

THE HIGH COURT

[2021] IEHC 696

[Record No. 2014/10908 P]

BETWEEN

JEAN CONNORS

PLAINTIFF

AND

DANIEL KINSELLA

FIRST NAMED DEFENDANT

AND

**DAVID TARRANT (PRACTISING UNDER THE STYLE AND TITLE OF TARRANT AND
TARRANT SOLICITORS)**

SECOND NAMED DEFENDANT

AND

**ANDREW TARRANT (PRACTISING UNDER THE STYLE AND TITLE OF TARRANT AND
TARRANT SOLICITORS)**

THIRD NAMED DEFENDANT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 8th day of November, 2021.

Introduction

1. In this application, the plaintiff seeks an interlocutory injunction against the first named defendant in respect of certain works carried out by him at a property known as 10 Casement Park, Bray, Co. Wicklow ('the property'). The plaintiff and the first named defendant are sister and brother, and the property is the former family home of their parents, the late Daniel and Frances Kinsella. No relief is sought in this application against the second and third named defendants, members of a firm of solicitors who at one point represented the first named defendant.
2. The proceedings are of some antiquity, and it will be necessary to consider the way in which the proceedings have developed, and to examine the background to the matter, before dealing with the present application.

The proceedings

3. Frances Kinsella ("the deceased") died on 2nd January, 2014, having been predeceased by her husband Daniel. The deceased died intestate leaving six surviving children: Helen Kinsella, Jean Connors, Daniel Kinsella, Sandra McGrath, Alan Kinsella and David Kinsella. On 16th September, 2014, the plaintiff, who is a practising solicitor, extracted a grant of letters of administration intestate to the estate of the deceased. The plaintiff maintains the current proceedings in that capacity.
4. The plaintiff issued the present proceedings on 23rd December, 2014. The general endorsement of claim was as follows: -

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

Defendant and the professional negligence of the Second Named Defendant who acted on behalf of both parties to the said voluntary conveyance.”

5. The statement of claim was delivered on 8th February, 2016. After appearances, the first named defendant delivered a defence on 11th July, 2016, and the second and third named defendants delivered their defence on 4th August, 2016. Particulars were subsequently exchanged between the parties, and on 30th April, 2018, an order was made for discovery against the first named defendant of certain named categories of documents.
6. The first named defendant then brought an application to strike out the proceedings against him as frivolous and vexatious and/or as an abuse of process. That application was refused by Simons J in a judgment reported at [2019] IEHC 451. However, in view of certain comments by the court on that occasion to the effect that the statement of claim did not provide proper particulars of the claim against the first named defendant, an application was made to this Court for liberty to amend the statement of claim. This application was granted on 11th November, 2019 (Cross J), and an amended statement of claim with greatly expanded particulars as against the first named defendant was subsequently delivered.
7. It was pointed out by me to counsel for the first named defendant that no amended defence had been delivered in response to the amended statement of claim. Counsel accepted that an amended defence should be delivered in view of the greatly expanded particulars of the claim against the first named defendant. However, it is clear from the existing defence, and indeed the affidavits in the present application, that the first named defendant vehemently denies and rejects all the allegations made against him.
8. I inquired during the hearing whether, given that the pleadings appeared to be closed, the matter could be set down for hearing without further delay. It appears that the plaintiff has intimated to the first named defendant that she may wish to apply for non-party discovery against a firm of solicitors who the first named defendant maintains gave independent legal advice to the deceased at the time of the transfer of the property to him. If that occurs, the proceedings will be subject to further delay.

The present application

9. By notice of motion issued on 4th October, 2019, the plaintiff sought the following reliefs against the first named defendant: -
 - “(1) An injunction, including an interim and/or interlocutory injunction, directing the First Named Defendant, his servants and/or agents, to immediately cease and desist from any and all demolition, construction and/or building and/or development works on the property situate at 10 Casement Park, Bray, Co. Wicklow more particularly comprised in folio no. WW16566F;
 - (2) An injunction, including an interim and/or interlocutory injunction, restraining the First Named Defendant his servants and/or agents, your servants shall 7 days

reinstate the property [sic] to the position prior to the commence of the said works situate at 10 Casement Park, Bray, Co. Wicklow more particularly comprised in folio number WW16566F;

(3) An injunction, including an interim and/or interlocutory injunction, restraining the First Named Defendant, his servants and/or agents, to immediately remove all construction and/or building and/or re-development machines, equipment, tools and materials from the property situate at 10 Casement Park, Bray, Co. Wicklow more particularly comprised in folio number WW16566F;”

10. On 4th October, 2019, the High Court (O’Hanlon J) granted interim relief in terms of paras. 1 and 3 of the foregoing notice of motion, and also granted the relief which clearly had been intended at para. 2 of the notice of motion in the following terms: -

“...within seven days of the date hereof reinstate the Property to the position prior to the commencement of the said works on the property situate at 10 Casement Park, Bray, County Wicklow more particularly comprised in Folio No. WW16566F...”.

11. It can be seen therefore that interim relief was granted on both a prohibitory and a mandatory basis by the court. On 10th October, 2019, application was made to this Court (Reynolds J) for an order that the plaintiff be at liberty to serve a notice of motion for attachment and committal of the first named defendant for non-compliance with the order of O’Hanlon J. On 11th October, 2019, the High Court (Jordan J) adjourned the matter to the Chancery List having received a sworn undertaking of the first named defendant “...that he will comply with the said order made on the 4th day of October, 2019 and that the rear wall of the property situate at 10 Casement Park Bray Co. Wicklow...will be reinstated by the First Named Defendant within seven days of the date hereof...”. The order of the court also notes that the parties had agreed that they would endeavour to reach agreement in writing in relation to the reinstatement and specification of the boundary at the side and front of the property. Such an agreement was concluded and reduced to writing, signed by the parties.

12. An application was subsequently made to this Court by the plaintiff for an order pursuant to O.40, r.1 of the Rules of the Superior Courts for the attendance in person of the first named defendant for cross-examination upon his affidavits. This application was refused, and the application for interlocutory injunctive relief was adjourned for hearing to 29th October, 2021. The application for attachment and committal of the first named defendant was adjourned to the trial of the action.

Background to the matter

13. The Casement Park property was the family home of the late Frances and Daniel Kinsella, the parents of the plaintiff and the first named defendant, and their six children. They occupied the property as tenants of Bray Urban District Council. The parents became entitled to purchase the property from the Council pursuant to a tenant purchase scheme in 1995 for local authority dwellings for a sum of IR£23,600, which was significantly below the property’s open market value. The first named defendant expressed interest in

acquiring the property at this time, and wrote a letter to the Council in which he stated "...I am thinking of buying 10 Roger Casement Park as a gift for my parents who have lived there since 1968, but I am disagreeing with the Council on price...". Ultimately, a written agreement of 26th March, 1996 set out the basis upon which the purchase was to proceed. The terms of this agreement were as follows: -

"AGREEMENT FOR 10 CASEMENT PARK, BRAY

CO. WICKLOW, IRELAND.

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

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

TERMS

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

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

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

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

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

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

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

All signatures below have read and understood this agreement.

Daniel Kinsella Senior

Frances Kinsella

Daniel Kinsella

Alan Kinsella

Sandra McGrath

David Kinsella.”

14. It is notable that this agreement was signed by both parents, the first named defendant, and three siblings of the plaintiff and first named defendant. The plaintiff places particular emphasis on the statement that “...this is considered a present to my parents...”. However, it must be noted that the immediately following sentence states “...I am buying the property for myself, but in my parents’ name who have lifetime tenancy”. The plaintiff does not dispute that the purchase monies for the property were provided by the first named defendant.
15. Daniel Kinsella senior passed away aged 81 on 19th August, 2012. The plaintiff alleges that her father had a “draft will” which stated that the property was to be placed on the market, and the sale proceeds to be divided among the six children. The copy of this “draft will” exhibited to her affidavit is a poor photocopy, and largely illegible. In any event, it is not contended by the plaintiff that this document was executed as a binding will. It is at this stage impossible to know what significance should be attributed to what appears in reality to be a handwritten scrap of paper, apparently signed by Daniel Kinsella Senior.
16. On 19th July, 2013, Frances Kinsella swore a Land Registry affidavit applying to the registrar to have the name of Daniel Kinsella Senior removed from the folio of the register. It appears from the declaration executed by her that she may have been advised by the third named defendant in this regard. Ultimately, by a Land Registry Transfer of 7th August, 2013, Mrs. Kinsella transferred the property subject to a sole and exclusive right of residence in the property in her favour for her lifetime to the first named defendant. The transfer was witnessed by Anne Marie Glynn, a solicitor in Meagher Solicitors, and it is contended by the first named defendant that Ms. Glynn provided

independent legal advice to Mrs. Kinsella in respect of this transfer. In this regard, the second and third named defendants, who were acting as the first named defendant's solicitors, wrote to the Council by letter of 20th August, 2013, in which they stated that "...Mrs. Frances Kinsella, the surviving widow and registered owner, decided to transfer the property during her lifetime to her son, Daniel Junior to avoid any dispute after her death regarding the ownership of the property. The reason for this is that it was in fact Daniel Junior who lent the monies to his parents in order that they could purchase the freehold from the Council, and Mrs. Kinsella intended willing the property to him but has since decided to effect a transfer now...her solicitor has witnessed the deed...".

17. The plaintiff makes extremely serious allegations against the first named defendant. She avers at para. 18 of her grounding affidavit that the first named defendant "...acted in a morally reprehensible manner in coercing, bullying, cajoling, harassing and manipulating his vulnerable and extremely ill late mother for the purposes of ensuring that she transferred her only real asset to him solely with such transaction being unconscionable and or so improvident that no reasonable person would enter into it". Perhaps unusually, the first named defendant does not engage with these allegations in his replying affidavits; his two affidavits are addressed towards the work which he carried out on the property, and the extent of his compliance with the order of O'Hanlon J. However, all the allegations contained in the statement of claim against him are denied in his defence, and there are proactive pleas in the defence setting out what the first named defendant contends was a regular and above-board sequence of events as reflected in the documentation. He specifically pleads that Mrs. Kinsella "obtained independent legal advice and was represented by independent solicitors in respect of the transfer of the premises at 10 Roger Casement Park, Bray...to the First Named Defendant. The First Named Defendant is a stranger to any independent advices afforded to the late Frances Kinsella..." [para. 22]. At para. 23 of the defence, the first named defendant pleads that the allegation that he induced his mother to transfer the property to him as contained in the statement of claim "...is scandalous and vexatious and is made with the intention of causing embarrassment to the First Named Defendant at the hearing of this Action".

The relief sought

18. The plaintiff avers that she became aware on 26th September, 2019 that the first named defendant, his servants and/or agents were carrying out "construction/demolition work" on the property. She states that the works "...include the removing [of] a concrete shed, removal of boundary walls and party boundaries including hedges and removal of walls and dividing walls between the front and rear gardens". In her affidavit, the plaintiff sets out the details of the correspondence between her and the first named defendant. She avers that the plaintiff resides in Nantucket, Massachusetts, USA with his family and is a US citizen who has resided in that country since 1987. She avers that the plaintiff's wife is a citizen of New Zealand, and that he operates a construction business in Nantucket. It is suggested that the first named defendant "is a flight risk".

19. The plaintiff accepts that the first named defendant obtained planning permission for a shed in the rear garden of the property, but claims that the works carried out by him are in excess of what is required to build a shed.
20. In his replying affidavit of 2nd December, 2019, the first named defendant avers that there is no risk of the construction works devaluing the property. He claims that the construction work being undertaken will have the effect of increasing the value of the property. He states that the works comprise the construction of a storage shed/garage to the side/rear garden of the existing dwelling, together with associated site works. This would of necessity involve demolition of the existing outhouse buildings. He avers that he applied for planning permission on 7th October, 2014, and avers that the planning department of Wicklow County Council "considered that the proposed works would be a 'considerable visual improvement on the site'. The planning file also records that the new garage would replace the old outbuildings which were in a 'dilapidated' condition". [Paragraph 6].
21. By an affidavit of 18th March, 2021, the plaintiff replied to the first named defendant's affidavit. While the affidavit is mainly concerned with the merits of the interlocutory application and the proceedings generally, the plaintiff does address the current position concerning the property. She avers that, as of the date of swearing of that affidavit, the property had not been reinstated and that the defendant, after the order of 4th October, 2019, had continued to carry out works on the property "including the ground work, formwork and foundations relating to the large shed/garage set out in the planning permission of November 2014" [Paragraph 60]. The plaintiff refers to written undertakings given by the first named defendant on 11th October, 2019 in relation to his intended compliance with the interim injunction, and refers to a letter of 21st November, 2019 from the first named defendant's then solicitor stating that the defendant's undertakings had been complied with "...save to the extent that the said defendant is awaiting 'a window of dry weather within which to pour concrete...". The plaintiff exhibits a report by Mr. Lloyd Semple, a Consulting Engineer from David L Semple & Associates. Mr. Semple exhibits various photographs of the property, and sets out his findings as to the current position of the property. He states that "...[t]here was no machinery evident on site, however the rear garden is very untidy, resembling a construction site. It appears that much excavation has taken place, and certainly does not resemble a typical residential garden situation". Mr. Semple expresses the opinion that the property "...has the potential for future residential development in the side garden...similar developments are taking place in Greystones. All granting of planning permission will be subject to the opinion and approval of Wicklow Council County planning department".
22. The first named defendant swore a further affidavit on 14th April, 2021 in relation to the state of the property. He avers that the works comprise the construction of a storage shed/garage to the side/rear garden of the existing dwelling which involves the demolition of the existing outhouse buildings; he states that he applied for planning permission for these works on 7th October, 2014, "...and the plaintiff raised no objection to the said application". He reiterates the views of the planning department that the proposed works

would be a “considerable visual improvement on the site” and that the old outbuildings were in a “dilapidated” condition.

23. The first named defendant goes on to state that the injunction necessitated his making an application for an extension of the planning permission which was due to expire on 12th January, 2020. This extension will expire in May 2022. He avers at para. 10 of his affidavit that any work carried out at the property since he was served with the order “was work necessitated by the order itself – I was required to reinstate parts of the property and remove machinery and materials”.
24. The first named defendant responds from para. 17 onwards to each of the allegations that the plaintiff makes in her affidavit regarding his works on the property. He states that the foundation for the replacement shed was poured before 6th October, 2019, and that the formwork is there specifically to keep the site safe. He denies that the shed has been “constructed”; he says that what is constructed is temporary and does not interfere with any boundaries as alleged. The first named defendant avers that he has reinstated part of the wall to the rear of the property with concrete blocks, with the rest being poured concrete foundation with steel rebar that is exposed, but surrounded and covered by shutters to make it as safe as possible. He responds to various other criticisms of his alleged compliance with the injunction orders, and states that he “...incurred significant time and expense in removing and returning or storing elsewhere the machinery that had been on site at the time interim orders were obtained”.
25. At para. 21 of his affidavit, the first named defendant avers as follows: -
 - “21. I say that the existence of the interim order has caused and continues to cause significant prejudice to me. It has caused me to incur significant expense and has delayed the completion of the proposed works. The interim order has left the property in a semi-completed state for over a year and a half. The granting of an interlocutory injunction will exacerbate this prejudice. I am most anxious to have the interim orders vacated so that the works can be completed...”
26. In a third affidavit sworn on 4th June, 2021, the plaintiff avers that she has “serious concerns as to the construction, development and standard of works carried out by the FND and the property being devalued in circumstances where Mr. Semple states the works carried out by the FND are substandard and inadequate and adversely impact upon the property and neighbouring boundaries...”. A further report from Mr. Semple of 2nd June, 2021 is exhibited in this regard.
27. The plaintiff sets out at length her comments on averments regarding the state of the property in the first named defendant’s affidavit. Much of her comments refer to the second report of Mr. Semple, who himself swore an affidavit on 4th June, 2021 exhibiting a further report. Mr. Semple sets out his observations and conclusions in relation to each aspect of the works. He comments that the rear garden “is very untidy, resembling a construction site. There is evidence of old concrete foundations from fence panelling. It appears that no effort has been made to reinstate the rear garden to a garden situation.

Certainly no grass has been sown and there does not appear to be topsoil evident...directly outside the rear door of the property there are signs of metal fabrication taking place..." This latter observation may be attributable to the fact that the brother of the plaintiff and the first named defendant carries out welding works in the back garden, to which the plaintiff has taken no objection.

28. Mr. Semple concludes that, in his opinion, the orders of 4th October, 2019 and 11th October, 2019 "have not been complied with". He states that vertical excavations "have been carried out to the rear and Duggan boundaries. Along the majority of boundary interface there is no permanent structure in place to support the excavated vertical face of soil. This is potentially a dangerous situation for the occupants at No. 10 Roger Casement Park and the bounding neighbouring properties". He states his opinion that "...the walls and foundations (based on aerial photographs of 6th October, 2019) constructed are inadequate and substandard, however full drawings and specifications of the works will be required to fully access the construction and hidden aspects of it".

The planning permission

29. In his second affidavit, the first named defendant exhibits the notification of the final grant of planning permission by Wicklow County Council in relation to the property. Planning permission appears to have been granted on 17th November, 2014. The grant contains the following comments:

"Description of proposed development

The proposed development is a 44msq garage with height of 3.6m to the side of the dwelling. The development includes removal/demolition of the existing sheds and outbuildings to the side of the dwelling which are in poor condition.

...Submissions/Objections.

No objections on file...

Assessment

The applicant is proposing replacing existing outbuildings with one new garage onsite. The existing site has a number of outbuildings in a somewhat dilapidated condition that appear to have been on site for many years. No evidence of commercial activity being carried out was evident onsite inspection. It is considered that the proposed garage would act as a replacement for the existing outbuildings and would be a considerable visual improvement on the site. Therefore, while the garage is large in size, on this large corner site it is considered acceptable in terms of design and size and it should be condition that the use is for private domestic purposes only.

Recommendation

Grant Planning Permission

Having regard to the location and design of the proposed development and the zoning objective of the Planning Authority in the current Bray Town Development Plan, it is considered that, subject to compliance with the conditions set out in the schedule below, the proposed development would not seriously injure the amenities of the area, or of adjoining properties and would be acceptable in terms of traffic safety and convenience, and would therefore be in accordance with the proper planning and development of the area.”

The plaintiff’s undertaking to damages

30. In obtaining the interim injunction, the plaintiff gave the usual undertaking as to damages. As I have mentioned above, the plaintiff is a practising solicitor, and at para. 53 of her grounding affidavit she averred as follows: -

“53. I say that I understand the meaning of an undertaking as to damages and as the deponent, I hereby undertake to this Honourable Court in the event of this application proving unfounded and in the event of the Court requiring the Plaintiffs to pay damages to the First Named Defendant, that such damages that may be awarded will be paid.”

31. In the very next paragraph of that affidavit, the plaintiff avers “that at this time there are no assets of the estate”, and refers to copies of the letters of administration in this regard.

32. In an affidavit of 11th December, 2019, the first named defendant’s former solicitor, Kieran Conway, avers that he “...wrote to the Plaintiff seeking clarification that this undertaking was given by the Plaintiff on behalf of the Estate or in her personal capacity. In the said letter, I further sought confirmation that, in the event that the undertaking was given on behalf of the Estate, O’Hanlon J was informed of this and that she was also informed that the net value of the estate is €0.00 according to the Grant of Administration”. Mr. Conway exhibits the reply from the plaintiff of 25th November, 2019 to his letter, stating that “...Judge O’Hanlon was informed that the estate has a nil value...the undertaking to damages was given by the deponent in her capacity as administrator...”.

Other proceedings

33. The plaintiff maintains the current proceedings in her capacity as administrator of her mother’s estate. It therefore may be of some assistance to consider what the attitude of the other beneficiaries of the estate is in relation to the present proceedings. At the hearing, I was informed that one of the four other siblings of the plaintiff and the first named defendant is taking no part in the current dispute. However, it is clear that the other three siblings – Sandra McGrath, Alan Kinsella and David Kinsella – have a very decided view in this regard.

34. Appended to the first named defendant’s legal submissions was a letter from these three siblings of 28th July, 2016 to the Law Society of Ireland (‘Law Society’). I was informed at the hearing that this letter was exhibited to an affidavit of the first named defendant in response to the attachment and committal application, although it is not exhibited in the

affidavits in the present application. However, counsel for the plaintiff indicated that he had no objection to reference being made to it.

35. The letter was stated to be for the purpose of lodging "an official complaint against a solicitor practising in Bray, Co. Wicklow, Jean Connors, who is also our sister". The letter is signed by Sandra McGrath, Alan Kinsella and David Kinsella. The letter states that "all 6 siblings were fully aware of [the purchase of the property from the Council] and no one contested it...our two elder sisters were asked if they wanted to purchase the house before my brother purchased it, one being Jean Connors, and they turned the offer down". The letter maintained that the plaintiff was "now trying to get the house transferred into her name, as Administrator, claiming that the transfer was illegal and that our Mother was vulnerable and not of sound mind, which was ridiculous!" Without going into undue detail, the letter is extremely critical of the plaintiff, and her very decision to take up the role of administrator. The letter is unequivocal as to the attitude of these three siblings to the present proceedings: "My brother owns the house fair and square. He bought it with his own money, let our parents live in it rent free and kept up the maintenance for the duration of their lives. It was always known that it would be transferred into his name".
36. The concluding paragraph of this letter states that the present law suit "...is full of lies and is taking up the court's time. We would like to know how to proceed from this point and would like you to look into this matter to remove Jean from this self-appointed position".
37. It seems that a formal application was brought by these three siblings to the solicitor's disciplinary tribunal on 29th January, 2019, setting out three alleged grounds of misconduct:
 - "(i) The respondent solicitor failed to officially notify the beneficiaries of her self-appointed position as administrator of her late mother's estate;
 - (ii) She failed to respond to direct instructions by us, the beneficiaries;
 - (iii) She has abused her position as a solicitor bringing a law suit against our brother with absolutely no evidence."
38. On 2nd August, 2019, the solicitor's disciplinary tribunal, in a detailed consideration of the complaints made, delivered its opinion that no *prima facie* case of misconduct on the part of the plaintiff had been established for an inquiry in respect of the allegations and the various affidavits of the appellants. This decision was appealed by the appellants to the High Court pursuant to s.7 of the Solicitors (Amendment) Act 1960 as amended. I am told that the siblings represented themselves for the purpose of the application to the High Court. Meenan J., in a brief reported decision at [2020] IEHC 238, held that he was satisfied that the decision of the solicitor's disciplinary tribunal was correct and in accordance with law, and refused the appeal. At para. 7 of the judgment, he stated that "...it is clear to me that the complaints made by the appellants against the respondent

solicitor should be resolved by civil proceedings and there is no evidence to support the allegations of misconduct made against the respondent Solicitor.

Submissions of the plaintiff

39. The plaintiff proffered detailed written legal submissions, and these submissions were supplemented by oral submissions from Mr. Brendan Kirwan SC at the hearing. Counsel accepted that, as part of the reliefs sought was prohibitory and part was mandatory, it might be that different tests applied to different reliefs sought. It was submitted that, to the extent that *Campus Oil* principles applied, the plaintiff had clearly established that there was a serious question to be tried. This was borne out by the decision of Simons J on the first named defendant's motion to have the proceedings dismissed as frivolous and vexatious. As Barniville J put it in *O'Gara v. Ulster Bank Ireland DAC* [2019] IEHC 213 at para. 42: -

"It may be helpful to view the threshold in terms of requiring a plaintiff who seeks an interlocutory injunction to demonstrate that there is a question or issue which would withstand an application to dismiss under the inherent jurisdiction of the court ... or under O.19, r.28 RSC as disclosing no reasonable cause of action or as being frivolous or vexatious. The threshold is of that order and so unless the case is unstateable, it is generally not a difficult threshold to meet."

40. It was submitted that in any event, the plaintiff had demonstrated a strong case likely to succeed at trial, the test of whether or not a mandatory injunction is warranted set out by decisions such as *Maha Lingam v. Health Service Executive* [2005] IESC 89. Counsel referred at length to the circumstances of the case, commenting on the fact that the 1996 agreement was not enforceable as such, and certainly did not provide a defence to allegations of undue influence or unconscionable bargain. Counsel also drew attention to the fact that the allegations by the plaintiff in this regard had not been specifically met in the affidavits submitted by the defendant. It was suggested that, in these circumstances, the plaintiff must be regarded as having a strong case likely to succeed at trial, all the more so because the claim of duress had not been specifically addressed in the defence or in the affidavits.
41. Counsel then addressed the balance of convenience, pointing out that, pursuant to the decision of O'Donnell J of the Supreme Court in *Merck Sharpe & Dohme Corporation v. Clonmel Health Care Limited* [2020] 2 IR 1, if the court is satisfied that there is a fair issue to be tried – which probably will be tried – "...the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice...the most important element in that balance is, in most cases, the question of adequacy of damages..." [para. 65(3)-(4)].
42. In relation to the question of adequacy of damages, counsel submitted that the plaintiff was seeking to protect a property right, both in the proceedings generally and in relation to the present application. If the plaintiff were to succeed in her claim, the property would go back into the estate of the deceased for distribution between the beneficiaries. As the Supreme Court commented in *Allied Irish Banks plc v. Diamond* [2012] 3 IR 549, the

courts have always been anxious to guard property rights in the context of interlocutory injunctions. Clarke J (as he then was) set out the rationale for this principle: -

“Even though there may be a sense in which it may be possible to measure the value of property lost, declining to enforce property rights on the basis that the party who has lost its property can be compensated in damages would amount to a form of implicit compulsory acquisition. If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position to pay compensation to that value (even together with any consequential losses), then it would follow that that person would be entitled, in substance, to compulsory acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value.” [Page 590, para. 96].

43. Counsel submitted that the plaintiff’s case generally, and the present application, concerned property rights. While the first named defendant would maintain that he was the property owner, the fact remained that the plaintiff was asserting a property right, and therefore the principle in *AIB v. Diamond* was engaged. If the plaintiff had established a fair case to be tried in the proceedings, the first named defendant should not be entitled to maintain that damages were an adequate remedy in circumstances where the plaintiff maintained its property rights were being infringed. Counsel referred to Mr. Semple’s report, and its conclusions. It was suggested that the damages arising from the acts of the first named defendant currently complained of would be exceptionally difficult to quantify, and the *Merck* case suggested that this was a factor that could be taken into account in the balance of convenience.

44. Counsel also addressed the separate contention of the first named defendant that the undertaking given by the plaintiff was worthless, as there are no assets in the estate. Reference was made to the judgment of O’Donnell J (as he then was) in *Minister for Justice, Equality and Law Reform v. Devine* [2012] 1 IR 326 at para. 23 as follows: -

“... it is well established that a court can give an injunction notwithstanding the fact that the undertaking as to damages is of little or no worth because of the lack of means of the applicant (*Allen v Jambo Holdings Ltd.* [1980] 1 WLR 1252). It would clearly be wrong that the deserving plaintiff with a good claim would be denied an injunction simply because he or she was without assets. In such a case the court must take into account the unlikelihood of such a party being able to satisfy an undertaking as to damages as one of the factors in considering the grant of an interlocutory injunction but may, and on occasion does, proceed to grant an injunction in such circumstances without such an undertaking. Finally, it is generally the case that an undertaking as to damages will not extend to protect the interests of third parties.”

45. Counsel urges that this is an appropriate case in which, notwithstanding that there does not appear to be any substance to the undertaking as to damages, the court should grant

an injunction given the merits of the application. I enquired of counsel as to whether the views of the beneficiaries of the estate, who stood to benefit if the plaintiff were successful in her action, should be taken into account in this regard, particularly given that three out of the four siblings other than the plaintiff and the first named defendant support the first named defendant and have trenchantly criticised the plaintiff for her institution and conduct of the proceedings. Counsel submitted that the views of the other siblings should not be a factor. No one had made an application to remove the plaintiff as administrator. She had “stepped up”, and should not be penalised because the estate had a nil value; she was acting on behalf of the estate, and in what she perceived to be its best interests. It was suggested that the first named defendant, with his resources, should not be allowed to prevail over the plaintiff merely because there were no assets in the estate. It was submitted that the High Court had granted an interim injunction in the knowledge that the undertaking was without value.

46. Counsel also submitted that the first named defendant had started his building works knowing that the proceedings were in being. The first named defendant complained of having to apply for an extension of his planning permission, but what was to stop him in the future applying for a new grant of planning permission? Counsel also raised the issue as to why he had applied only for a two-and-a-half-year extension up to May 2022, rather than a longer period. It was submitted that any difficulties to do with planning permission either were of the first named defendant’s own making, or were such that they could be easily remedied by him.
47. Counsel submitted that it was clear from the Semple report that there had not been compliance with the order of the High Court. The balance of convenience was heavily in the plaintiff’s favour, and required a return to the *status quo* which applied prior to the works being commenced. It was not open to the plaintiff to argue that the *status quo* was the situation which pertained when the interim injunction was sought, as works were in progress at that stage; the only way in which the *status quo* could be restored was by means of the mandatory orders made by the court on an interim basis.

Submissions of the first named defendant

48. Counsel for the first named defendant, Mr. Peter Shanley BL, produced written submissions at the hearing which contained revisions of the original submissions proffered on behalf of the first named defendant. However, no issue was taken by the plaintiff on this point.
49. Counsel submitted that the weakness of the plaintiff’s underlying case was such that she had not established a fair question to be tried, or that she had a strong case likely to succeed at trial. The letter of 20th August, 2013 from the second and third named defendants on behalf of the first named defendant to Bray Town Council explained the rationale for the transfer, and while that letter referred to the first named defendant as being the client of the second and third named defendants, the letter pointed out that the deceased’s solicitor “has witnessed the deed and you will note a full and exclusive right of residence was included in favour of Mrs. Kinsella which not only covers her entitlement to remain in the property for the rest of her life, but also entitles her to seek maintenance

and support from her son". It was also submitted that the support of three of the four remaining siblings for the first named defendant's position, notwithstanding that they would benefit if the plaintiff were to succeed in the proceedings, should strongly influence the court's discretion. It was intimated that all of those siblings would give evidence at the trial in support of the first named defendant.

50. Counsel submitted that it could not be said that there was a fair case to be tried. In particular, he submitted that the decision of Simons J could not be determinative of there being a fair case to be tried, as the application before Simons J, and his judgment in that matter, both occurred prior to the works now complained of being commenced by the first named defendant. The basis upon which the plaintiff had sought the injunction was that the works had the effect of decreasing the value of the property: in this regard, see para. 84 of the plaintiff's second affidavit, in which the plaintiff averred that "...the said works shall have the effect of decreasing the value of the property in light of the state the Defendant has left the property in given his failure to reinstate the property in accordance with the interim orders". It was submitted that the terms of the grant of planning permission made it clear that the works being carried out by the first named defendant were of considerable benefit to the property, and that there was thus no basis for saying that the works would devalue the property. The real difficulty was that the first named defendant had been prevented by the interim orders from finishing the works in accordance with the planning permission.
51. As regards the question of adequacy of damages, it was submitted that it was perfectly clear that the plaintiff would be adequately compensated by damages. The dicta of Clarke J in *AIB v. Diamond* in relation to the protection afforded to a property right simply did not apply to the present case: the first named defendant owned the property and had obtained planning permission to carry out the works which he was carrying out. In no respect could the plaintiff maintain that these works, if properly carried out, would cause damage to the property, and the County Council were clearly not of that view. Also, the injunction had been obtained from the High Court on 4th October, 2019, and the first named defendant was given seven days to reinstate the property; notwithstanding that, an application was made for short service for a notice of attachment and committal on 10th October, before the expiry of the seven-day period.
52. A number of submissions were also made generally in relation to the balance of convenience. It was suggested that the Semple report referred to the present state of affairs, whereby the works had been reinstated to the extent that they could, but which had given rise to a wholly unsatisfactory situation where the works which originally were intended to be carried out in accordance with the planning permission could not be completed. For this inability to "unscramble the egg", the first named defendant was being threatened with attachment and committal. It was stated that the first named defendant's wish is to complete the works so that the present unsatisfactory state of the property is resolved.

53. The plaintiff had pointed to the fact that there is potential to develop a second house on the area on which the garage is now being constructed. Counsel submitted that it was not explained how the erection of a garage instead of the present dilapidated shed would in any way hinder such a development. Counsel submitted that, leaving aside the question of the erection of another house, the works to be carried out in accordance with the planning permission undoubtedly enhanced the value of the property rather than devalued it.
54. In relation to the question of what represents the *status quo* which should be preserved by an interlocutory injunction, counsel's position was that the *status quo* was the position immediately preceding the issue of the plenary summons, rather than the position before the works commenced. It is in fact the mandatory aspect of the interim orders which, rather than preserve the *status quo*, are directed to the first named defendant to carry out works in order to restore the position prior to when the works commenced.

Discussion

55. There is no dispute between the parties as to the general principles to be applied in determining an interlocutory injunction. Both sides have in fact called in aid in their submissions the steps which O'Donnell J suggested at para. 65 of his judgment in *Merck* might be followed in the case of an interlocutory injunction. Those steps are as follows: -
- "(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted.
 - (2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of [the *American Cyanimid* and *Campus Oil* approach] will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit.
 - (3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice.
 - (4) The most important element in that balance is, in most cases, the question of adequacy of damages.
 - (5) In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy.

- (6) Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.
- (7) While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial.
- (8) While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined.”

56. I am also mindful of the principle which both parties accept applies to mandatory injunctions, in relation to which, as Fennelly J commented in his *ex tempore* judgment in *Maha Lingam* “...it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action”. While this test may be more applicable to a case in which the reliefs sought at interlocutory stage mirrors the relief which will ultimately be sought at trial – which is not the case in the present matter – it does seem to me that a strong case must be shown before the court will, on an interlocutory basis, order the respondent to take steps to undo what it might appear that, in the normal course, he would be entitled to do.

A fair issue to be tried?

57. The case is somewhat unusual in that the reliefs sought in the present application do not equate to the reliefs sought in the statement of claim, but raise an issue not contemplated by the pleadings. As Clarke J put it at para. 11 at *Diamond*:

“Most interlocutory injunctions seek to preserve the position of the parties pending a full hearing at which the court is likely to consider whether the plaintiff is entitled to a permanent injunction in much the same terms as the interlocutory injunction which is sought. While there may, for practical reasons and on the facts of individual cases, be some difference between the nature of the order sought at an interlocutory stage and those which might, if the plaintiff be successful, be granted after a full trial, nonetheless there is ordinarily a close connection between the temporary or interlocutory order sought and the permanent order which the plaintiff might be entitled to in the event that the plaintiff succeeds at trial. Thus, a plaintiff who alleges trespass may hope to secure a permanent injunction at trial preventing such trespass but may seek a temporary interlocutory order pending trial in much the same terms...”.

58. In the present application, the plaintiff does not seek on a temporary basis the substantive relief sought in the proceedings. This led counsel for the first named defendant to suggest that the question of whether or not there was a "fair issue to be tried" should be considered in the context of the dispute in the motion, rather than the general issues in the action. It was submitted that the court should look at whether the plaintiff had established a fair issue in relation to the building works – which commenced after the judgment of Simons J – rather than whether the plaintiff had established a fair issue in the proceedings generally. It was submitted that the plaintiff's merits on the injunction application were so weak that it could not be said that, in relation to that application, the plaintiff had established a fair issue to be tried.
59. I do not think that this is the correct approach. It is well established in the cases regarding interlocutory injunctions, and in my view affirmed by the Supreme Court decision in *Merck*, that the court considers whether the proceedings issued by the plaintiff raise a fair issue to be tried, whether or not the reliefs in the proceedings are co-extensive with the reliefs sought in the interlocutory application. Once the court is satisfied that there is a fair issue to be tried, it can examine the conduct complained of in the application for interlocutory relief to see whether it gives rise to a situation where the rights claimed in the proceedings are being infringed or impeded. If so, the balance of convenience will be considered to determine whether interlocutory relief is warranted until the hearing of the action, and the strength or weakness of the plaintiff's claim for injunctive relief will be a major factor in that consideration.
60. I consider that the plaintiff has established a fair issue to be tried, and that this conclusion follows from the refusal of the High Court of the first named defendant's application to strike out the proceedings as frivolous and vexatious and/or as an abuse of process. As Simons J put it at para. 49 of his judgment: -
- "...[i]t is simply not possible for this court, on the basis of the affidavit evidence and documentary evidence before it, to say that the claim is bound to fail. The dispute between the parties can only be resolved on oral evidence."
61. However, can it be said that the plaintiff has a strong case, likely to succeed at trial, such as would normally warrant the grant of mandatory relief on an interlocutory basis? In my view, this is a much more problematic test for the plaintiff. As Simons J points out, the sort of allegations on which the plaintiff's case is based could only ever be determined as to their truth or otherwise by the hearing of oral evidence. In that regard, it appears that the plaintiff may have to contend with four of her five siblings giving evidence which is contrary to the case made by her. If, as the first named defendant contends, the deceased did indeed receive independent legal advice in relation to the execution of the transfer of the property to the first named defendant subject to a sole and exclusive right of residence, it may prove difficult for the plaintiff to establish that the transfer was procured by undue influence or duress. If the plaintiff has independent evidence that the deceased's will was being overborne in the manner she alleges, she has not brought it forward in support of the present application.

62. The plaintiff makes many points at length in her various affidavits to support the claims she makes in the proceedings. However, she will bear a heavy onus in seeking to set aside the transfer to the first named defendant; the courts do not lightly entertain claims of undue influence and duress, which of their nature can only be proved by way of oral evidence which cannot be evaluated at this interlocutory stage.
63. Having evaluated all of the affidavit and documentary evidence before me, I do not think that it can be said that the plaintiff has a strong case, likely to succeed at trial. That is not to say that the plaintiff may not produce evidence at trial which persuades the court to grant the relief she seeks; rather, that the plaintiff has not established a strong case at this preliminary interlocutory stage.
64. However, I am mindful that the second and third reliefs granted by the High Court on 4th October, 2019 – the reinstatement of the property and the immediate removal of machines equipment tools and materials from the property – are clearly linked to the first relief granted, *i.e.* that the first named defendant cease and desist from any further demolition, construction or development works on the property. It could be said that there would not be much point in the first order if the property were not reinstated, at least to the point where the property was safe and capable of use as it was prior to the works commencing.
65. Mr. Semple has furnished two reports of 16th March, 2021 and 2nd June, 2021. These reports set out comprehensively what Mr. Semple found on his inspections of the property. He concludes that the first named defendant has not complied with the interim orders, or his undertaking to the court of 11th October, 2019, and is particularly critical of the efforts at reinstatement of the property. He complains about vertical excavations which have been carried out to the rear and “Duggan” boundaries. The latter boundary “historically consisted of an embankment only along the rear section”. This embankment has been removed, although fencing has been erected along that boundary. Mr. Semple is concerned about the excavation in these areas, stating that “...along the majority of the boundary interface there is no permanent structure in place to support the excavated vertical face of soil”. Mr. Semple describes this as “potentially a dangerous situation for the occupants of No. 10 Roger Casement Park and the bounding neighbouring properties”. In fairness to the first named defendant it should be said that he set out in detail in his affidavit of 14th April, 2021 his position in relation to the various points made by Mr. Semple in his first report. He averred that he did not consider Mr. Semple’s report to be accurate, and asserted that he had reinstated the property to the best of his ability.
66. The issue of whether or not the first named defendant has complied with the orders of 4th October, 2019 and 11th October, 2019 is primarily the subject of the attachment and committal motion, which has been adjourned to the hearing of the trial. The task of this Court is to determine whether the interim order should continue pending the hearing of the action. Given that I have decided that the plaintiff has established a fair issue to be tried, the balance of convenience is of crucial importance in determining whether or not to grant the reliefs sought.

Balance of convenience

67. The first named defendant is the registered owner of the property as a result of the transfer to him in August 2013. He obtained planning permission from Wicklow County Council to remove existing outbuildings on the property, and to build a new garage which the Council stated would be "a considerable visual improvement on the site", and which was "considered acceptable in terms of design and size...". As the expiry of the five-year term of his planning permission approached, the first named defendant commenced the work to carry out the development. He did so in the knowledge that the present proceedings were in train, but was of the view that the works could only enhance the value of the property. He has been prevented from carrying out the works by the orders obtained by the plaintiff, and accepts that, whether or not he is to be regarded as having complied with the court's orders, the present situation is clearly unsatisfactory.
68. The plaintiff swears at para. 52 of her grounding affidavit that "...in circumstances where the First Named Defendant has failed or refused to furnish an expert report confirming that the said demolition, construction and/or building and/or development works to the said property is necessary and is being carried out within the boundaries of the property and in compliance with planning permission and building regulations that the balance of convenience favours your Deponent and that the status quo should remain pending the determination of the within proceedings". She asserts that the property is devalued by the works, but rejects the suggestion that damages are an adequate remedy, as she says that her property rights are being infringed by the first named defendant, and relies on the dicta of Clarke J in *Diamond* quoted at para. 42 above. She argues that allowing the first named defendant to pay damages would amount to a "compulsory acquisition" of the property as suggested in the aforementioned passage in *Diamond*, and that the court should not allow her property rights to be trammelled in this way.
69. However, I do not think the situation in the present case equates with the circumstances being considered by Clarke J in *Diamond*. The question of whether the plaintiff as administrator of the deceased's estate has any rights at all in the property is the question at the heart of this case, and the establishment of those rights depends entirely on the plaintiff being successful in the proceedings. As things stand, the first named defendant is the registered owner of the property by reason of a transfer from the deceased whose estate the plaintiff represents. As such, he has obtained planning permission from the local authority, which was of the view that the works could only enhance the property if carried out in accordance with that permission; the question in the present application is whether the plaintiff should be permitted to inhibit, until the trial of the action, the exercise by the first named defendant of the property rights which he has in property registered in his name. The facts of the case are, in my view, more consistent with the plaintiff maintaining that an interference with the undoubted property rights of the first named defendant is justified in the circumstances of the case, rather than there being an expropriation or "compulsory acquisition" of the plaintiff's asserted rights by the defendant. As it is the first named defendant's established proprietary rights which are being impugned in the proceedings, it does not seem to me that the principle in *Diamond*

that an award of damages cannot compensate for an expropriated property right on the part of the plaintiff is engaged.

70. Also, while the plaintiff will acquire a proprietary right in the property if she is successful in the present proceedings, the function of the administrator of the deceased's estate is to get in the assets of the estate and distribute them to the beneficiaries, which presumably in the present case would be the children of the deceased. This would most likely involve the sale of the property and the division of the proceeds, after costs and expenses, between the beneficiaries. If the property is found by the court to have been devalued by the actions of the first named defendant, an award of damages against him would compensate for that devaluation, as this award would simply form part of the distribution to the beneficiaries. While the first named defendant resides outside the jurisdiction, the plaintiff would have access to his one-sixth share of the estate against which to execute any such award of damages.
71. It seems to me, from the material available to the court, that the first named defendant's intention was to carry out the development as mandated by the planning permission. It is suggested by the plaintiff at para. 52 of her grounding affidavit that the works being carried out are "in excess of what is required to build a shed". That may or may not be so. However, if the development is not being carried out in conformity with planning permission, there are other avenues open to the plaintiff and indeed Wicklow County Council to deal with such a situation. The unsatisfactory state of the property presently is due mainly to the fact that the first named defendant has not been able to complete the development and render it safe and in accordance with the planning permission.
72. If the development is indeed completed, it is very difficult to see how it can devalue the property. The Council was clearly of the view that it would be a significant improvement on what is there. It does not seem to me that the completed works would be any impediment to the sort of development suggested by Mr. Semple, *i.e.* construction of a separate dwelling on the grounds. In any event, there is no evidence before the court that the completed development, which the plaintiff sought to stop in its tracks by means of the application for interim relief, would devalue the property. To the extent that the property may be devalued by remaining in its current state, in my view this would more appropriately be remedied by allowing the first named defendant to complete the development works, rather than requiring him to undo what he has already done.
73. The first named defendant complains that, as there are no assets in the estate, and as the plaintiff has confirmed that she gave the undertaking as to damages in her capacity as administrator, it is clear that there is no reality to the undertaking, and that the injunctions should be refused on this ground alone. In this regard, the plaintiff relies on the decision of Clarke J (as he then was) in *Molloy v. Molloy* [2007] IEHC 282, in which the court stated as follows: -

"...any plaintiff is entitled to offer an undertaking as to damages. The capacity of the plaintiff to meet any such undertaking does not [affect] the validity of the undertaking itself. However, the capacity of the party concerned to meet any

damages which might likely be awarded is a material factor in considering the adequacy of damages and the balance of convenience. A party which could adequately be compensated in damages and who has the benefit of an undertaking from an opposing party who would be good for any likely damages to be awarded is in a very different position from a party faced with a largely worthless undertaking as to damages." [at para. 15]

Conclusions

74. Having considered all of the affidavits, documentation and oral and written legal submissions, it seems to me that the balance of convenience decisively favours the first named defendant. I am of the view that the interlocutory relief should be refused. It follows that the orders made by this Court on 4th October, 2019 and 11th October, 2019, together with the undertaking proffered by the first named defendant on 11th October, 2019, must be discharged. The question of whether the first named defendant complied with these orders is the subject of the attachment and committal motion, which has been adjourned to the trial of the action.
75. I am satisfied that the plaintiff has established a fair issue to be tried in the proceedings. However, it is not apparent to me that the plaintiff has a strong case likely to succeed at trial, such that the first named defendant should be the subject of mandatory interlocutory reliefs. In any event, I am of the view that interlocutory orders are inappropriate, in circumstances where the first named defendant owns the property, is carrying out development works which have been authorised by planning permission, and which works are not likely to devalue the property, the very harm for which the plaintiff contends. I accept that the first named defendant has incurred significant expense and delay in the completion of the works as a result of the orders to date.
76. Also, while I accept that an undertaking without substance is not an absolute bar to injunctive relief, in my view the plaintiff should present a sufficiently compelling case for an injunction if she wishes to persuade the court that it should overlook the fact that her undertaking as to damages is of no value. The plaintiff, who is a practising solicitor, is no doubt well aware of the necessity to give a meaningful undertaking, and the consequences of not doing so. The merits of the current application suggest to me that an undertaking of no value works an injustice on the plaintiff, and further tips the balance of convenience in his favour.
77. Finally, it seems to me to be a great pity that there has been such dissension and strife among five of the children of the late Daniel and Frances Kinsella. The plaintiff may win her case. The defendants may successfully defend the matter. However, the proceedings are complex, extremely costly and will no doubt, if pursued to the end, take a serious emotional toll on all involved in respect of what is a relatively modest estate in material terms. I would urge the parties, even at this advanced stage of the proceedings, to see whether some compromise is possible, whether mediated or otherwise. Indeed, the parties might consider whether an exercise by the court of its powers under s.16 of the Mediation Act 2017 might be of assistance in this regard.

78. As regards the present matter, there will be orders refusing the plaintiff's application and discharging the orders of this Court of 4th October, 2019 and 11th October, 2019. The court will also discharge the first named defendant's undertaking to the court of 11th October, 2019. The parties may make brief written submissions within 14 days of delivery of this judgment in relation to the issue of costs, or any other order which the parties consider it necessary to make as a result of the findings of this judgment.