sandpit and the farming, he was working seven days a week, about 70 hours a week with very little in the way of holidays. He said that there was still a lot of farm work with 87 cows – especially when they calved. The plaintiff maintained (at p. 27 on the same day) that on some part of every day, right up to the year 2007 he worked on the farm (on some days going to the mart) and that the farm work continued notwithstanding the sale of the sheep. He explained (at p. 29 on Day 2) that herding of cattle had to be undertaken at least once a day and on Sundays twice a day.

38. Insofar as the sandpit business is concerned, the plaintiff's evidence was that he was "*one of the founder members of all that business. . . I bought the first lorry and trailer . . . to start that sandpit. I signed for a 01 Hyno Ready Mix truck. I was the foundation of that business*" (Day 2 at p. 30). He also says that he was instrumental in dealing with the requirements under the Planning and Development Act 2000 in respect of existing sandpits and quarries. The relevant provisions of that Act in relation to this issue became operative on 28 April 2004 and the Act required that the quarry had to be registered within one year from the coming in to effect of the section. He also said that he was involved in the purchase of vehicles (including a truck and a semi-trailer) for this new business. His evidence was that the loan was taken out in his own name but that his mother, the deceased, provided a guarantee. This evidence was given against the background where, as noted above, the defendant contended in his defence that the sand and gravel business had been commenced by the deceased together with the defendant and J. and that the plaintiff merely worked as an employee in the business.

39. The plaintiff also gave evidence that he was involved in insuring the fleet of trucks used by the business. By this time, a company had been incorporated by the deceased for the running of that business. In this judgment, I will refer to this company as "*the company*".

40. The plaintiff fully accepted that each of his brothers also played a full part in the business. The plaintiff's evidence was that when the sandpit business commenced, the fencing business previously carried on by the defendant came to an end. During this time, the plaintiff was paid out of the business €450 per week. In addition, the company paid €120 per week towards his mortgage until that was discharged (with the assistance of a final payment of €10,000 by the deceased) in 2004. From 2004 onwards, the plaintiff says that he was paid €650. That appears to have been the gross payment as the records produced to the court during the hearing would suggest that the plaintiff received €512 per week into his hand.

41. Under cross-examination, the plaintiff's evidence was that each of the brothers were paid roughly the same. On Day 2 at p. 80 he said (and he was not challenged on this): - "*We were all on the same standing in the business*".

42. The plaintiff's evidence was that, during this period, he was doing well financially, such that his wife (who previously had taken a five-year career break from her job with the Eastern Health Board) decided not to go back to work. The plaintiff's explanation for this was (Day 2 at p. 90 – 91): -

> *"And when the two lads – when the second arrived, I was going from morning until night and I didn't have much time, it was from bed to work, and the childminder that was minding the oldest fella, sometimes I used to be late picking him up and stuff, so when the five years – stayed at home for the five years then it was a decision time then whether she'd have to give up her job or go back to work. . . so we decided we were financially OK at the time . . . in 2004"*

43. The evidence given by the plaintiff's wife corroborated the evidence set out at paras. 37-42 above. She stressed that even after the sand and gravel business started, the plaintiff continued to carry on his work on the family farm. On Day 3 at p. 81 she explained that he still farmed. She said that there was still nearly as much work to be done as before. Both the cattle and the land required looking after. It was necessary to make silage and hay and to fertilise the ground and to assist with calving of cows.

44. The plaintiff's wife also confirmed in her evidence that, insofar as she could see, each of the brothers had as much a role in the sand and gravel / concrete business as each other. She explained that it was very hard at home because the plaintiff was at work most of the time. It should be noted that the plaintiff's wife also said that the first time she ever heard of any allegation that the plaintiff lacked interest in farming or that the plaintiff was involved in intimidating the deceased, or that the plaintiff was no more than an employee in the business, was when the present proceedings were brought. This is clear from her evidence on p. 107 on Day 3. None of this evidence was challenged on cross-examination.

45. The defendant, in his evidence, explained that in order to set up the sand and gravel business, the plaintiff sold the cattle lorry (previously used for haulage) and bought a truck and the plaintiff got finance for a trailer and that is how the business started. (Day 3 pp. 154 – 155) Thereafter, it appears from the defendant's evidence at p. 155 on Day 3 that the business (and subsequently the company when it was established) purchased any further equipment. At p. 158 on the same day, the defendant confirmed that each

of the brothers were paid the same. This appears to me to be inherently inconsistent with the case made by the defendant in his defence that the plaintiff was merely an employee of this business. It is clear from the defendant's own evidence that the plaintiff played a key part in the establishment of the business. Furthermore, the fact that each of the brothers was paid the same wage strongly suggests an equality of interest in the business.

46. The defendant described that his mother was in charge of the finances for the business. The defendant confirmed that there were no management meetings of any kind. He also confirmed (Day 4 at p. 11) that the plaintiff drove a tipper truck as part of his work for the business and he would draw stone and sand and gravel and deliver it to builders and farmers. When asked who directed operations, the defendant (again at p. 11 on Day 4) answered as follows: -

> *"Well, the way it was with it at that particular time, [J.] was married and he was living [away from the home farm] and I was the one that was living at home. So in the morning I was there first naturally. So when the workers came in, the boys came in to drive lorries, I was dealing with them, and sure when everyone finished up whatever they were doing and they went home, I was still there. So I was dealing with them first and last".*

47. Over time, it appears that the defendant gradually acquired a greater role and say in the running of the business. It is also clear that a tension developed between the plaintiff and the defendant in relation to the way in which the sand and gravel / concrete business was operated. It appears to be clear from the evidence given by the defendant (as quoted in para. 46 above) that, although the deceased took charge of finances, it was the defendant who became *de facto* manager of the business. This is confirmed by the evidence given by J. on Day 4 at p. 155. However, it is clear from the evidence described in para. 45 above that the plaintiff played a key role in the establishment of the business. It is also clear from the evidence of the plaintiff and his wife that the plaintiff continued to work in the business right up to the events of 2007 (described below). As noted in para. 8 above, in the defence of the defendant, it is specifically alleged that the plaintiff's contribution to the business "*although tolerated for several years, was erratic and disruptive*". This was strenuously denied by the plaintiff, who says that the first time he heard this allegation was when he saw the defence delivered in these proceedings. The only evidence that was given to substantiate the allegation in the defence was the following: -

> (a) The defendant gave evidence on Day 4 at p. 12 that the plaintiff did not return delivery dockets to the office on the day of deliveries but did so on the following morning. The defendant also said that no-one really knew what time he started and what time he finished but he said that *"that was never a problem, no-one questioned it";*
>
> (b) The defendant also sought to give evidence that the plaintiff had only come into the office once every three or four days "*with a ball of dockets and just fire them at the women in the office".* However, counsel for the plaintiff objected to this evidence on the basis that it had not been put to the plaintiff on cross-examination. In response to the plaintiff's objection, I reminded counsel for the defendant that I had drawn attention at the end of Day 2, to the necessity to put matters of this kind to the plaintiff in the course of the cross-examination. Counsel for the defendant did not demur and therefore this line of evidence was not continued. No submission was made that the plaintiff might be recalled to deal with this issue. For completeness, I should record that, in my view, it is a matter of basic fairness to a witness that if an allegation of this kind is to be made in the course of evidence on behalf of the defendant, it is essential that it should be put to the plaintiff so that the plaintiff has an opportunity to address it and respond to it in the course of his own evidence. I also reiterate that there was an adequate opportunity between the end of the hearing on Day 2 and the resumption of the cross-examination of the plaintiff on Day 3 for the defendant and his witnesses to provide the defendant's legal team with any specific examples of alleged bad behaviour by the plaintiff so that they could be addressed in the course of the resumed cross-examination of the plaintiff on Day 3.
>
> (c) When the parties' sister, P., came to give evidence, she explained the difficulty that arose for her when delivery dockets were not returned by the plaintiff on the day of delivery. She said that she needed the delivery dockets before the business opened the next morning after delivery. In circumstances where customers came to pay bills, there would be a problem for her if the delivery docket was not available. She needed the docket in order to confirm the amount that was owed by the customer. I should explain that P. worked in the office of the company. She explained that, as a result, the company did not look "*professional as a business*".
>
> (d) It is also alleged in the defence that the plaintiff retained the company phone and did not answer it with the result that customers turned to other suppliers. There was, in fact, no evidence given at the hearing by any witness that customers turned to other suppliers. The plaintiff, in his evidence, said that he only had one phone which he used for the business and his private use as well. Nothing definite was put to the plaintiff on cross-examination in relation to this issue. It was suggested that the deceased had an issue with the plaintiff in relation to a phone, but the nature of the "*issue*" was never identified in the course of the cross- examination of the plaintiff. On Day 4 at p. 11 the defendant was asked by his own counsel whether he had any role in relation to the "*issue*" with regard to the mobile phone, but he gave no evidence, in response to this question, about the plaintiff's use of the phone. However, when P. came to give her evidence, she was cross- examined by counsel for the plaintiff in relation to the phone and she said that there were two phones. P. said that when the plaintiff went away to play music at weekends, the deceased bought another phone which the plaintiff was to use during the week for his calls, and then to leave it in the office at weekends if he was not going to be at home because the deceased wanted to ensure that the phones were always answered. However, P. did not explain what was the problem with the phones and no evidence was in fact given about any impact arising from the phone "*issue*" on the business of the company.
>
> (e) P., under cross-examination, also referred to "*difficulties with the other members of staff*" but no evidence was given of what these difficulties were, and, in those circumstances, I am left without any real evidence as to what difficulties might have existed. Notwithstanding that the cross-examination of P. would have permitted a re-examination of P. on this issue, no attempt was made to re-examine P. by reference to the evidence which she had given under cross-examination. I therefore have no sufficient evidence about these alleged difficulties.

48. Subject to what I say below, the evidence falls far short of establishing that the plaintiff was guilty of conduct that amounted to disruption of the sand and gravel and concrete business. There was, however, evidence of an altercation (which I describe below) between the plaintiff and the defendant. There is also some evidence (which is strenuously denied by the plaintiff) that the plaintiff shouted at his mother, the deceased. In the defence it was alleged that the plaintiff became irate with the deceased following his discovery that she sold certain land without consulting him. It is alleged that he roared and verbally abused the deceased, placing her in fear for her safety and that he then departed "*in fury*". In the course of his direct examination, the plaintiff gave evidence that this never happened; that he was in fact delighted that the deceased had sold this land and he said that he "*most certainly*" never shouted at his mother. Under cross-examination, what was put to him was that in July 2006 the deceased had taken him to task

about the mobile phone and the dockets, and the plaintiff lost his temper and stood over his mother and shouted at her. The plaintiff's response was that this was not true.

49. Under cross-examination it was also put to the plaintiff that he lost his temper with the deceased over the decision to sell the lands. It was put to him that this occurred in the office in the presence of the defendant and that the plaintiff was abusive towards his mother and that he stood over her shouting at her. It was also put to him that he stormed outside into the yard and, to prevent him from coming back into the office, the defendant physically restrained him. The plaintiff responded by saying that none of this was true and he reiterated that he was in fact delighted that the field in question had been sold.

50. It was also put to the plaintiff in very general terms that from 2007 onwards the plaintiff "*on occasion sought to intimidate the deceased"* and that there was "acrimony" between the plaintiff and the deceased. Both of these general accusations were denied by the plaintiff in his evidence and nothing concrete was put to him in respect of either of these allegations. In the course of the cross-examination of the plaintiff, it was suggested that J. would give evidence regarding an incident relating to the use of a motorbike in a field, which it was suggested intimidated the deceased. Again, this was denied by the plaintiff. He said that his elder son had a scrambler motorbike on which his son went over the fields and the plaintiff used to open the gates to give him a spin from one field to the other. But he said there was no issue about it. Subsequently, when J. came to give evidence, there was no mention of a motorbike. I therefore do not believe that there is any evidence to support the general allegation that the plaintiff sought on occasion to intimidate the deceased. For completeness, I should mention at this point evidence heard by me on a *de bene esse* basis from P. in relation to an incident which she recounted between her mother and herself relating to the plaintiff's conduct. Essentially, P. sought to give evidence as to what the deceased had said to her about the plaintiff. This was heard by me *de bene esse* on the express basis advanced by counsel for the defendant that submissions would subsequently be made to me as to the admissibility of this evidence. Ultimately, when it came to the closing submissions, I was informed that in fact I would not be addressed on this issue. In the circumstances, I do not propose to recount in this judgment the evidence given by P. on this issue. For the purposes of this judgment, I must proceed as though that evidence had never been given.

51. Subsequently, the defendant gave evidence in relation to what I might describe as the alleged incident of shouting by the plaintiff at the deceased over the sale of part of the farm by the deceased (as described in para. 48 above). This was dealt with by the defendant in his evidence in chief on Day 4, pp. 13 – 15. Although not all of the detail of this evidence had been put to the plaintiff, I took the view that the thrust of the evidence had been put to him. However, it is noteworthy that, contrary to what had been put to the plaintiff, namely that this altercation took place in the office, the defendant's evidence was that the altercation had taken place in the kitchen of the house in which the deceased and the defendant resided. In fact, this is where the plaintiff said the conversation about the sale of the land had taken place. It was put to the plaintiff on Day 3, p.18 at Q 52 that the defendant's evidence would be that all three were together in the office. The plaintiff's was "*No, we were actually in the house*". However, notwithstanding his evidence to that effect, it was again put to him at Q 54 that the conversation took place in the office. The question put to him was: "*That this took place in the office, [the defendant] will say, not at the home."*

52. Yet, when the defendant himself came to give evidence, notwithstanding the line of cross-examination of the plaintiff (presumably done at his instruction) as described in para. 51 above, the defendant gave evidence that the incident in fact happened in the kitchen. The defendant alleges that the plaintiff came into the kitchen in a rage, complaining that he had not been told about the land being sold. The defendant says that he went out to the yard and got the key of the lorry that the plaintiff had driven to the family home and he continued as follows: -

> *"And I brought it in and I left it on the table, to try and explain to him that if this hadn't have happened, we were in serious financial trouble, we were gone, if we hadn't have got to sell that land, but when I returned into the kitchen he was roaring and screaming at her. He was standing over her. She was sitting in an armchair in the corner of the kitchen, 'that she had no right to sell the land. Who did she think she was?'"*

53. The defendant said that he remonstrated with the plaintiff and that the plaintiff then went out into the yard where he took the key out of the pick-up that the defendant intended to drive. As the plaintiff was heading back towards the house, the defendant says that he went out after him to prevent him doing so, following which

> *"we had a bit of a tussle in the yard. I got the key of the pick-up back off him, and he left, he left the yard."*

54. There was certainly a tussle between the plaintiff and the defendant which occurred in July 2007. However, the plaintiff's account of the incident has nothing to do with the conversation (if the plaintiff's version of events is true) or the altercation (if the defendant's version of events is true) that took place with his mother in relation to the sale of the lands. According to the plaintiff in his evidence in chief (Day 2 at. P. 42) he was assaulted by the defendant in the yard in front of the office in July 2007. He also says that he made a complaint to the local Gardai. He expanded on this under cross-examination (also on Day 2 at pp. 91 – 93). He said that on 23 July 2007 at about noon, he drove the lorry into the yard. As he was filling it with diesel, the next thing that happened was that the defendant: -

> *"came storming up from the house, pulled the keys out of the lorry, and he says to me, he says, 'I have enough of you' he says to me like that. With that, I filled the lorry, I went on down to the house and he got very erratic towards me over that he was the boss and he didn't want – he didn't like – he wasn't getting on with me as such, right. . . .*
>
> *But what happened then was I went into the house and I said to him, I said '. . . what did you take the key out of the lorry for? What's going on, you know? Well he says 'I have enough of you', he says like that. And I went outside anyway and there was a red pick-up outside the door which was used for the concrete and it was used for the farm . . . so I took the keys out of the pick-up and I said 'I am going' says I, 'you can't do that on me', I said like that 'that's not fair you know'. So with that anyway he jumped on me in the yard and got me down in front of the office. And my brother –in –law was there as well standing in the yard watching. And he got me down anyway and he put his knee on my face. I got up after a few minutes anyway and I went to the back door of the house and I got some tissue and my mother says, she says 'that's a terrible carry on', she says like that. And with that I rang [my wife] and she came out for me and I went home."*

55. The plaintiff says that he discussed the matter with his wife and he went down to the local Garda sergeant to make a statement in relation to the incident as he was "*afraid of what was going to happen next*". He explained that on the following morning he had a spare key of the lorry and he went back out, started up the lorry and worked away as usual.

56. Unfortunately, there is a direct conflict between the evidence of the plaintiff on the one hand and the defendant on the other as to the circumstances in which the incident occurred. I therefore have to decide which version of events is correct. I have come to

the conclusion that the plaintiff's evidence in relation to the incident is more credible. He was able to provide significant detail in relation to what occurred. Furthermore, he provided this detail in answer to questions put to him while under cross-examination. He was not led in his evidence in any way. In contrast, the explanation given by the defendant for walking out of the house and taking the key out of the lorry is difficult to credit. There was no need to take the key out of the lorry to explain to the plaintiff that if the sale of the land had not gone through, the family business was in serious financial trouble. Furthermore, there is the inconsistency between the evidence given by the defendant as to where the discussion in relation to the sale of the lands occurred as between the evidence given by him on the one hand (where he said the discussion took place in the kitchen) and what he must earlier have told his counsel for the purposes of the cross- examination of the plaintiff (when it was put to the plaintiff that the defendant's evidence would be that the interaction occurred in the office). It also has to be said that, on an overall basis, I found the plaintiff to be a more forthright witness than the defendant. For example, under cross-examination, the plaintiff was willing to make concessions and he did not prevaricate in his evidence. In contrast, the defendant was unable or unwilling to explain, for instance, why he had given instructions to his solicitors to refuse to provide a copy of the Will. When he was pursued on this issue in cross-examination his ultimate – and I have to say, unconvincing - answer was that he could not remember why the Will or the full copy of the Inland Revenue affidavit had not been furnished to the plaintiff's solicitor, notwithstanding the requests which had been made for copies of these documents which, in my view, ought to have been provided. I do not understand how there could be any proper basis to refuse to provide copies of these documents to a person in the plaintiff's position who had commenced proceedings of this kind. I do not accept that the defendant's explanation that he could not recall why the copy Will was not provided. It seems to me to be probable that the refusal was in fact fuelled by the animus which the defendant harbours against the plaintiff. The defendant was also unable to answer questions as to the inquiries made by him in relation to certain assets which, according to the Inland Revenue affidavit, had passed by survivorship to some of his siblings.

57. It is clear that the incident in the yard was the event which ultimately led the deceased to exclude the plaintiff from the family farm and from the sand and gravel / concrete business. In this context, it will be recalled that in the defence delivered on behalf of the defendant it is expressly alleged that the plaintiff left voluntarily. However, no evidence to that effect was offered at the trial. It is quite clear from the evidence given at the trial that a decision was taken by the deceased that the plaintiff's involvement in the business should cease. While there is a dispute on the evidence (which I deal with further below) as to whether any representation was made by the deceased at this time to the plaintiff that he would inherit lands, there is no dispute on the evidence that the deceased and M. called to the home of the plaintiff on the Bank Holiday Monday in early August 2007. According to the plaintiff (Day 1, p. 36) the deceased came in to his house with M. and said that she wanted to see the plaintiff and his wife. According to the plaintiff she said: -

> *"[the defendant] and yourself are not getting on together. You'll have to go and do something else".*

58. The plaintiff said (Day 2 at p. 43) that he was: -

> *"devastated with what she said to me, I never expected that she would do that . . . She said, [the defendant] can't get on with you and she says, he wants you out of it. . . . And I said to her . . . can I not keep the farm, and can I not do the farming and let him work away in the business? No, she says, I'm keeping all the land until after my time, which . . . we knew that all the time."*

59. In substance, that evidence is entirely consistent with the evidence both of the plaintiff's wife and of M. Insofar as the plaintiff's wife is concerned, she was asked under cross-examination about the visit by the deceased and M. in August 2007. She said (Day 3 at pp. 114 – 115): -

> *"I wasn't there for the whole conversation because when she came in we sat down the four of us in the kitchen, the back door was open, and the children were out, it was a Bank Holiday Monday. The first sentence she said was P. and yourself are not getting on and I think you need to go and do something else. So when she said that I was in shock, P. was in shock. . .. I said this conversation should be in [the deceased's home] not in my kitchen, and I walked out the back door and they were still talking and M. will verify that."*

60. The plaintiff's wife also confirmed that the plaintiff said to his mother that he wanted to farm the land, and her response was that she was keeping the land "*until after her time*".

61. When M. came to give evidence, the essential facts as described by her are the same. She explained that she received a telephone call from her mother who said: - *"I'm having a problem with the lads . . . I want to talk to [the plaintiff]"* (Day 4, p.108). M. described going into the kitchen where the plaintiff's wife put on the kettle and then the deceased said to the plaintiff that she could not have them fighting; that she needed to do something; that she wanted him to leave the business. At that point, M. said that the plaintiff's wife turned around to the deceased and said: - "*how dare you bring your business into my house"*, following which she left the kitchen. M. then continued as follows: -

> *"My mother continued on to say to [the plaintiff] that she couldn't have: 'you fighting among the other employees', and she couldn't deal with it. So she asked [the plaintiff] to leave and go and get something else. To try and do something else. [The plaintiff] said that he knew nothing else, that he had farming. My mother said: '. . . there's no money in farming. You may go and find something else to do'".*

62. M. said that the deceased then said that she would offer to think about it and see was there anything else that he could do - or have an interest in - that would help him make a living. She said that she would help him and back him financially in anything he wanted to do. M. also confirmed that the plaintiff said that all he knew was farming, and that farming was what he wanted to do. She also expressed the view that she thought this decision of the deceased was "*pounced*" on the plaintiff.

63. It is therefore very clear that the departure of the plaintiff from the family business was a forced departure. Given the plaintiff's stage in life, it was quite clearly a momentous decision to have made to force him from participation in the family farm and family business. There was considerable debate in the course of the trial as to why the deceased was motivated to take such a decision. On the basis of the evidence heard at the trial, it is impossible to accept that the deceased decided to terminate the plaintiff's participation in the family business (including the farming business which he so evidently loved) purely on the basis of the "issue" with the phone or the delivery dockets or even on the basis that the plaintiff occasionally shouted at his mother. While the evidence in relation to shouting incidents is in fact quite thin, I do not exclude the possibility that the plaintiff may have shouted at his mother from time to time. However, none of that sufficiently explains why the deceased would take such a harsh decision to exclude a member of the family from the family business in which he had participated since he left school at age fifteen, particularly in circumstances where he had no experience of any other business, had no qualifications of any kind, and had a wife (who was no longer working) and two children of school-going age. It is noteworthy that none of the witnesses present at the meeting on the Bank

Holiday Monday gave evidence that the deceased said anything about the phone or the delivery dockets or even that the plaintiff had been rude to her or had shouted at her. The stated reason was the antipathy between the plaintiff and his brother, the defendant. It is also noteworthy that the meeting took place very soon after the "tussle" which I have described above. In my view, it is likely that this "tussle" was the proverbial straw that broke the camel's back. It seems to me to be clear that there was a very serious underlying and pre-existing family rift and it is this rift which led to the antipathy between the plaintiff and the defendant and ultimately to the tussle. It is true that, notwithstanding this rift, the deceased did offer at the meeting on the August Bank Holiday weekend to provide some financial assistance to the plaintiff in setting up some new business or launching some new career (a difficult thing to achieve at his age without any qualifications or experience). However, it subsequently transpired that very little was in fact offered by the deceased by way of financial support following his departure from the business. His evidence was that his mother continued to pay him €521 net per week from the business up to Christmas 2007 and that she also gave him a gift of €6,000 sometime after that. Thereafter, the plaintiff was left to fend for himself. At this point, it should be noted that there was no evidence at the hearing to support the contention made in the defence (as summarised in para. 8(k) above) that the plaintiff had refused the offer of support from his mother. On the contrary, the evidence was that such an offer was made; there is no evidence that any assistance was refused by the plaintiff - but the only financial support that was actually forthcoming from the deceased was as set out above.

64. In light of the considerations outlined above, I do not believe that there is any basis on which to form the view that the plaintiff's participation in the family farm and family business was terminated on the basis of any "*issue*" with the phone or the delivery dockets or on the basis that the plaintiff shouted at his mother. On the contrary, it seems to me that there must have been some other reason underpinning the deceased's decision to terminate the plaintiff's involvement in the family business. Based on the evidence of all of the witnesses who were present at the meeting which took place in the plaintiff's kitchen on the August Bank Holiday Monday in 2007, it seems to me that the underlying reason was the antipathy which clearly existed between the plaintiff and the defendant. This is evident from what was said by the deceased in the course of that meeting. It is also evident from the comment made by the deceased to M. prior to the meeting (quoted in para. 61 above). It seems likely that the incident in the yard (described in paras. 53 to. 55 above) was what brought things to a head. In my view, it is clear that the deceased must herself have shared some of the antipathy towards the plaintiff. It is difficult to understand how a parent would have taken the course which she did unless she was motivated by some element of animosity towards him. The payment of €6,000 fell well short of any real compensation for taking such a devastating step against him. In these circumstances, it seems to me that one must look elsewhere for an understanding of what caused this antipathy and motivated the deceased to cut the plaintiff off in this way. In my view, the answer is to be found in the evidence given by the plaintiff, his wife and his aunt relating to earlier litigation between the deceased and a relation of the family who claimed adverse possession over part of the family farm. The evidence given on the plaintiff's side was that following this litigation, there was a tangible cooling of relations with the deceased and the defendant and that the deceased was, in particular, "*furious*" that the plaintiff's father in law had given evidence on behalf of the relation claiming adverse possession.

65. There were in fact two disputes in which the plaintiff's in-laws were involved as adversaries against the deceased. The first of these disputes involved a claimed right of way over a laneway which arose in 1998 or 1999 between the deceased and a half-brother of the plaintiff's wife who lived in a house adjoining the laneway. There is very little in the evidence by way of detail in relation to this dispute. According to the evidence given by the plaintiff's wife, this dispute created an atmosphere between the deceased and her family and the plaintiff's wife's family (including the plaintiff and his wife themselves). According to the plaintiff's wife there was "*strain*" but that "*it wasn't as severe as the next dispute*". (Day 3 at p. 91).

66. However, subsequently, in 2001 and 2002, there was litigation in the local Circuit Court (and subsequently in the High Court on appeal) relating to a small part of the family farm (adjoining the neighbouring village) between the deceased and a relation of the family. The plaintiff's father in law gave evidence on behalf of the relation who succeeded in his adverse possession claim (which I understand was advanced by way of counter claim in response to a claim brought against him by the deceased). According to the plaintiff, this caused a rift between his wife's family (extending also to himself) and his own family in that he "*got caught in the crossfire with the whole saga"* (Day 1, p. 43). The plaintiff said that while he had no problem with the deceased, there was tension between the two families which led to himself and his wife being "*shunned*" by the rest of his family. His evidence was that this drove a "*wedge in between my mother and myself over time after that*" (Day 1, p. 44).

67. This was confirmed by the plaintiff's wife in her evidence who said on Day 3 at p. 96 that there were a few occasions after the litigation in 2001 / 2002 when she went out to the family home and sensed that she was not welcome. For example, she described the kitchen falling silent when she entered.

68. In addition, the plaintiff gave evidence (and this was not challenged) that the defendant showed particular antipathy towards the plaintiff's family following this litigation. His evidence was quite graphic. In order to maintain anonymity, I will refer for this purpose to the plaintiff's in-laws as "the Murphy's". The plaintiff's evidence was (Day 2 at p. 148): -

> *"It's because what my wife's father did when he went against – we were often in the house in [the family farmhouse] and a dispute would start and [the defendant] would say 'you're not going to leave the land to those half – Murphy bastards'. That happened. We heard that several times, so we did. And this was the cause of the whole problem. We wouldn't be here today only for this".*

69. Both the defendant and the other members of the family called to give evidence on his behalf denied that their mother was furious over this court case but I have reached the conclusion that the court case did cause significant resentment on the part of the deceased and the other members of the family. This is borne out by the evidence given by the aunt (who also gave evidence on behalf of the relation in the adverse possession proceedings). In the course of her direct examination, the aunt was asked about the reaction of the deceased to the outcome of the litigation. Her evidence (Day 3 at p.40) was as follows: -

> *"Oh, she was furious. I mean, she was furious. The way I looked at it, you know, in these things there is no great winners in them. What took me worse was that my sister was there in a wheelchair. She had broken her leg and she had to be helped up on to the stand and helped down to the toilet. I was taking her down and all my nephews were standing around there and only a guard came over to help me. I had no-one to take her. They were not allowed – [the deceased] was there with them and they just didn't – we were ignored and we were ignored for the last twenty years, which is very sad."*

70. There was nothing put to the aunt on cross-examination which undermined in any significant way the evidence given by her as to the deceased's reaction to the court case. In fact, it was clear from the aunt's evidence that she was shunned by the entire family (including the plaintiff) following the court case in circumstances where she had given evidence on behalf of the relations. The first time the plaintiff spoke to the aunt following the hearing described above was immediately in advance of the hearing of the present case. If the family were prepared to treat their aunt in this way, this seems to me to substantially corroborate what the plaintiff and

his wife have said about the way in which the family resented the "*Murphy*" support for the adverse possession claimant.

71. The plaintiff's version of events in relation to this issue is also corroborated by the changes made by the deceased to her Will in the period following the events which I have just described. In this context, it should be noted that on 18 March 1997, the plaintiff made a Will in which she left a substantial part of the family farm (which is slightly larger than the area which the plaintiff says is subject to a testamentary contract) to the plaintiff. However, in 2003, she made a new Will revoking the 1997 Will. Under that Will, the area of land which she proposed to give to the plaintiff was very substantially reduced. The 2003 Will was executed on 28 July 2003. By that time, the litigation involving the adverse possession claim of the relation had been concluded and the evidence had been given by the plaintiff's father in law in favour of that relation. When seen in light of the evidence of the aunt, the plaintiff and his wife, the change in approach taken by the deceased in relation to the provision for the plaintiff as between 1997 and 2003 seems likely to have been her unhappiness at the involvement at the plaintiff's in-laws in the litigation against her. This is also evident from the way in which she decided in 2003 for the first time to name the defendant as her executor. In the 1997 Will, the plaintiff had been named as her executor.

72. There was no evidence before the court which sufficiently explains the dramatic change of heart on the part of the deceased in 2003 in relation to her testamentary intentions other than the litigation which had occurred in 2001 and 2002. In all of the circumstances outlined above, I reject the evidence of the defendant and his siblings who suggested that the deceased was not concerned about the outcome of the litigation with her relation and I find that the evidence given on the plaintiff's side is more credible on this issue. I have accordingly come to the conclusion that the litigation (and more particularly the plaintiff's in-laws' involvement in it) did in fact lead to significant resentment on the part of the deceased and of other members of her family (in particular the defendant) and that this formed the underlying reason why the defendant was at loggerheads with the plaintiff (eventually spilling over into a physical tussle) and also the underlying reason why the deceased ultimately in 2007 took what can only be described as a very harsh decision to terminate the plaintiff's involvement in the family farming and sand and gravel/concrete business.

The alleged representations and the alleged testamentary contract

73. Having set out the relevant background facts, I now turn to consider the different elements of the plaintiff's claim. The plaintiff gave evidence that a number of promises were made to him over the years. He said that the first promise was made to him in 1983 when reclamation works were being carried out on the lands. He said that his uncle said to him: -

> *"God, isn't it a grand farm, won't you have a fine farm in time to come, won't it be a lot more than we had when myself and your father started out with just the front. . . . So my father over the years then, when we'd be working with sheep or cattle or whatever and we'd be getting hardship in the springtime with the year, with lambs being born and calves being born, and he'd say look it, if you look after the stock they'll look after you at the end of the year and we'll keep the farms and we'll be able to pay everything and you'll have a fine farm after my time*. (D2 p.54)

74. When asked whether he understood that he was to get the entire farm, he said that his father's and uncle's intentions were that the three boys were to get the land in equal shares. This evidence was supported by evidence given by the aunt. Her evidence was that it was her belief (which appeared to be based on conversations with her two brothers) that "the three lads" were to inherit the land at the expense of the daughters.

75. In any event, the evidence given by the plaintiff as to what was said to him by his father and uncle was not challenged on cross-examination. I fully appreciate that, of course, the defendant was at a disadvantage in that both his father and uncle had died many years ago. However, no attempt at all was made to explore the evidence given by the plaintiff in relation to his evidence as to the representation or promise set out above. A number of legal arguments were nonetheless made and, in due course, I will have to consider whether what was said to the plaintiff by his uncle and father gives rise to any enforceable rights against the estate of the deceased. It will be necessary to consider whether what was said was sufficient to create any right or expectation on the plaintiff's part. It will also be necessary to consider the argument made by the defendant that there is a serious *lacuna* in the plaintiff's case in that the plaintiff has not given any evidence that the deceased was party to the promises or representations made by the father and the uncle.

76. In addition to the evidence described in para. 73 above, the plaintiff gave evidence on Day 1 (at p. 8) that during the time he worked with his father after he left school that his father often said that: -

> *"Sure, look, when you're looking for money, like, he said, sure what would I want to pay you for, aren't I leaving it to [you] when I die like . . .after my time won't you have . . . the land, you're working for yourself".*

77. The plaintiff also separately dealt with his interaction with his mother, the deceased, in relation to the land. What he said was (Day 1 at pp. 9 – 10): -

> *"Well, the promise was made by my father and uncle down the years that I was getting part of the lands. When my father passed away in '96, he died suddenly, and she was left all the land, so she made a promise to me after my father died that I was to get the land from the [village] up to the yard at C . . .She was anxious about probate and things like that after his passing so she said to me one day at home in the kitchen . . . that I'm leaving you the land from [the village] up to the yard in C. . . which is 90 acres."*

78. The plaintiff said that the deceased made this statement in 1997 in the family home on the farm and that she also indicated that she had an appointment with a solicitor a few days later to execute her Will. The plaintiff returned to this subject on Day 2 at pp. 54 where he again referred to the "*promise*" made to him by the deceased after his father's death and again he said that she promised him the land from the village up to C. "*where the stone wall goes through the shed*". The plaintiff described how the deceased then went to her solicitor and that when she came back after making her Will she told him that she had made a Will leaving him the land from the village up to the yard C. In the course of his evidence on Day 2, the plaintiff illustrated his understanding of what was said to him by his mother by reference to the map showing the extent of the lands left respectively to him and to each of his brothers under the 1997 Will. It would be impossible to replicate what was said by the plaintiff in this judgment without revealing details which will identify the parties. I therefore will not attempt to do so in this judgment. Essentially, the area of lands identified by the plaintiff ran from a small section shown in white on the map next to the village and covering nearly all of the lands shaded in pink as far as the lands of C, but stopping at the red line which runs diagonally in a northwest to southeast direction running at the northern end from the public road leading out of the village to lands shown in white at the southern end. I should explain that this area of lands coincides to a very large extent with the lands which the plaintiff was to inherit under the 1997 Will save that under the 1997 Will, the plaintiff was also to receive two additional fields which lay to the eastern side of the red line which I have mentioned above.

79. The plaintiff was not challenged on his evidence as to what transpired between himself and his mother in 1997. Subsequently, in the course of submissions, counsel for the defendant said that the reason for this was that the deceased was obviously not in a position to give instructions as to what transpired. I fully appreciate and accept the difficulty that arises in cases of this kind but it is still possible for a cross-examiner to explore and test the evidence of a witness even where the witness is giving evidence about a conversation which he or she had with a person who has since died. There are many ways in which to test the credibility of a witness. In circumstances where the credibility of the plaintiff on this issue has never been tested, and more particularly in circumstances where I found the plaintiff to be a very fair witness, I am now left in the position where the plaintiffs evidence on this issue has gone unchallenged. Furthermore, the will made by the deceased following this conversation in 1997 is consistent with the plaintiff's evidence (albeit that it provides for a more generous gift of lands than was discussed with the plaintiff in the family home). While the gift under the Will did not match precisely the terms of the promise which the plaintiff says was made by the deceased, it nonetheless coincides to a very large extent with the promise and is precisely similar to the promise save for a very small area of lands shown in white next to the village and the two fields to the eastern side of the red line described above. In all other respects, it coincides precisely with the terms of the "*promise*". In this regard, it is important to note that the plaintiff did not see the 1997 Will until after discovery. He had already set out his case in the statement of claim (in particular at para. 13(n)) before he saw the 1997 Will. Therefore, there can be no suggestion that the plaintiff retrospectively constructed a case to coincide with (or to nearly coincide with) the terms of the 1997 Will. In my view, the terms of the 1997 Will provide cogent corroboration of the evidence given by the plaintiff.

80. Each of the plaintiff's siblings who gave evidence all said that their mother never discussed her Will with any of them. I have considered whether this undermines the evidence of the plaintiff described above in which he says that his mother did discuss her Will with him in 1997. I have come to the conclusion that it does not undermine that evidence. The plaintiff has given clear evidence of the interaction that took place between him and the deceased. As I have already mentioned, the Will was made by the deceased following that conversation which the plaintiff says took place at around the time the deceased went to see her solicitor to make her Will. My assessment of the plaintiff on this issue is that he was truthful. There was nothing rehearsed about the way in which he gave the evidence. I have no reason to disbelieve the plaintiff in relation to this evidence. I therefore accept the plaintiff's evidence in relation to the promise which he said was made to him by his mother.

81. There is one further issue which arose in relation to what was said by the deceased to the plaintiff in 1997. On Day 2 (pp 64 – 65) the plaintiff said that his mother told him that M. would also have to be looked after, out of the gift to him. The plaintiff was somewhat vague about what was said to him in relation to this issue but, under the terms of the 1997 Will, the gift to the plaintiff was stated to be "*subject to and charged with the payment of the sum of £IR30,000 to my daughter M. . . within two years from the date of my death*". As it transpires, M. was subsequently looked after by the deceased in that land in an adjoining county was purchased in the joint names of the deceased and M. which, by virtue of the right of survivorship, M. succeeded to on the death of the deceased. According to the Inland Revenue affidavit, the value of these lands, at the date of death of the deceased, amounts to €90,000. In addition, the inland revenue affidavit discloses that M. was the joint holder of a savings account with the deceased and that on the death of the latter, she became entitled to the amount held in that account in the sum of €14,586.

82. Evidence was also given of one further interaction between the plaintiff and his mother in relation to what he would inherit. This is alleged to have occurred in the course of the conversation that took place on the bank holiday Monday in August 2007 at the plaintiff's home. There is a dispute on the evidence in relation to what was said by the deceased on that day. Ultimately, I am not sure that any decision that I have to make depends in any way on the conversation that took place on that day. For the reasons already discussed above, I accept the evidence of the plaintiff in relation to the promise which he said was made to him by the deceased in 1997. If that promise is enforceable, the plaintiff does not have to rely on what he says happened in August 2007. Nonetheless, lest this case go any further, I will set out my conclusion in relation to this conflict of evidence.

83. According to the plaintiff, in the course of the conversation which he had with his mother on the bank holiday Monday in August 2007, she told him that she was giving him the land up to C after her death but that she was "keeping it until after my time". The other witnesses who were present for some or all of that conversation were, as noted above, the plaintiff's wife and M. According to the plaintiff's wife, she was not there for the whole conversation. As explained above, she left the kitchen at one point. Her evidence was that the conversation was something of a "blur" to her because she was not expecting what happened and was not prepared for what happened. The plaintiff's wife said that while she was there, there was a reference to the deceased "*keeping the land until after her time*". The plaintiff's wife did not say that she heard the deceased make any promise to the plaintiff to provide for him in her Will. In these circumstances, the plaintiff's wife is not in a position to confirm what was said by the plaintiff.

84. M. also gave evidence. On Day 4 at p. 110, she said that the plaintiff put to his mother that if he had 100 acres he would be able to farm and he would not be annoying anybody, to which his mother responded: - *"No . . . the land was hers to do with what she wanted*".

85. When the plaintiff was being cross-examined about the events on the August bank holiday Monday, it was put to him that M. would say that she had no recollection of her mother saying anything about a promise of lands to the plaintiff. However, under cross-examination she went further and on p. 125 in answer to the following question: -

> *"[The plaintiff] recollects that his mother said to him or gave him to understand that the lands that had been promised to him earlier were going to go to him under the Will, you don't remember that?"*

To which she said: -

> *"She never made a promise like that and as far as I know she never made a promise to anybody. That land was hers to do with what she wanted."*

She was quite emphatic in her evidence.

86. In relation to this conflict of evidence, I have come to the conclusion that it would be unsafe to hold that the deceased made any promise to the plaintiff during the course of this conversation in August 2007. In the first place, the evidence given by M. is very definite on this issue and she was not shaken in relation to it on cross- examination. Secondly, the plaintiff's wife (who was not, of course, present for the entire conversation) has not been in a position to say that she heard the deceased say this even though she did hear the deceased say that she was keeping the land "*until after her time*". While I appreciate that the conversation may not have been linear, the plaintiff's evidence was that the promise and the reference to the land being kept "*until after her time*" was all said at the same time. Thus, if the deceased had made a promise in those terms, one would expect that the plaintiff's wife would have heard it.

87. I am conscious that the plaintiff's wife said that the conversation was something of a "blur" because of the shock which the decision of the deceased engendered. I have to say that I expect that the plaintiff must also have been in a state of shock and while there clearly was talk about the plaintiff obtaining some land from his mother, I am not persuaded that there is clear evidence that any promise was made by the deceased. For completeness, I should make clear that it does not seem to me that the words which everyone agrees the mother said (namely that the lands were hers until after her time) is inconsistent with the promise previously made by her as described in paras. 77 to 78 above. On the contrary, the evidence given by M. on day 4 at p. 110 suggests that the plaintiff asked his mother that he should be given 100 acres of land, i.e. during the deceased's lifetime. That was not what had been promised in 1997. What was promised in 1997 was that 90 acres of land would be given to the plaintiff under the deceased's Will. Thus the evidence of the plaintiff and his wife, that the deceased said that she was keeping the land "*until after her time*" was not in any way inconsistent with the promise previously made by her in 1997. Furthermore, even if it could be said to be inconsistent with the promise previously made, that does not negate the promise previously made in any way if that promise is enforceable (an issue dealt with below).

88. For completeness, I should deal, here, with the case made in the defence (as summarised in para. 8 (r)-(t) above that the plaintiff deliberately delayed in commencing these proceedings in order to ensure that the deceased would not be in a position to contradict his evidence in relation to the alleged testamentary contract. During the course of the hearing, it was put to the plaintiff that he visited solicitors following the August Bank Holiday Monday meeting to take advice. However, I do not believe that there is any basis on which I could form the view that the plaintiff deliberately withheld commencing proceedings until after his mother's death. In the first place, the plaintiff had no way of knowing in 2007 that his mother would not honour the promise previously made by her in 1997 to leave him the lands in her Will. The fact is that if such a promise was made, it only became enforceable on the deceased's death unless there was some indication during the lifetime of the deceased that she had repudiated the alleged testamentary contract of 1997. In this context, it is clear from the evidence that the plaintiff never saw his mother's will and in particular never saw the Will of 2011. He therefore had no way of knowing that his mother would not honour the promise. Secondly, as the plaintiff explained in his evidence On Day 2 at pp. 144 – 146, while he did attend a solicitor following the events of August 2007, it was in relation to a possible unfair dismissal claim. This is perfectly understandable given the consequences for him and his family following his expulsion from the family farm and the subsequent failure of his mother to provide him with any significant financial assistance. The plaintiff also explained that the reason why he could not bring himself to take any form of proceedings (such as unfair dismissal proceedings) during the lifetime of his mother was that he would be suing his own mother and that is not something that he wished to do. I have no doubt that the plaintiff loved his mother. Quite apart from that consideration, it is clear that the focus of the legal advice given to the plaintiff at this time was in relation to the decision to expel him from the family business. There is nothing to suggest that he had any intimation that his mother proposed to change the gift in her will which had been the subject of the promise made in 1997 or that the plaintiff sought any legal advice in relation to that promise.

89. In the circumstances, I have come to the conclusion that a promise was made by the deceased to the plaintiff in 1997 in the terms set out in para. 77 above and that there is no basis to form the view that the plaintiff deliberately withheld commencing proceedings to enforce that promise until after his mother had died. In the submissions made on behalf of the defendant, it was suggested that even if there was no deliberate decision on the part of the plaintiff to pursue his mother in 2007 in relation to the 1997 promise, there was, nonetheless, acquiescence on his part in failing to take action against his mother at that time. However, for the reasons set out in paras. 87-88 above, I do not believe that the plaintiff had any intimation that his mother would alter her Will in a manner inconsistent with the promise made by her in 1997. In those circumstances, I cannot see any basis on which any question of acquiescence could be said to arise.

Enforceability
90. What I must now consider is whether the representations made by the father and uncle as described above give rise to any enforceable claim. I must also consider whether the promise made by the deceased is enforceable. It seems to me that it is appropriate to deal with these issues first before addressing any issue that arises under s. 117 of the 1965 Act.

The representations made by the father and the uncle
91. The plaintiff submitted, on the basis of the decision of the House of Lords in *Thorner v. Major* [2009] 1 WLR 776 (adopted in Ireland by White J. in *Finnegan v. Hand* [2016] IEHC 255), that the doctrine of proprietary estoppel involves three main elements namely: -

(a) A representation or assurance made to the claimant;

(b) Reliance on it by the claimant;

and

(c) A detriment to the claimant in consequence of his (reasonable) reliance on that assurance.

92. The test laid down in *Thorner v. Major* is essentially the same test as that suggested by Griffin J. in the Supreme Court in *Doran v. Thompson* [1978] I.R. 223 at p.230. It was submitted on behalf of the plaintiff that, in cases of this kind, relatively broad brush evidence is sufficient to establish the first element of the *Doran v. Thompson* test – namely whether there is an enforceable representation. In terms of the clarity of the promise, the plaintiff relied in particular on the following observation of Lord Walker in *Thorner v. Major* at para. 56: -

> *"I would prefer to say (while conscious that it is a thoroughly question-begging formulation) that to establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context. I respectfully concur in the way Hoffmann LJ put it in Walton v Walton (in which the mother's "stock phrase" to her son, who had worked for low wages on her farm since he left school at fifteen, was "You can't have more money and a farm one day"). Hoffmann LJ stated at para 16:*
>
> > *"The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made.""*.

93. It was submitted that the plaintiff, having left school at fifteen to work on the farm, acted in a manner which was consistent with the promises made to him and that the plaintiff relied on those promises. The plaintiff also relied on the observation of Geoghegan J. in *Smith v. Halpin* [1997] 2 ILRM 38 where he said: -

> *"Even if nobody knew of any conversations between father and son, I think that any reasonable person with knowledge*

of the family such as a friend or relation would have assumed that the intention at all material times was that the entire house would become the property of the Plaintiff upon the deaths of his parents".

94. I do not disagree that a representation can arise by conduct and can be inferred from circumstances. I also do not doubt that, in some cases, relatively general evidence may be sufficient to establish an enforceable representation. However, the evidence that was given in relation to the representations of the father and uncle was, by any standard, very thin. I have also not been persuaded that the plaintiff was in effect forced to leave school at age fifteen. On the basis of all of the evidence that I have heard, it appears to me that the plaintiff was quite willing to leave school at age fifteen and was keen to work on the farm. At the same time, it would appear to be likely that, as the aunt said in her evidence, there was an assumption that the "*three boys*" would get the farm following the death of their father and the uncle. However, the evidence falls short of establishing that the plaintiff was to receive any particular part of the farm, such as the 90 acres that was the subject of the discussion with his mother in 1997.

95. Moreover, at the time these representations (such as they were) were made by the father and the uncle, there was no sand and gravel business and concrete business on the land. In fact, the evidence of the aunt was that the father would not have wished to commence such a business.

96. If, therefore, any claim the plaintiff had in respect of these representations was enforceable against the estate of the deceased, very difficult issues would arise as to how it could be satisfied and as to the manner in which it would be satisfied. Ultimately, it seems to me to be unnecessary to consider those questions because, in my view, the claim based on these representations is not enforceable against the estate of the deceased. The simple fact is that following the father's death, all of the land was left to the deceased. Understandably, no steps were taken by the plaintiff at that stage to demand his share of the farm. However, the Will in which the father left everything to the deceased was patently inconsistent with the representations relied upon. As noted in para. 76 above, his father spoke of leaving land to the plaintiff "*when I die*".

97. In my view, the case made by the defendant is correct, that there is a significant lacuna in the plaintiff's case against the deceased in relation to the representations made by the father and the uncle. In my view, the defendant is correct in that there is no evidence that the deceased ever adopted the promises or representations made by the father and the uncle. The plaintiff has given no evidence that his mother was a party to the representations that were made by the father and the uncle. His case against the deceased in relation to the promise made by her is a separate and distinct case which is based on a very specific promise made by her in relation to a specific parcel of lands namely the 90 acres discussed in paras. 77-78 above. No authority has been cited to the court that a party in the position of the plaintiff is entitled to enforce a claim of this kind against a party in the position of the deceased where there is no evidence that the latter was a party to any of the representations in issue. Moreover, any such claim would have been enforceable at the time of the father's death. If the plaintiff wished to pursue a claim based on the representations made by the father, the time to pursue that claim was following his father's death when a will emerged which was inconsistent with the representations described above in so far as it left everything to the deceased.

98. The case made by the plaintiff in response to the *lacuna* argument is that the farm was a family farm and that there is nothing to suggest that the deceased was a stranger to the intention of the father and uncle that the farm was "*for the boys*" as had been suggested by the aunt. It is suggested that it is inconceivable that the deceased was not similarly aware of the understanding or assumption that the "boys" would inherit the farm. It is therefore suggested that the deceased inherited the lands subject to the promises made by her husband and brother in law.

99. In my view, no sufficient case has been established that the deceased was in some way bound in equity to honour the representations made by her late husband and brother in law. The onus of proof in this case lies on the plaintiff and, in my view, the plaintiff has neither adduced sufficient evidence nor made any sufficiently persuasive or cogent argument to establish that any equity arises as against the deceased. If such a case were to be successfully made, it would need to be the subject of more detailed evidence, argument and analysis. However, it does seem to me that the fact that the representations were made may well be relevant to the next part of the plaintiff's case – namely the case he makes based on the promise and representations made to him by his late mother, the deceased.

The promise made by the deceased

100. For the reasons already outlined in paras. 78 to 81 above, I am of opinion that the deceased made a promise to the plaintiff in the terms outlined in para. 77 above. The question that I now have to consider is whether this is enforceable and if so I have to consider in what manner it can or should be enforced.

101. The case which is made on behalf of the plaintiff is twofold. The plaintiff contends that the promise constitutes a representation which gives rise to a similar estoppel as that discussed above in the context of the claim arising from the representations made by the father and the uncle. In addition, the case is made based on a testamentary contract. I now deal with those issues in reverse order. I deal first with the case made on the basis of a testamentary contract. I then turn to consider the case based on estoppel.

The testamentary contract

102. Significant reliance is placed by the plaintiff on the decision of the Supreme Court in *McCarron v. McCarron* (Supreme Court, unreported, 13 February 1997). In that case, the claimant was a cousin of a farmer and came to work on the farm in 1976. Previously, the farmer had asked the claimant's father for someone to come out and "*give a hand with hay and do odd bits of turns*". For several years, the claimant worked long hours helping out with the management of the farm. The claimant alleged that the farmer entered into an agreement with him in 1980 to remunerate him for this work by providing for him in his Will. Subsequently, the farmer died without making a will and the alleged agreement was therefore never honoured. The claimant had worked virtually full-time on the farm between 1976 and 1982 although his involvement later declined somewhat after he acquired a small farm of his own. In the Supreme Court, Murphy J. held that the discussions between the farmer and the claimant were very limited and that they amounted to no more than an exchange between the farmer and the claimant in which the farmer said "*I suppose you are wondering about some compensation for your work*" to which the claimant replied "*I suppose I will not be forgotten*" in response to which the farmer said to the claimant "*you'll be a rich man after my day*". There was also a later discussion where the farmer asked the claimant did he want a formal agreement to which the claimant replied: - "*I will not put you out of your house or home*", to which the farmer said "*Right. . we will leave it at that*". Notwithstanding the rather brief and general exchange between the parties, the Supreme Court held that there was a binding agreement that should be specifically performed. Murphy J. said at p. 9 of the judgment: -

> *"What is noticeable from the transcript . . . was the natural courtesy . . . which often results in an unwillingness to pursue discussions to a logical and perhaps harshly expressed commercial conclusion. In other parts of Ireland, the concept of a person working long hours over a period of four years before any discussion takes place in relation to remuneration or reward might be unthinkable. Even less likely would be agreement or an expression of satisfaction at that stage that the question of compensation would not be overlooked. I would merely conclude that in some,*

particularly rural areas, a meeting of minds can be achieved without as detailed a discussion as might be necessary elsewhere".

103. It will be seen from the decision of the Supreme Court in that case that a relatively general conversation may be sufficient (depending on the circumstances), to give rise to an enforceable contract. An important underlying factor in that case was that it was impossible to explain how a person in the claimant's position would have been prepared to work long hours on the farm of a stranger without any form of remuneration whatsoever. It might be said that this factor is absent in the present case in that the plaintiff here was the eldest son of the deceased. However, in contrast to the *McCarron* case, the interaction between the plaintiff and the deceased here (as recorded in para. 77 above) was much more detailed and specific. A promise was made to leave the plaintiff a specific parcel of 90 acres of land running from the village up to the yard in C. Moreover, this promise was made in the aftermath of her husband's sudden death. This promise was made against the backdrop of the representations previously made by the father and the uncle. It was also made in circumstances where, as recorded earlier in this judgment, the deceased was clearly worried about the liabilities of her late husband's estate to the bank and where she had every incentive to secure the continued participation of her eldest son in the family farm and subsequently in the sand and gravel business. The evidence of all of the witnesses at the hearing attested to the extent of the work done by the father on the farm. Following his sudden death, there would have been an increased need to ensure that the plaintiff continued to work on the farm. While decisions were made to discontinue elements of the farming enterprise (such as the rearing of sheep), it is quite clear that the farming enterprise continued. It is also clear from the evidence of the plaintiff's wife that the plaintiff continued to work long hours on the farm even after the sand and gravel business was established. Indeed, at the time the promise was made, there could have been no guarantee that the sand and gravel business would have been successful. Therefore, there was an obvious need for the deceased to continue the farming enterprise after her husband's death. In all of these circumstances, it is perfectly understandable why the deceased would have wished to secure that her son, the plaintiff, would remain on the farm and provide an incentive to him for that purpose. While I have held that there is no evidence that she was a party to any of the representations made by her late husband and brother-in-law, it is nonetheless probable that she was aware of an expectation on the part of the plaintiff that he would get at least a part of the farm. The evidence given by the aunt would suggest that there was a general expectation the plaintiff and his brothers would succeed to the farm. In circumstances where her husband had left everything to her under his Will, she may also have considered herself under a moral obligation to make the promise which she did. At first sight, it may seem odd that the deceased would have made a promise to the plaintiff and not made similar promises (involving other parts of the farm) to his brothers. However, it seems to me to be understandable that the plaintiff would have been singled out by his mother in this way in circumstances where, on the basis of the evidence which I have heard, it was the plaintiff who carried out the bulk of the work undertaken on the farm alongside his father and uncle. It is also clear that his mother placed significant trust in the plaintiff at this stage. This is evident, for example, from the fact that in her 1997 Will, she appointed the plaintiff as her executor. It must be recalled that the promise was made before the litigation described in paras. 64-66 above.

104. I have considered whether a promise of this kind could be said to be supported by consideration given that, at the time the promise was made, the plaintiff had already left school at fifteen and had already done many years' work on the farm. It might be suggested that, in the circumstances, any consideration was purely past. However, in my view, it would be wrong to suggest that all of the consideration was past. It seems to me that the promise was, in fact, supported by fresh consideration moving from the plaintiff because the plaintiff remained involved in the farm and continued to work very long hours on the farm. In addition, he contributed his lorry to the sand and gravel business which was clearly a key part of the deceased's plans to generate income to pay off the bank. It is clear even from the evidence of the defendant that the sale of the lorry (which had been used to carry animals) was instrumental in allowing a new lorry to be purchased for the purposes of commencing a business in sand and gravel on the family farm. In my view, there was therefore ongoing consideration given by the plaintiff for the promise which his mother made to him.

105. I have also given consideration to whether there is sufficient evidence before the court to rebut the presumption that domestic family transactions are usually not intended to be legally binding. This is not an issue that was addressed in any detail by either side at the hearing. It is an issue which is addressed in considerable detail in McDermott "*Contract Law*" (2nd Ed., 2017) at pp. 217 – 227. The authors cite in this context the decision of Devlin J. (as he then was) in *Parker v. Clark* [1960] 1 WLR 286 at p. 292 where Devlin J. made clear that in an appropriate case a promise to make a bequest to a family member can be contractually binding. Devlin J. said: -

> *"The . . . submission in answer to the claim is that the letters, construed in the light of the surrounding circumstances, show no intention to enter into a legal relationship or to make a binding contract. No doubt a proposal between relatives to share a house, and a promise to make a bequest of it, may very well amount to no more than a family arrangement of the type considered in Balfour v. Balfour, which the courts will not enforce. But there is equally no doubt that arrangements of this sort, and in particular a proposal to leave property in a will, can be the subject of a binding contract."*

It seems to me that the promise made by the deceased here was intended to have legal effect. It is clear that this was not a vague or hastily made promise. The promise was in very definite terms. It spoke not only of the making of a bequest in favour of the plaintiff but also charging that bequest with a requirement that the plaintiff should in turn provide for M. It was made in the course of a conversation in which the plaintiff was told that the deceased intended imminently to attend her solicitors for the purposes of making a Will incorporating the promise. Thereafter, the deceased did in fact visit her solicitor and executed a Will which provided for a gift to the plaintiff in substantially similar (albeit more generous) terms to the promise made by her. Furthermore, as outlined in para. 104 above, the plaintiff provided consideration for the promise. This was not a gratuitous arrangement. It was a serious and deliberate arrangement entered into against the backdrop (described earlier) of the death of her husband which left the deceased in a situation where the plaintiff was now the primary person on whom she could depend to continue the farming enterprise previously carried on by her husband.

106. In all of the circumstances, I have come to the conclusion that an enforceable promise was made by the deceased to the plaintiff in the terms set out in para. 77 above which gave rise to a testamentary contract.

107. The next issue which I must consider is whether it is appropriate to order that this testamentary contract should now be specifically performed. In this context, the defendant has submitted that the plaintiff's claim should be defeated by reason of laches and acquiescence. For similar reasons to those already addressed in paras. 88- 89 above, I do not believe that there is any evidence of acquiescence on the part of the plaintiff in relation to the claim based on the testamentary contract. For similar reasons also, it seems to me that the defence of laches should not succeed. While I fully appreciate that a very significant period of time has elapsed since the date when the 1997 promise was made, that is not of itself sufficient in order to establish a defence of laches. As Biehler explains in "*Equity and the Law of Trusts in Ireland"* (6th Ed., 2016} at pp. 32 – 33: -

> *"In deciding whether the defence of laches has been established, a court must first consider whether the plaintiff has*

delayed unreasonably in bringing his claim and secondly, assess whether prejudice or detriment has been suffered by the defendant as a result. Delay of itself will almost invariably be insufficient and clearly the period of time necessary to invalidate a claim will vary according to the circumstances of each case. . . .”

108. In the present case, there is, in my view, no basis to conclude that the plaintiff has delayed unreasonably in bringing his claim. He brought the proceedings very promptly after the grant of probate was eventually taken out by the defendant 20 months after the death of the deceased. On that basis alone, it seems to me that the defence of laches must fail. Quite apart from that consideration, it seems to me that there is in fact no evidence of circumstances that would render it inequitable to enforce the claim. This is an essential element of the doctrine of *laches* as Keane J. (as he then was) explained in *J.H. v. W.J.H*. (High Court, unreported, 20 December 1979) at p. 35: -

“I have no doubt that the interval of time which elapsed before the proceedings were issued in the present case could properly be described as substantial. That, however, is not sufficient . . .there must also be circumstances which render it inequitable to enforce the claim after such a lapse of time.”

109. As acknowledged in the defendant’s written submissions at para. 24, if a defendant has altered his or her position or acted to his or her detriment, as a result of the plaintiff’s inaction over a substantial period of time, the defence of laches may be successfully invoked. No case is made in the submissions that the defendant here has altered his position or acted to his detriment (although such a case had been pleaded in the defence, as summarised in para. 8(p) above). Instead, it is submitted on behalf of the defendant that “*detrimental reliance is not an essential ingredient of laches, and it may be replaced by some other form of prejudice”.*

110. I do not disagree with the defendant’s submission that detrimental reliance is not, of itself, an essential ingredient of *laches*. I agree that any prejudice which would make it inequitable for the plaintiff to succeed may be sufficient. However, I reject the suggestion that it would be inequitable to permit the plaintiff to succeed on foot of his specific performance claim. While I fully appreciate the difficulty that arises for the defendant as a consequence of the death of the deceased, there are in fact very few cases where a plaintiff will be able to assert a cause of action in respect of a testamentary contract prior to the death of the relevant promisor. This is for the simple reason that any testator or testatrix can, as a matter of fact, change their Will at any time prior to death without knowledge on the part of a potential beneficiary. A potential beneficiary will often not be in a position, therefore, to assert any cause of action until the terms of the will become public after death. There may inevitably be a significant lapse of time between the making of the promise and the death of the promisor. In this case, for the reasons which I have already set out above, I have come to the conclusion that the plaintiff was unaware of any intention on the part of the deceased to alter her will. It is quite clear from the evidence that the plaintiff continued to love his mother even after he was expelled from the business of the company and there is nothing to suggest that he had any inkling that she would hit him with the double blow not only expelling him from the family business in 2007 but also rescinding in 2011 the promise previously made by her in 1997. Thus, the plaintiff could not be said to have unreasonably delayed in bringing the proceedings. While the defendant is at a disadvantage in evidential terms, this is not a disadvantage that arises as a consequence of any culpable failure on the part of the plaintiff to commence his proceedings at an earlier time. It would not be inequitable in those circumstances to order specific performance in this case.

111. I therefore propose to make an order for the specific performance of the testamentary contract described above. That order will require the defendant, as personal representative of the deceased, to transfer to the plaintiff the 90 acres that were identified during the course of the court hearing which run from the village to the yard at C. That is the extent of what was promised to the plaintiff under the testamentary contract. The gift to him under the 1997 Will is more extensive than what was promised to him but, in my view, the plaintiff is only entitled to enforce the promise. He is not entitled to take the benefit of the 1997 Will. To ensure that any order made by the court is capable of precise interpretation and enforcement, I will direct that the plaintiff’s solicitor should prepare a map based on the evidence given in the course of the hearing precisely delineating the 90 acres in question. That map should be supplied to the defendant’s solicitor in the first instance so that the defendant’s side can make any necessary suggestions in relation to the map. In the event of any dispute between the parties, I will rule on that dispute. In circumstances where the small parcel of lands given by the deceased to the plaintiff under the 2011 Will forms part of the 90 acres described above, no issue arises in respect of double recovery. Nonetheless, for clarity, I will make a declaration that the lands to be transferred to the plaintiff are in substitution for any gift to the plaintiff under the 2011Will.

112. I have not lost sight of the fact that, as part of the 1997 contract, the deceased told the plaintiff that M. would also have to be looked after out of the gift to him. This is confirmed by the terms of the 1997 Will under which the gift to the plaintiff was stated to be subject to and charged with the payment of IR£30,000 to M. within two years following the death of the deceased. I have given consideration as to whether the decree of specific performance should be made subject to a similar charge. I have, however, come to the conclusion that in the circumstances outlined in para. 81 above it would not be appropriate to do so. As noted in para. 81 above, it is clear that M. was subsequently looked after by the deceased in a number of ways: -

(a) In the first place there was land purchased in the joint names of the deceased and M. Thus, M. has had the benefit of those lands following the death of the deceased. The value of these lands amount to €90,000;

(b) In addition, M. has received a sum of €14,586 in respect of the savings account which had been placed by the deceased in the joint names of herself and M.

The estoppel claim based on the 1997 promise

113. In light of the conclusion which I have reached in relation to the testamentary contract, it is not strictly necessary that I should form any view in relation to the alternative claim based on estoppel. However, lest I am wrong in the view which I have formed in relation to the testamentary contract, I will, for completeness, set out my views in relation to the claim based on estoppel.

114. In para. 91 above, I have set out the three well-established elements of a claim based on proprietary estoppel. While the plaintiff has sought to cast his claim in promissory estoppel, proprietary estoppel and/or legitimate expectation, I agree with the submission made on behalf of the defendant that the case is more properly characterised as a proprietary estoppel claim.

115. For the reasons already discussed above in the context of the testamentary contract claim, I have come to the conclusion that a promise was made to the claimant. Thus, it seems to me that the first element of a proprietary estoppel claim has been satisfied in this case.

116. I must now consider whether the second element (reliance) and the third element (detriment) have also been established.

117. Insofar as reliance is concerned, this issue is not addressed by the defendant in the legal submissions delivered on his behalf. This is unsurprising in light of the evidence which I have heard from the plaintiff and his wife in the course of the hearing. At the time the promise was made in 1997, the plaintiff was still a young man, he was not long married, both he and his wife could, in the absence of the promise, have made some attempt to restart their life in a different career or business. That is not what happened. Subsequent to the promise, the plaintiff remained on the family farm and was a key participant in the establishment of the sand and gravel business. Furthermore, his wife ultimately took a decision not to continue her career following the expiry of a career break. All of these steps taken by the plaintiff and his wife are consistent with reliance on the promise that ultimately the plaintiff would have security of tenure (so to speak) in the farm into the future. In these circumstances, there is no issue in the proceedings but that the plaintiff relied on the promise made to him in 1997.

118. There is, however, an issue in relation to detriment. It is submitted on behalf of the defendant that the plaintiff, in seeking to enforce the 1997 promise by way of proprietary estoppel, must rely on detriment incurred after the promise was made. The defendant stresses that it is "*common case*" that the plaintiff was remunerated for all work carried out in the course of his employment in the family farm business and in the family sand and gravel business. The defendant therefore submits that no detriment has been sustained by the plaintiff. In making this case, the defendant submits that the detriment suffered by a claimant in the position of the plaintiff must be of a substantial nature. Reliance is placed by the defendant on *Nagus v. Bahouse* [2008] 1FLR 381 and on the following statement by *Biehler* (op. cit. at pp. 835 – 836): -

> *"Detriment will be suffered where the assurance on which reliance is placed is withdrawn and it is the fact of detriment having been suffered which will render it unconscionable for the legal owner to insist on enforcing his rights. While the detriment suffered by the claimant will usually involve expenditure of money or the building of premises on another's land, it would appear that it need not consist of the payment of money or other quantifiable financial detriment so long as it is something substantial".*

119. There are three bases on which the defendant contends that the plaintiff has not suffered detriment: -

> (a) First, as noted above, it is said that the plaintiff has in fact been remunerated for all of the work he did on the farm;
>
> (b) Secondly, it is contended that the work done by the plaintiff was not as substantial as he claims and therefore could not be said to be sufficient to constitute "*detriment*";
>
> (c) Thirdly, it is alleged by the defendant that the detriment suffered by the plaintiff is wholly disproportionate to the value of the lands which the plaintiff seeks to recover.

120. I am not persuaded by any of these arguments. My views can be briefly stated as follows: -

> (a) The first argument of the defendant fails to address the factors identified in para. 117. In my view, if no promise had been made to the plaintiff in 1997, or if the plaintiff knew in 1997 that the promise made at that time would not be honoured, he could have taken steps at that stage while he and his wife were still relatively young to start a new career or a new business. It must be borne in mind that he could, for example, have developed his haulage business. Instead, the plaintiff stayed on the farm where he worked very long hours, he sold his lorry to assist in the setting up of the new family sand and gravel business and he dedicated the rest of his life exclusively to the family farming and sand and gravel businesses. In my view, that is by any standard, substantial detriment since the plaintiff thereby tied himself to the family farm and the family business little knowing that he would subsequently find himself expelled from that business at a stage in his life when, as is well known, it is much more difficult to strike out into a new career. Equally, the plaintiff little knew that he would be expelled from the family business at a time when he had significant commitments, in particular the need to provide for his wife and two school-going children;
>
> (b) I reject the second argument advanced on behalf of the defendant. For the reasons discussed in paras. 19-36 above, I have come to the conclusion that the plaintiff worked very long hours on behalf of the family business then owned by the deceased. In my view, the work undertaken by the plaintiff and the other matters described in subpara. (a) above show very clearly that the detriment in this case was substantial;
>
> (c) The third argument made by the defendant is more appropriately addressed in the context of the next issue to be considered – namely the "manner" in which the equity in favour of the plaintiff should be satisfied.

How should the equity in favour of the plaintiff be satisfied?

121. In the submissions made on behalf of the defendant, it was suggested that any equity which the court may find in favour of the plaintiff should be satisfied by an award of monetary compensation. My attention was drawn to the decision of the Court of Appeal in *Naylor v. Maher* [2018] IECA 32 where Peart J. referred to the diverging strands of jurisprudence which have developed in the United Kingdom and Australia respectively relating to whether an "*expectation-based approach*" or a "*detriment-based approach*" should be taken by the courts in cases of this kind. Peart J. referred to the way in which this is dealt with in *Snell's Equity* (33rd Ed.) at para. 12-1408 in in the following terms: -

> *" . . uncertainty arises as the courts have yet to choose clearly between two competing approaches. On the first approach the starting point is that B's expectation will be protected, and a departure from this is permitted only if it is clear that such an order would impose a disproportionate burden on A. On this view . . . the concept of proportionality has only a negative role to play. On the second approach, there is no presumption in favour of making B's expectation good, and the extent of relief will be determined principally by the need for such relief to do no more than ensuring that B suffers no detriment as a result of B's reasonable reliance on A; although B may be left to suffer some detriment if A can show that such an outcome would not on the facts 'shock the conscience of the court'."*

122. In *Naylor v. Maher*, Peart J. did not consider it necessary to decide which approach is more appropriate. On the facts of the *Naylor* case, Peart J. considered that it would not be a sufficient satisfaction of the plaintiff's claim that he should be recompensed in purely monetary terms. Peart J. said at p. 11: -

> *"The Court when exercising its equitable jurisdiction . . . must be guided by correct equitable principles, which necessarily includes a consideration of proportionality and fairness between the parties. The Court is not confined to a consideration of how much money will suffice to compensate him for the loss of his entitlement to the lands. The*

present case is a good example of where the court's consideration of how the plaintiff's claim in equity to the lands ought to be satisfied must embrace more than simply how much money the plaintiff has lost by making a decision to move back to the family farm, and remaining there in reliance upon the representations made to him. The detriment to him is not confined to a reduction of income or other purely monetary loss. He altered the course of his life. . . ...."

123. While Peart J. made clear that there are cases where it may be just in the circumstances that the particular equity should be satisfied by a pecuniary award, he did not think it would be appropriate in that case to do so. Instead, he held that the circumstances in the Naylor case were such that the appropriate way in which to satisfy the equity was to essentially enforce the representation that had been made to the plaintiff there that he would receive the relevant farm. In coming to this conclusion, one of the factors relied upon by the court was explained by Peart J as follows at pp. 10 – 11: -

"In addition, it is important also to state that the representations made to the plaintiff by the deceased that he would get these lands, and the reliance which the plaintiff placed upon them, in truth amount to a contract which ought to be fulfilled. The deceased should be kept to his contract . . .The satisfaction of the plaintiff's equity by receiving a transfer of the lands will attend to this, and does not offend good conscience."

124. It is clear from *Naylor v. Maher* that it is open to a court to seek to satisfy an equity by a monetary award. There are cases where such a course would be entirely appropriate. However, in my view, this is not one of them. It is quite clear from all of the evidence that I have heard that the main interest in the plaintiff's life has been farming. Moreover, he has spent by far the greatest part of his life on the family farm until he was expelled from it in 2007. He did not leave voluntarily. Secondly, by the time the plaintiff was expelled from the family farm, he was not qualified to do anything other than farming. By that stage he had worked for nearly three decades on the family farm. Thirdly, in common with the *Naylor* case, the plaintiff here was promised a specific parcel of lands, namely the 90 acres in question. Those 90 acres were specifically identified by the deceased. Thus, the transfer of 90 acres to the plaintiff was precisely what the deceased herself envisaged in very explicit terms. Fourthly, no case has been made to me that the satisfaction of the equity in this way would impose a disproportionate burden on the defendant or any of the other members of the family. While it was argued in general terms that the claim of the plaintiff was disproportionate, no argument was made either in the written submissions or in the oral submissions of counsel that either the defendant or any of his siblings would suffer some unintended or disproportionate burden by having the equity satisfied by means of a transfer of lands rather than a monetary award. In the submissions, no case was made that steps had been taken by the defendant or other members of the family on the 90 acres in question that created an equity in their favour over this parcel of lands which should be given a greater priority than that of the plaintiff. While, as noted in para. 8(p) above, such a case had been made in the defence, it was not developed in any real way at the trial.

125. In these circumstances, I believe that the only appropriate way in which to satisfy the equity of the plaintiff in this case is to make a declaration, in the alternative to the order for specific performance proposed in para. 111 above, that the plaintiff is entitled to the 90 acres described in para. 111 above in satisfaction of the equity arising in respect of his parallel proprietary estoppel claim. In circumstances where I propose to make an order in the terms of para. 111, in satisfaction of the plaintiff's claim for specific performance of the testamentary contract, I do not believe that it is necessary to make any further order for the transfer of the lands in satisfaction of the equity which I have just described.

126. For completeness, I should mention that I have, of course, had regard to the decision of Laffoy J. in *Coyle v. Finnegan* [2013] IEHC 463 on which the defendant placed some reliance. There, Laffoy J. held that the equity raised by the plaintiff in that case should be satisfied by an award of monetary compensation for the labour and services provided by the plaintiff to the deceased. However, in my view, that case is clearly distinguishable. In that case, there was no evidence of an unconditional promise. On the contrary, the promise made by the deceased there to the plaintiff in that case was expressly stated to be revocable. Furthermore, it appears that in that case, the plaintiff had ceased working (of his own accord) on the deceased's land several years before the death of the deceased such that the deceased had to rely on others to assist him in the maintenance and running of his farm. It seems to me that the approach taken by Laffoy J. in that case was very much influenced by the individual facts and circumstances of the case which, in my view, are quite different from the facts and circumstances of this case.

The section 117 claim

127. In light of the findings which I have made above in relation to the testamentary contract and the proprietary estoppel claims, it is unnecessary for me to consider the plaintiff's claim pursuant to s. 117 of the 1965 Act. However, in the event that my judgment in relation to those issues is held to be erroneous, I will, for completeness, also set out my findings in relation to the s. 117 claim.

128. It is unnecessary to set out the text of s. 117 in this judgment. The text is well known and is accessible to anyone who wishes to read this judgment. There was no dispute between the parties as to the principles which are applicable to an application under s. 117. Counsel for the defendant expressly acknowledged that the principles are accurately and comprehensively described in *Spierin* "*Succession Act 1965 and Related Legislation: A Commentary"* (5th Ed.), 2017. At p. 399, *Spierin* observes that any determination under s. 117 is reached by way of a two-stage process: -

(a) the court must first decide whether the testator or testatrix has failed in his or her moral duty to make provision for a child;

(b) only if he or she has so failed, will the court proceed to the second stage which is to decide what provision should be made for the child.

129. *Spierin* also refers to the very helpful judgment of Kearns J. (as he then was) in *Re ABC: XC v. RT* [2003] 2 I.R. 250 at p. 263 where the applicable principles were summarised as follows: -

"(a) The social policy underlying Section 117 is primarily directed to protecting those children who are still of an age and situation in life where they might reasonably expect support from their parents against the failure of parents, who are unmindful of their duties in that area

(b) What has to be determined is whether the testator, at the time of his death, owes any moral obligation to the children and if so, whether he has failed in that obligation.

(c) There is a high onus of proof placed on an applicant for relief under Section 117 which requires the establishment of a positive failure in moral duty;

(d) Before a court can interfere there must be clear circumstances and a positive failure in moral duty must be

established.

(e) The duty created by Section 117 is not absolute.

(f) The relationship of parent and child does not itself and without regard to other circumstances create a moral duty to leave anything by will to the child.

(g) Section 117 does not create an obligation to leave something to each child,

(h) The provision of an expensive education for a child may discharge the moral duty as may other gifts or settlements made during the lifetime of the testator.

(i) Financing a good education so as to give a child the best start in life possible, and providing money, which if properly managed, should afford a degree of financial security for the rest of one's life does amount to making "proper provision".

(j) The duty under Section 117 is not to make adequate provision but to provide proper provision in accordance with the testator's means.

(k) A just parent must take into account not just his moral obligations to his children and to his wife, but all his moral obligations such as those owed e.g. to aged and infirm parents.

(l)In dealing with a Section 117 application, the position of an applicant child is not to be taken in isolation. The court's duty is to consider the entirety of the testator's affairs and to decide upon the application in the overall context. In other words, while the moral claim of a child may require a testator to make a particular provision for him, the moral claims of others may require such provision to be reduced or omitted altogether.

(m) Special circumstances giving rise to a moral duty may arise if a child is induced to believe that by, for example, working on a farm he will ultimately become the owner of it thereby causing him to shape his upbringing, training and life accordingly.

(n) Another example of special circumstances might be a child who had a long illness or an exceptional talent which it would be morally wrong not to foster.

(o) Special needs would also include physical or mental disability.

(p) Although the court has very wide powers…such powers should not be construed as giving the court a power to make a new will for the testator.

(q) The test to be applied is not which of the alternative courses open to the testator the court itself would have adopted if confronted with the same situation but rather, whether the decision of the testator to opt for the course he did, of itself and without more, constituted a breach of moral duty to the plaintiff.

(r) The court must not disregard the fact that parents must be presumed to know their children better than anyone else."

130. Not all of those principles will be relevant in any individual case. As the decision of Laffoy J. in *A v. C* [2007] IEHC 120 makes clear, it is necessary to identify the particular principles that are relevant to an individual case. For present purposes, it seems to me that those set out at subparas. (i), (k), (n) and (o) are not relevant here and therefore do not require to be considered by me. I will confine my consideration of the circumstances of this case to the remaining principles set out by Kearns J.

131. I must bear in mind the social policy underlying s. 117. At first sight, it may appear incongruous that someone in the position of the plaintiff (who was almost 50 years old at the date of death of the deceased) could nonetheless be considered to be of an age and situation in life where he could reasonably expect support from his mother. However, as Keane J. (as he then was) observed in *EB v. SS* [1998] 4 I.R. 527 at p. 560: -

> *" . . the legislature, no doubt for good reasons, declined to impose any age ceilings which would preclude middle aged or even elderly offspring from obtaining relief, ..."*

132. There is accordingly no bar to the claim made by the plaintiff in these proceedings merely on account of his age. Nonetheless, as *Spierin* at p. 417 highlights, it is still the case, in light of the decision of the Supreme Court in *Re. IAC* [1990] 2 I.R. 143, that a mature applicant "*will have a heavy onus to discharge*".

133. I must therefore consider whether the plaintiff in this case has discharged the heavy onus which lies upon him to establish a positive failure of moral duty on behalf of his mother to make proper provision for him. In this regard, it seems to me that the following facts and circumstances are relevant: -

> (a) In this case, at the time of death of the deceased, it is common case that the plaintiff was living in a house with no mortgage commitments. However, he was providing for his wife and two school-going children. His income was quite modest. He had no significant savings. He had no financial resources to cushion him or his family against any financial demands or shocks which might occur in the future. Moreover, as a consequence of leaving school at age fifteen, and having spent his lifetime up to 2007 working on the farm (and from 1997 in the family sand and gravel business) the plaintiff had no qualifications or experience of any kind to undertake any other form of employment. Nor did he have the means to buy a farm for himself or to set up any significant business. He resorted to operating a hackney business which did not generate very much by way of income. In contrast, the deceased left an estate which according to the Inland Revenue affidavit had a total net value of €3,702,838. The lands alone (with the buildings) had a gross value of €2,236,500. As I understand it, the valuation does not include the value of the good will of the sand and gravel and concrete making business.
>
> (b) It is true that certain provision had been made for the plaintiff during his lifetime including assistance with the acquisition of the house in the local village. In this context, it does not seem to me that the fact that the plaintiff was paid a salary is of any significance in the context of s. 117. The plaintiff was paid (such as it was) for work done.

Moreover, the plaintiff was not alone in having some provision made for him during the lifetime of the deceased. It is also clear from the full copy of the Inland Revenue affidavit that the plaintiff's siblings also had some provision made for them during the lifetime of the deceased. Thus, for example, the defendant and J. received significant gifts during the lifetime of the deceased. The defendant received a gift of land valued at €100,000 while J. received a cash gift of €32,847 and a site with a value of €50,789. In addition, M. received a half interest in the property in the nearby county with a value of €90,000 to which she succeeded on the death of her mother.

(c) There is no evidence before the court that any of the siblings of the plaintiff were living, at the time of death of the deceased, in anything like the reduced circumstances in which the plaintiff found himself.

(d) The deceased does not appear to have considered that she should make any significant provision for her daughters in her will. The defendant did not adduce any evidence of the financial circumstances of any of his sisters. However, it is notable that none of the daughters has made a claim under section 117. Furthermore, neither of the daughters who gave evidence before me suggested that they were living in straitened circumstances.

(e) On the other hand, the deceased clearly had a desire that both the defendant and J. should be provided for in her will. I have no doubt that she considered herself under a moral obligation to provide for both the defendant and J. given their respective involvement in the family sand and gravel business and concrete making business. In my view, their roles in that business gave them a moral claim for appropriate provision to be made for them by the deceased and it is therefore unsurprising that she should wish to be generous to them. In addition to her moral duty to the defendant and J., I think it is likely that she considered that it would be wise to make appropriate provision for them in order to ensure that the family business (in which they had participated since 1997) should continue into the future.

(f) On the other hand, I must also bear in mind that no evidence was given to the court to the effect that it was essential that the defendant and J. should have provision made for them of the order set out in the last Will of the deceased.

(g) There is no question in this case that any of the children received an expensive education albeit that the deceased appears to have had a desire that each of the daughters should remain in school until they had sat the Leaving Certificate examinations. Insofar as the three boys are concerned, they are all in an equal position insofar as the extent of their respective education is concerned. However, the fact that their education was relatively limited in each case is a factor which, in my view, a just and prudent parent would bear in mind when considering what provision should be made for them in his or her will. Their limited education meant that they were less well equipped to build a career for themselves than might otherwise have been the case. In such circumstances, one would expect that the just and prudent parent would make provision for each of them in his or her will where (as here) the parent had the means to do so.

(h) As the *ABC* case makes clear, the court on an application of this kind can take into account special circumstances which might give rise to a moral duty where a child is for example, induced to believe that by working on a farm, he or she will ultimately become the owner of it. In my view, this is undoubtedly a consideration which arises in the present case. Even if none of the representations made to the plaintiff in the present case (either by his father, his uncle or his mother, the deceased) were enforceable against the deceased's estate, there is no reason to doubt that the statements quoted in paras. 73, 76 and 77 above were made. The plaintiff was led to believe that he would receive an interest in the farm. That was very clearly a consideration to which the deceased, as a just and prudent parent, ought to have borne in mind when it came to making her will.

(i) Furthermore, the plaintiff's work on the farm from age fifteen onwards was a huge part of his life. Thus, quite apart from any representations made to him, his experience on the farm from such an early age most definitely shaped his upbringing, training and life. In my view, quite apart from the representations, this seems to me to be a factor which the deceased, if she were to act as a just and prudent parent, would have to bear in mind in considering what provision she should make for her children under her will.

(j) On the other hand, I must bear in mind that similar considerations apply to the defendant and to J. at least insofar as the sand and gravel business is concerned. While the evidence before me demonstrates that the plaintiff had a much more significant role on the farm than either the defendant or J., it is also clear that both the defendant and J. had very substantial roles in the family sand and gravel business. Furthermore, it appears equally clear that, as between J. and the defendant, it is the latter who had the greater role within the sand and gravel business.

(k) Another factor which has to be borne in mind is the manner in which the plaintiff was expelled from the family business in 2007. That expulsion took place at the height of the building bubble that had gripped the State at that time. The sand and gravel business and the related concrete making business was therefore booming at that time and there is no suggestion that there was any inkling at the time that the business was likely shortly afterwards to go into a decline. In those circumstances the expulsion was particularly harsh.

(l) In my view, this factor has the potential to increase any moral duty owed by the deceased to make provision for the plaintiff. Having been cast out of the family business and left to fend for himself (notwithstanding his age and lack of experience, all of which made the prospects of a successful alternative career very poor) this seems to me to constitute a further circumstance that I must now bear in mind in considering whether there was a moral duty on the part of the deceased to make more significant provision for the plaintiff in her Will than the bequest actually made for him.

(m) A further factor that must be borne in mind is the contention made on behalf of the defendant that the plaintiff was abusive to his mother. However, while that case was certainly made by the defendant, I have found (as para 63 above makes clear) that there is very little evidence of any abuse. I do not discount the possibility that the defendant may have shouted at his mother from time to time. However, it would seem to me that there would have to be much more significant evidence of abuse before this factor could carry any significant weight in the overall consideration of all circumstances.

(n) I must also bear in mind that, as I have already found, the deceased resented the participation of the plaintiff's in-laws in the litigation described above. In my view, while that feeling of resentment may be understandable, it is not a consideration that any just and prudent parent should properly bear in mind when it comes to consideration as to how that parent's estate should be dealt with after death. I regret to say this but, in my view, a just and prudent parent should not harbour resentment or antipathy in such circumstances. I therefore do not believe that this is a factor which

can ultimately carry any weight in my consideration as to whether there was a failure of moral duty on the part of the deceased. In particular, I do not believe that it justifies the rather modest provision made for the plaintiff in the Will as compared to the provision made for the defendant and J.

(o) The difference between the provision made for the defendant and J. on the one hand and the provision made for the plaintiff on the other is striking. It is impossible to account for it other than on the basis that the deceased harboured an ongoing resentment in respect of the participation by the plaintiff's in-laws in the litigation described above. It is almost as though the deceased wished to punish the plaintiff twice. In the first place, he was punished by his expulsion from the family business in 2007. Secondly, he was punished by the lack of provision made for him in the will notwithstanding his very modest circumstances. In my view, a just and prudent parent would not act in this way. On the contrary, it seems to me that a just and prudent parent would wish to reward all of her sons in a similar way in respect of the very significant contribution which each of them had made to the respective businesses carried on by her and previously by her husband and brother in-law. Thus, a just and prudent parent would, in my view, wish to reward the plaintiff for the work done by him on the farm. In addition, it seems to me that a just and prudent parent would wish to compensate the plaintiff for the fact that he had been expelled from the family business in 2007 and left to fend for himself.

134. Having regard to the considerations outlined in para. 133 above, I have come to the conclusion that the deceased here did fail in her moral duty to make proper provision for the plaintiff in her last will. In my view, the plaintiff, in the very particular circumstances of this case, has satisfied the high onus that rests on him to demonstrate that there was a failure of moral duty on the part of the deceased. While the deceased had a moral duty to provide for the defendant and for J., I am of the view that there was a manifest failure on her part to make proper provision for the plaintiff in accordance with her means. She had an extensive estate. The plaintiff had obvious needs. He had been left in a very difficult position following his expulsion from the family business in 2007. By reason of his leaving school at such an early stage and by reason of his lack of experience for anything other than work on the family farm and in the family business, a just and prudent parent would, in my opinion, have made more significant provision for him. The gift to him under the will was disproportionately small when compared with the gifts to the defendant and J. (the other children to whom she undoubtedly owed moral duties having regard to the roles which they had played in the family business).

135. In light of the conclusion which I have reached as set out in para. 134, I must now consider what provision should be made for the plaintiff out of the estate of the deceased.

136. In order to consider what provision should properly be made for the plaintiff, it is necessary to consider the terms of the Will made by the deceased on 31st August, 2011. Leaving aside the very small gifts to the daughters of the deceased, the estate was divided in the following way:-

(a) J. received a gift of a very small parcel of lands at C.; I do not have a valuation for those lands. However, these lands are so obviously small in area that they can be discounted for present purposes.

(b) The defendant was given two separate parcels of land namely 75.8 acres at G. and 123 acres at C. & M. In the course of the hearing, I was provided with an agreed valuation of these lands as at June 2018. While this is a current valuation rather than one at the date of death, it seems to me that it can usefully serve as a proxy in order to assess the relative value of the gifts to the defendant as at the date of his mother's death. According to the agreed valuation by J.P. & M. Doyle, the value of the lands comprising 75.8 acres as of June 2018 was €1.5m and the value of the parcel of 123 acres as at the same date was €1,750,000. This suggests that the value per acre of the 77.8 acre farm is greater than the value per acre of the 123 acre farm.

(c) The plaintiff received a gift of 3.5 acres of land at M. with a value as at June 2018 of €100,000. Again, that seems to me to serve as a useful proxy for the value of those lands at the date of death.

(d) The shares in the family company were divided as between J. and the defendant. J. received 40% of the shareholding in that company while the defendant received 60%. In the Inland Revenue affidavit the total value of the shares in the company, as at the date of death of the deceased, was €508,725.

(e) In addition, the deceased left her total shareholding in a further company (which owns 55 acres elsewhere) to J. However, although the value of the 55 acres as at June 2018 was agreed at €750,000, the evidence given by the deceased's accountant at the trial was that the value of that company was nil in circumstances where it had significant liabilities to the main family company mentioned at (d) above.

(f) The deceased also left her livestock and machinery to the defendant and J. (to be divided equally between them).

137. It is clear, therefore, that the defendant received the bulk of the estate of the deceased. J., in the course of his evidence at the trial, made no complaint about this. The value to him of his shares in the family company is of the order of €200,000 while the value of the shares in the family company to the defendant is of the order of €300,000. This is on a very rough basis, having regard to the fact that, as noted above, the total value of the shareholding held by the deceased in the family company was stated to be €508,725.

138. The total value of the gifts to the defendant (excluding the livestock and machinery) was, therefore, of the order of €3,550,000. In contrast, the total value of the gift to the plaintiff was €100,000 (again using the June 2018 valuation as a proxy for the value at the date of death of the deceased).

139. If one were to take the values given in the Inland Revenue affidavit, the total value of the gifts – as at the date of death of the deceased - was just over €3m in the case of the defendant while the total value of the gifts to J. was €748,547. In both cases, these values are stated to include benefits passing on survivorship. In contrast, the value of the gift to the plaintiff was €42,000.

140. For the purposes of this exercise, I do not propose to take into account the value of the family homes of both the plaintiff and the defendant. Based on the J.P. & M. Doyle valuations of June 2018, the valuation of both properties was very similar. Leaving the value of the respective family homes aside, it is clear that the defendant is to receive the Lion's share of the estate under the Will. The share to J. is significantly less. In those circumstances, I do not believe that it would be appropriate to interfere with the gift to J. under the Will. It seems to me, on the contrary, that any adjustment in favour of the plaintiff must be at the expense of the defendant.

141. In my view, the deceased was, of course, fully entitled to make a more generous gift to the defendant than to the plaintiff.

However, it seems to me that the disparity between the gifts is extreme and that a just and prudent parent would not, in light of the considerations outlined in para. 133 above, permit such a disparity to exist. If one were to take the total value of the lands described in the Will (excluding the gift of lands to J.), the total value (again using the June 2018 valuations as a proxy) was €3,350,000. This is made up of €1.5m in respect of the lands at G., €1,750,000 in respect of the lands at C. & M. and €100,000 in respect of the lands given to the plaintiff under the Will. It seems to me that, while continuing to honour the deceased's intention to favour the defendant, a more appropriate split in terms of value would be in the range of one third to two fifths to the plaintiff and two thirds to three fifths to the defendants. In terms of figures (based on the 2018 valuation), the range would be of the order of €1,117,000 to €1,340,000 to the plaintiff with a range of €2,233,000 to €2,010,000 to the defendant. I stress that these are no more than broad brush figures. They are not intended by me to be anything more than a very rough and ready guide as to how the estate should be divided by a just and prudent parent. In light of the history of the plaintiff in relation to the farm, I am convinced that a just and prudent parent would provide for him by means of a gift of land rather than a gift of money out of the estate.

142. If the plaintiff were to receive all of the lands given to him under the 1997 promise, I was informed at the hearing that he would receive 73% of the 123 acres at C. & M. which are given to the defendant under the Will. In round terms that would equate, by my calculations, to €1,277,500 (i.e. 73% of €1,750,000). In my view, that is within the range of values which I believe a just and prudent parent would consider (allowing for the desire of the deceased to favour the defendant over her other children including the plaintiff while at the same time making proper provision for the latter). In these circumstances, it seems to me that the appropriate provision to be made for the plaintiff is to give him the lands which were promised to him in 1997 – namely the lands from the village up to C. "*where the stone wall goes through the shed*". In other words, the provision to be made for the plaintiff should be the lands which were to be given to him under the 1997 Will less the two additional fields which lay to the eastern side of the red line described by me in para. 78 above.

143. While I do not have any separate valuation for this area of lands, this would seem to me to be appropriate having regard to the range of values outlined in para. 141 above while at the same time ensuring that the plaintiff receives a gift of land rather than of monies. I appreciate that, by proceeding in this way, the ultimate value of the gift to the plaintiff may transpire to be somewhat less (or perhaps somewhat more) than the range of values set out in para. 141 above. However, as I have sought to emphasise, this range of values is no more than a rough and ready attempt on my part to ensure that proper provision is made for the plaintiff while at the same time continuing to honour (insofar as it can be done without encroaching on the proper provision to be made for the plaintiff) the wish of the deceased to favour the defendant in her Will.

Conclusion

144. While I have attempted to deal with the case under s. 117 of the 1965 Act in the event that I am wrong in the conclusion which I have reached in relation to the claim made by the plaintiff on foot of the testamentary contract and representations, I do not believe that it would be appropriate for me to make any order under section 117. I have dealt with s. 117 solely for the purposes of setting out my view, in the event, that I am subsequently held to be wrong in the conclusion which I have reached in relation to the contractual and estoppel elements of the plaintiff's case. In my view, subject to hearing any submissions from the parties to the contrary, the only orders to be made in this case are those set out in paras. 112 and 125 above.

145. As it happens, there is no distinction between the extent of the remedy to be granted under s. 117 on the one hand (were it necessary to make an order under that section) and the extent of the remedy to be granted in respect of the testamentary contract and related proprietary estoppel claim on the other. I should make clear for completeness that, in light of the relief granted in respect of the latter claims, I can see no basis on which the plaintiff could also expect that provision be made for him under s. 117.