

# THE HIGH COURT

[2023] IEHC 494

[2018 7829 P]

**BETWEEN**

**MARIE GIBSON**

**PLAINTIFF**

**AND**

**KEVIN O’GORMAN PRACTISING UNDER TITLE AND STYLE OF KEVIN**

**O’GORMAN AND COMPANY SOLICITORS,**

**PAULINE GIBSON,**

**PAUL McCLEARY**

**AND PROMENTORIA DAC**

**DEFENDANTS**

**JUDGMENT (NO. 2) delivered by Mr. Justice Cregan on the 28 day of June, 2023**

## **Introduction**

1. This matter was heard before me over a period of three days in October, 2022 and I gave a written judgment on 14<sup>th</sup> December, 2022. In that judgment, I held:

- (1) that the first defendant was negligent in his performance of his duties to the plaintiff; and
- (2) that the second defendant, Ms. Pauline Gibson, the daughter of the plaintiff had committed a fraud on her mother and various other parties.

2. It was agreed between the parties that in the first module of the case I would determine issues of liability, and that I would hold over issues such as the validity of the charge, rectification of the register, (if necessary), damages and related issues until the second module.

### **Joinder of fourth defendant**

3. The third defendant, Mr. Paul McCleary, was the receiver appointed by the lending institution which had acquired the loan advanced by First Active to Ms. Pauline Gibson. However, although counsel for the receiver was present throughout the first hearing, he did not actively participate in that hearing.

4. After I had delivered judgment in December 2022, Promontoria DAC, the lending institution which had acquired the loan which Ms. Pauline Gibson had taken out with First Active, and which held a charge over the plaintiff's property, consented to being joined as a fourth named defendant to the proceedings. It did so in order that it could be heard in these proceedings about the validity or otherwise of the charge which it held over the plaintiff's property and also in relation to the challenge to the legality of the appointment of the third named defendant as receiver.

5. In the circumstances, I gave directions about amended pleadings. An amended statement of claim was furnished by the plaintiff and served on all parties and the fourth named defendant filed a defence in these proceedings.

### **The issues in this module**

6. There are a number of issues to be considered by me in this module of the proceedings. These are:

- (1) the validity of the transfer of the plaintiff's family home ("the property") from the plaintiff, Mrs. Gibson (and her husband), to their daughter Ms. Pauline Gibson;

- (2) the validity or otherwise of the charge registered by Ms. Pauline Gibson over the plaintiff's property in favour of the lending institution;
- (3) the validity of the appointment of the receiver, Mr. Paul McCleary;
- (4) the issue of damages against the first named defendant;
- (5) the issue of damages against the second named defendant.

7. I will deal with these issues in the order set out above.

**The first issue – the transfer of the property from Mr. and Mrs. Gibson to their daughter Ms. Pauline Gibson.**

8. The first issue to be considered is the legality of the transfer of the family home from Mr. and Mrs. Gibson to their daughter, Ms. Pauline Gibson.

9. As I found in my written judgment of 14<sup>th</sup> December 2022, Ms. Pauline Gibson engaged in a deliberate and calculated fraud on her parents to bring about the fraudulent transfer of their family home to her. Ms. Gibson did not defend these proceedings at any time and never appeared before the court to explain her actions. All the relevant facts in this regard were set out in my first judgment.

10. It is clear therefore that the transfer of the family home effected by Ms. Pauline Gibson from her parents to herself was a fraudulent transfer. As such, it is *void ab initio*. In the circumstances I will set aside this transfer.

11. The setting aside of this transfer on the grounds that it was a fraudulent transfer and should be *void ab initio* was not contested by either the first named defendant, the second named defendant, the third named defendant or the fourth named defendant.

12. I will therefore:

- (a) grant a declaration that the transfer of the said property from Mr. and Mrs. Gibson to Ms. Pauline Gibson was procured by fraud and is *void ab initio*;

(b) direct the Property Registration Authority to carry out any acts as are required to rectify the register to reflect the fact that the true owner of the leasehold interest in the said property at all times were Mr. and Mrs. Gibson, and since Mr. Gibson's death, Mrs. Gibson alone.

### **The legality of the charge**

13. The central issue in the second module of these proceedings is the validity of the charge over the said property given by Ms. Pauline Gibson to First Active (and thereafter assigned to Promontoria) in return for obtaining a sum of €190,000 from First Active.

14. The plaintiff submits that this charge was based upon a fraud and therefore should be *void ab initio*.

15. The first defendant agrees with this submission.

16. Promontoria however submitted that the charge should not be set aside and that it was a valid charge over the property as First Active was not involved in the fraud and had no knowledge of it.

17. In considering this issue it is important to analyse what happened in this case and the extent of the fraud perpetrated by Ms. Pauline Gibson on various parties. As I stated in my judgment of 14<sup>th</sup> December, 2022 at para. 145 and following:

#### **"The fraud of Ms. Pauline Gibson**

*145. In the light of all of the evidence which has been adduced in this case and in circumstances where Ms. Pauline Gibson has failed to enter an appearance, instruct solicitors or appear in person to defend any aspect of these proceedings, I have no hesitation in finding that Ms Pauline Gibson acted in such a way in this transaction as to defraud her parents. She engaged in a scheme the object and/or effect of which was to obtain a fraudulent transfer of her parents' family home to herself and, in return, she paid her parents nothing*

*and never disclosed to her parents the true nature of the transaction. As a result of this fraud, Ms Pauline Gibson obtained a mortgage from First Active in the amount of €190,000 in or about September 2003.*

*146. I also conclude, based on the evidence, that the signatures of the plaintiff and her husband on the purported deed of transfer dated 22<sup>nd</sup> May 2009 (and then re-dated 16<sup>th</sup> March 2010) are forgeries and that on the balance of probabilities, their signatures were forged by Ms. Pauline Gibson or a person on her behalf.*

*147. I therefore conclude that Ms Pauline Gibson engaged in a deliberate and calculated fraud and deception on her parents in or about September 2003 and/or in 2009/2010 and as a result of this fraud and/or deception purported to obtain the transfer of the plaintiff's family home from her parents to herself by means of a purported transfer in 2003 and/or in 2009/2010 and to obtain a loan from First Active based on this fraud.”*

**18.** I also found at para. 117 of my judgment that Ms. Pauline Gibson forged (or procured another person to forge) her parents’ signatures on a transfer order drawn up by Dublin City Council which vested the fee simple in the property in the name of the plaintiff and her husband.

**19.** It is clear therefore that Pauline Gibson engaged in three separate frauds in relation to this transaction. These were:

- (1) the fraudulent transfer of the property from her parents to herself;
- (2) fraudulently obtaining the consent of Dublin City Council to transfer the fee simple in the property from Dublin City Council into the name of the plaintiff and her husband by forging her parents’ signatures on the application form to Dublin City Council; and

(3) fraudulently misrepresenting to First Active that she was the owner of the said property, fraudulently misrepresenting to it that she was entitled to grant a charge over the said property, fraudulently signing the relevant documents to grant a charge over the said property and fraudulently obtaining a sum of €190,000 from First Active by means of such a deception.

20. It is clear that these actions were all part of a calculated and thoroughgoing fraud perpetrated by Ms. Pauline Gibson on her parents, on Dublin City Council and on First Active.

21. Mr. Thomas, the plaintiff's conveyancing expert, gave evidence in both modules and, in his opinion, all the matters set out above were frauds. In Mr. Thomas's view, the dealing number in the Land Registry (i.e. the instrument to transfer the property from the plaintiff and her husband to Ms. Pauline Gibson) was a fraud; in addition, in his expert opinion, the charge (which had the same dealing number) was also a fraud.

22. Mr. Thomas stated, that, in his expert opinion, he did not see how the charge could stand in the light of the fraud.

23. In its legal submissions, Promontoria submitted at para. 10: *"By contrast taken strictly on its own, the charging of the property with Pauline Gibson's borrowings was not a fraud"*.

I do not accept this submission. As set out above, I am of the view that the granting of a charge over the property by Ms. Pauline Gibson was clearly a fraud, from start to finish.

24. Promontoria also submitted that this was, more properly speaking, a case of undue influence, rather than fraud, and therefore the charge was not void but voidable. In making this submission, it sought to place reliance on one piece of evidence – that Ms. Pauline Gibson told her parents that she intended to borrow from a bank, and that she intended to do so "against the house". However, in my view, Promontoria's submission on this issue does not accurately characterise the totality of the evidence in this case. It seeks to place undue

reliance on one piece of evidence given above – and ignores entirely Mrs. Gibson’s other evidence – that she would never, under any circumstances, transfer the property in its entirety to her daughter for no consideration. It is clear from my first judgment that this was a case based on fraud rather than undue influence.

**25.** Counsel for Promontoria placed particular reliance on the case of *Re Leighton's Conveyance* 1936 1 All ER 667. This was a case in which the court held that a transfer from mother to daughter would be set aside as fraudulent but that the subsequent charge in favour of a Bank would not be set aside. However the facts of that case are a long way removed from the facts of this case. The fundamental distinction between the cases is that in *Re Leighton's Conveyance* is a case of *non est factum* whereas this case involved fraud at each step in the process.

**26.** I would conclude therefore, that the charge which Ms. Pauline Gibson entered into with First Active was a fraudulent charge and that she obtained a sum of €190,000 on foot of this fraudulent misrepresentation and deception. In the circumstances I would conclude that the charge is *void ab initio*.

**27.** Section 30 of the Registration of Title Act, 1964 provides that:

*“Subject to the provisions of this Act with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner.”*

**28.** It is also clear that under s. 31 of the Registration of Titles Act, 1964, this court has jurisdiction, based on grounds of actual fraud, to make an order directing the register to be rectified in such manner and on such terms as it thinks just.

29. In the circumstances, I am satisfied that this is an appropriate case in which to direct the register be rectified to set aside the charge entered into by Ms. Gibson in favour of First Active and its assignees.

30. I will therefore

- (a) grant a declaration that the charge entered into by Ms. Pauline Gibson and First Active wherein she granted a charge to First Active over the property of Mr. and Mrs. Gibson was procured by fraud and is *void ab initio*;
- (b) direct the Property Registration Authority to carry out such acts as are required to rectify the register to set aside this charge.
- (c) grant a declaration that the vesting by Dublin City Council of the fee simple in the said property in the names of the plaintiff and her husband should be set aside on the grounds that it was procured by the forgeries and fraud of the second defendant Ms. Pauline Gibson.
- (d) direct the Property Registration Authority to carry out such acts as are required to rectify the register in relation to this matter also.

**Section 90 (6) of the Housing Act, 1966**

31. Counsel for the plaintiff also submitted that the charge is void pursuant to 90 (12) of the Housing Act, 1996 as substituted by s. 26 of the Housing (Miscellaneous Provisions) Act, 1992.

32. Section 90 (12) of the Housing Act, 1966 as amended provides that:

*“The following additional provisions shall apply in respect of a dwelling to which a special condition described in paragraph (c) of section 89 of this Act applies:*

...

*(c) any attempted or purported mortgaging, charging or alienation in contravention of the special condition shall be null and void against all persons; provided, however,*



*that in any case where the consent of the housing authority is given after the attempted or purported mortgaging, charging or alienation, such consent shall, if the authority so direct, so operate as to validate with retrospective effect such attempted or purported mortgaging, charging or alienation.”*

**33.** In substance, the Housing Act, 1966, as amended, provides that if a person intends to create a mortgage or charge over a property which is owned by a housing authority, the housing authority (in this case Dublin City Council) must give its consent to the creation of such a charge and, if such consent is not obtained, then the charge shall be “null and void” against all persons.

**34.** Mr. Thomas (the plaintiff’s conveyancing expert), gave evidence that there was no operative consent by Dublin City Council in this case on the basis of the fraud committed by Ms. Pauline Gibson in forging the signatures of the plaintiff and her husband (or procuring the forging of those signatures). Mr. Thomas’s expert opinion was that Dublin City Council did not give a full and informed consent to the vesting of the property in fee simple in the plaintiff and her husband and, as a result, that vesting was void.

**35.** Mr. Thomas’s expert opinion also was that, in circumstances where Dublin City Council did not give a proper consent to the creation of a mortgage or charge over the property, the mortgage or charge was null and void. I accept his evidence.

**36.** The plaintiff submits that, in the present case, because the consent of Dublin City Council to the vesting of the fee simple in the property in the plaintiff and her husband was obtained by means of the forgeries and fraud of Ms. Pauline Gibson, such consent is vitiated and must be set aside. I agree with that submission. It is clear that the consent of Dublin City Council to the vesting of the fee simple of the property in the names of the plaintiff and her late husband was only obtained by virtue of the forged signatures on the application forms by

Ms. Gibson and/or by a person procured by her. In the circumstances the consent of Dublin City Council is void *ab initio* and should be set aside.

37. Counsel for Promontoria submitted that, although the consent of Dublin City Council was obtained by means of forged signatures, Dublin City Council had no objection to vesting the fee simple in the plaintiff and her husband, and that if the plaintiff now sought the vesting of the property in fee simple in her name, there would be no objection from Dublin City Council; in those circumstances it was submitted that the Court should not put too much weight on this matter because all parties would now be seeking to vest the fee simple in the plaintiff. However I do not accept that submission. The consent of Dublin City Council to the vesting of the property in fee simple in the plaintiff and her husband was procured by the fraud of the second defendant, Ms. Pauline Gibson. In those circumstances it is void against all parties and should be set aside. It will then be up to the plaintiff and her legal advisors to take such steps as she may be advised to obtain the relevant consents, if she so wishes. This court could not turn a blind eye to the actions by Ms. Pauline Gibson and let the vesting of the fee simple by Dublin City Council remain in the name of the plaintiff in circumstances where it was procured by such a fraud.

38. In the circumstances I am of the view that the charge is null and *void ab initio* by virtue of s. 90 (12) of the Housing Act, as amended.

**Section 72 of the Registration of Title Act, 1964**

39. Section 72 (1) of the Registration of Title Act, 1964 provides that all registered land shall be subject to the burdens set out in that section which affect the land whether those burdens are, or are not, registered including

*“(j) the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where, upon enquiry made of such person, the rights are not disclosed.”*

40. Mr. Thomas, the plaintiff's conveyancing expert, gave evidence about the meaning and operation of s. 72 in conveying practice. His evidence was that the register was not ever designed to show all the information which related to a property but only designed to set out the information which is required to be registered under the legislation. His evidence was that there were some burdens which could not be registered or did not have to be registered and these are set out in s. 72 and s. 73. He stated in evidence that this obviously created difficulties for conveyancers because solicitors who are acting on behalf of purchasers always wanted to ensure that there were no s. 72 burdens affected the property before their clients purchased those properties. Thus, conveyancers make enquiries in the usual way as to whether any s. 72 burdens affect the land. One of these burdens is the right of persons in actual possession of the land set out in s. 72(j). His evidence was that the property is subject to these burdens, even if they are not registered as a burden.

41. However, although I heard submissions on this matter from the plaintiff and the fourth named defendant, I do not believe that it is necessary for me to deal with this matter in my judgment. The s. 72 argument made by the plaintiff is a subsidiary argument to her main submissions (i) that the charge is a fraudulent charge, as a matter of law, and is therefore *void ab initio*, and (ii) that it is also null and void by virtue of the provisions of s. 72 of the Housing Act, 1966 as amended.

42. Having given my decision on these matters, I do not believe that it is necessary for me to embark on an analysis of the scope and meaning of s. 72, its application to the present case and/or the evidence in relation thereto given in this matter.

#### **Whether the receiver was validly appointed**

43. Given that I have found that the charge which was created over the property was *void ab initio*, I am of the view the receiver was not lawfully appointed. His appointment is therefore invalid.

**The issue of damages against the first named defendant**

44. The plaintiff, in her submissions, seeks damages against the first named defendant. In her submissions she has sought:

- (a) compensatory damages and
- (b) aggregated damages.

45. The plaintiff has not sought exemplary or punitive damages against the first named defendant.

46. In *Conway v. Irish National Teachers Organisation* [1991] 2 IR 305 Finlay C.J. stated as follows:

*“In respect of damages for tort or for breach of a constitutional right, three headings of damage in Irish law are, in my view, potentially relevant to any particular case. They are:*

- (1) Ordinary compensatory damages being sums calculated to recompense a wronged plaintiff for physical injury, mental distress, anxiety, deprivation of convenience, or other harmful effects of a wrongful act and/or for monies lost or to be lost and/or expenses incurred or to be incurred by reason of the commission of the wrongful act.*
- (2) Aggravated damages, being compensatory damages increased by reason of*
  - (a) the manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or*
  - (b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or*

*(c) conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff, up to and including the trial of the action.*

*Such a list of the circumstances which may aggravate compensatory damages until they can properly be classified as aggravated damages is not intended to be in any way finite or complete. Furthermore, the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must, in many instances, be in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the Defendant.*

*(3) Punitive or exemplary damages.”*

47. I also note that, as stated in *Damages* (2<sup>nd</sup> ed.) (Dorgan and McKenna) at para. 6.09: “*In Murray v. Budds, Denham C.J. of the Supreme Court considered whether the plaintiff in a professional negligence action against his former solicitor would be entitled to recover damages for ‘worry and stress’ regarding his legal representation during his criminal trial. The court cited Addis v. Gramophone Company Ltd as authority for the position that, in general, a court should not permit damages for worry or upset as a consequence of a breach of contract but noted that some exceptions had developed depending on the factual scenario, including instances of malice, fraud, defamation or violence or instances where relaxation or peace of mind were specifically provided for in the contract. The court concluded that ‘worry and stress’ arising out of claims including the fact that the plaintiff did not know whose counsel would be the day before his trial, did not fall into one of the exceptions recognised in Addis”.*

### **Compensatory Damages**

48. However, in my view, the plaintiff in this case did not just suffer worry and stress. The plaintiff is an elderly woman who had moved into her family home with her husband and family in 1963. She lived there happily with her husband and raised her family over the ensuing decades. Her husband passed away in 2017. It was only after his death that the plaintiff discovered that the property was not registered in her name or that of her husband but was in fact registered in her daughter's name. The fact of this fraud understandably came as a great shock to the plaintiff. Whilst the first named defendant is not accused of any fraud, there is no doubt that his gross negligence contributed to this manifest interference with the plaintiff's right to the proper enjoyment of her home. Through the gross negligence of the first defendant, the first defendant caused or permitted a situation to arise where the plaintiff's property rights were significantly affected and which required the plaintiff to bring legal proceedings to remedy these matters.

49. Indeed the plaintiff suffered the extraordinary experience of receiving a letter from the receiver's property management agent demanding that she vacate the property within a period of weeks (or provide some proof of a tenancy or other agreement under which she was in possession of the property). One can only imagine the fear which this would have instilled in an elderly woman who had just lost her husband. This was an unlawful violation of her property rights caused by the first defendant's gross negligence.

50. In the circumstances I am of the view that an appropriate figure to compensate the plaintiff for this interference in her property rights over the last number of years is €5000.

#### **Aggravated damages**

51. I turn now to consider the issue of aggravated damages. I have set out above the criteria set out by the Supreme Court in considering the issue of aggravated damages. The issues which arise in the present case are:

- (a) the manner in which the wrong was committed by the first named defendant involving elements such as oppressiveness, arrogance or outrage;
- (b) the conduct of the wrongdoer after the commission of the wrong such as the refusal to apologise or to ameliorate the wrong done or the making of threats to repeat the wrong and/or
- (c) the conduct of the wrongdoer and his representatives in the defence of the claim of the wronged plaintiff up to and including the trial of the action.

**52.** Finlay C.J. also stated that the circumstances which might aggravate compensatory damages set out in his judgment were not intended to be in any way complete and that the circumstances which might form an aggravating feature in the measurement of compensatory damages must, in many instances, be a recognition of the added hurt or insult to a plaintiff who has been wronged and, in part also, a recognition of the cavalier or outrageous conduct of the defendant.

**53.** I am of the view that this is definitely a case in which the court should made an award of aggravated damages. In this regard I wish to draw attention to certain parts of my judgment of the 14<sup>th</sup> December, 2022 which set out the conduct of the first defendant in this matter.

**54.** Among the matters set out in my judgment which led me to a conclusion that the first defendant had behaved in a grossly negligent manner towards the plaintiff and her husband were:

- (1) that the plaintiff said she had never received any written advice or any written communication from Mr. O’Gorman in connection with this transaction whatsoever, an assertion which Mr. O’Gorman accepted;
- (2) that although Mr. O’Gorman was permitted to act on both sides of the transaction at the time, it was on condition that parties should be informed in

writing that they had a right to obtain independent legal advice; Mr. O’Gorman never told the plaintiff or her husband of this;

- (3) throughout the trial Mr. O’Gorman sought to rely on the fact that the plaintiff had obtained independent financial advice from Mr. Leahy - in circumstances where he knew or ought to have known that Mr. Leahy was in fact an agent of First Active and therefore was not in a position to provide independent financial advice to the plaintiff and her husband;
- (4) that Mr. O’Gorman knew, (because he had control over the funds after the First Active monies were lodged to his client account), that he was using those funds to pay out the entirety of the funds to Ms. Pauline Gibson and was not paying any amount of the funds over to his other clients, Mr. and Mrs. Gibson;
- (5) that Mr. O’Gorman’s defence – which was put to the plaintiff in cross examination – was that this matter was a “collective family enterprise” in which the plaintiff would share the proceeds of the sale of the loan; however it is clear from Mrs. Gibson’s evidence that neither she nor her husband ever gave such instruction to Mr. O’Gorman;
- (6) that Mr. O’Gorman having lost the entire file in relation to the transaction, initially declined to furnish the file to the plaintiff’s new solicitors because he said he had been instructed by the second defendant Ms. Pauline Gibson to deal with the transaction (and that he could not give a copy of the file to the plaintiff’s new solicitors without her consent) - in circumstances where Mr. O’Gorman knew that he had in fact also acted for the plaintiff in this matter and therefore should have immediately acceded to her request to furnish her with this file;



(7) that Mr. O’Gorman failed to make any, or any meaningful, efforts to reconstitute the file once he realised it had been lost; he could have written to Ulster Bank, to the Property Registration Authority, to Dublin City Council and other parties asking them to furnish him with whatever documents they had in relation to this matter. However he did not do so.

55. Moreover there are also other matters which came to light in the course of the hearing and which are set out in detail in my judgment of 14<sup>th</sup> December, 2022 which, in my view, provide a basis on which it is reasonable to conclude that an award of aggravated damages should be made against Mr. O’Gorman.

56. First, Mr. O’Gorman said in evidence that he removed and destroyed the first page of the purported deed of transfer from the plaintiff and her husband to Ms. Pauline Gibson - which he said was dated 2003 - and created a new document to date the deed of transfer 22<sup>nd</sup> May, 2009 – six years later.

57. Secondly, Mr. O’Gorman admitted under oath that he falsified the purported date of transfer in 2003 and redated it 22<sup>nd</sup> May, 2009 and that he did so because he had not stamped the deed within the required number of days of the execution of the deed as he was required to do. As a result Mr. O’Gorman knew that he would have had to pay stamp duty plus interest and penalties for six years – interest and penalties for which he himself would be personally liable not the client. Thus, Mr. O’Gorman admitted in his evidence that he falsified the date of the deed of transfer in order to present a false date to the Revenue Commissioners for the purposes of not paying tax under the stamp duty legislation.

58. Thirdly, Mr. O’Gorman signed his name on a document which states “Re-executed by the said John Gibson and Marie Gibson in the presence of Kevin O’Gorman” when it was clear from the evidence that these signatures were not re-executed in his presence at all.

**59.** Fourthly, Mr. O’Gorman stated in interrogatories, (which were subsequently confirmed to be correct on affidavit), that Mr. and Mrs. Gibson had signed their signatures in his presence when he knew or ought to have known that that was simply not true and which was established in the evidence not to be true.

**60.** Fifthly, it is also clear from the evidence that Mr. O’Gorman made no attempt whatsoever to contact the plaintiff or her husband in any way around this time (i.e. from 2009 to 2014) to advise them in any way about the transaction. Again his actions were clearly negligent towards the plaintiff in or around 2009 onwards as well as in 2003.

**61.** Sixthly, Mr. O’Gorman also set about changing the date of the first page of the deed of transfer from 22<sup>nd</sup> May, 2009 to 16<sup>th</sup> March, 2010 so that the deed of transfer was now dated the day after the DCC transfer order (see para. 138 of my earlier judgement).

**62.** Counsel for the first defendant submitted that Mr. O’Gorman was entitled to defend these proceedings until the point at which his own conveyancing expert gave evidence that Mr. O’Gorman was negligent in the conduct of this case towards the plaintiff. However this submission must be understood in the light of what happened at the trial.

**63.** The first defendant retained an expert, Mr. Lycett, who provided an expert report for the assistance of the court. This report was only furnished on the day before the hearing commenced. It is a report which, in essence, took Mr. Thomas’ report (the plaintiff’s expert) and made comments on it in red. It is hedged about with qualifications which indicate, that Mr. Lycett’s opinion depended on whether certain facts were found to be true or not true by the court. That was an understandable position for the defendant’s expert to take.

**64.** However, Mr. Lycett was in court to hear the evidence of the plaintiff, the plaintiff’s conveyancing expert and, more importantly, the evidence of the first named defendant, Mr. O’Gorman. I think it is fair to say that the true nature of Mr. O’Gorman’s actions – set out above – only became clear in the course of his evidence – both in direct examination, in cross

examination, and indeed in response from questions from the court. Mr. Lycett then took the stand after this evidence was given. Almost immediately, in the course of his direct examination, in response to questions put to him by Mr. O’Gorman’s counsel, he gave his opinion under oath that the first defendant’s actions towards the plaintiff and her husband had been negligent. Clearly, the first defendant’s counsel was surprised by this turn of events.

**65.** I am of the view that all of the matters set out above (in particular, the fact that Mr. O’Gorman falsified dates on various documents for the purposes of misrepresenting to the Revenue Commissioners the true date of the transfer to avoid stamp duty interest and penalties, the fact that Mr. O’Gorman apparently destroyed the two pages of the purported original deed of transfer from 2003, and the fact that Mr. O’Gorman signed certain documents confirming that the plaintiff and her husband had signed these documents in his presence – when he knew that all these were untrue) were all matters which were known to Mr. O’ Gorman but which clearly had not been brought to the attention of Mr. O’Gorman’s expert by Mr. O’Gorman. If Mr. O’Gorman had brought these matters to the attention of his conveyancing expert before his expert provided his report for the Court, it is, in my view, inconceivable that Mr. Lycett would have furnished an opinion seeking to defend the actions of Mr. O’Gorman. In other words, it is an inescapable inference Mr. O’Gorman gave incomplete and misleading instructions to Mr. Lycett and Mr. Lycett gave an opinion based on these incomplete instructions.

**66.** In summary therefore ,I am of the view that Mr. O’Gorman was clearly aware at all times of all his own actions; he knew, as he accepted in evidence, that he had failed to furnish any written advice to the plaintiff; he knew that the plaintiff had never obtained any funds from the transaction; he knew that he had destroyed the purported originals of transfers in 2003; he knew that he had falsely re-dated the transfer to 2009; he knew that he had falsely re-dated the conveyance to 2009 to ensure he did not have to pay interest and penalties on the

stamp duty on the deed; he knew that he had not witnessed the plaintiff's signatures on various documents; and he knew that he had sworn an affidavit to confirm that interrogatories which stated that he had witnessed the signatures were true. Mr. O'Gorman had actual knowledge of all of his own actions throughout this transaction from start to finish. He knew therefore, that he had conducted this transaction in a manner which was grossly negligent towards the plaintiff and her late husband.

67. Yet, despite knowing all these things, he still sought to defend this case tooth and nail until the third day of the trial when it became clear to his own expert that Mr. O'Gorman's actions in this matter were indefensible.

68. Shortly thereafter the first defendant accepted liability for his negligence. However instead of conceding liability entirely and moving to an assessment of damages, he continued to argue the point that the plaintiff had obtained independent financial advice from Mr. Leahy who was then called to give evidence. It appeared from the evidence of Mr. Leahy, as set out in my earlier judgment that Mr. Leahy's independent financial advice was not independent as he was an agent of First Active. This was known to Mr. O'Gorman.

69. All of the above matters lead inexorably to the conclusion that an award of aggravated damages in favour of the plaintiff as against Mr. O'Gorman is justified in this case.

70. Having regard to the fact that Mr. O'Gorman, as his counsel indicated to the court, is not a man of means, I would assess the amount of aggravated damages in the sum of €30,000.

#### **Damages against the second defendant**

71. As is stated by Finlay C.J. in *Conway*, punitive or exemplary damages are intended to mark the court's particular disapproval of a defendant's conduct and its decision that it should publicly be seen to have punished the defendant for such conduct by awarding such damages, quite apart from its obligation, to compensate the plaintiff for the damage which he or she have suffered.

72. As the second defendant has engaged in an utterly unscrupulous fraud on her parents, on Dublin City Council, and on the First Active, in order to effect a scheme to defraud her parents out of their family home. I would make an award of exemplary and/or punitive damages against her in the sum of €75,000.

**The evidence about current amount outstanding on the loan**

73. Mr. Dean O’Connell, a manager with BCMGlobal Ltd, gave evidence on behalf of Promontoria. BCMGlobal Ltd is the company appointed by Promontoria to manage its portfolio of loans. Mr. O’Connell was familiar with the loan taken out by Ms. Pauline Gibson and the performance of that loan.

74. The original loan offer was made in 2003 to Ms. Pauline Gibson and a sum of €190,000 was advanced by First Active to Ms. Gibson secured on the plaintiff’s property. It was regarded as a residential investment property and the loan was interest only for a period of five years.

75. Ms. Pauline Gibson defaulted on the payments after a period of time and when the debt was transferred from Ulster Bank, a sum of €256,000 was due and owing at that time.

76. Mr. O’Connell gave evidence that the amount due and owing on the loan was €348,504.65 as at 25<sup>th</sup> April, 2023. In addition interest is accruing at a rate of €41 per day at an interest rate of 4.3%.

77. Given that the charge has been set aside, it is not necessary for me to consider making an award of damages against Mr. O’Gorman in favour of the Plaintiff of an amount sufficient to enable the Plaintiff to pay off the charge of her property.

78. Counsel for Promontoria has indicated that it is likely that Promontoria will pursue Mr. O’Gorman on foot of his solicitor’s undertaking to compensate it for its loss. That however is a matter for another day.

**Conclusion**

79. I would therefore conclude as follows:

1. the purported transfer from the plaintiff and her husband to Ms. Pauline Gibson was a fraudulent transfer and is void ab initio;
  2. the Property Registration Authority will be directed to take such steps as are necessary to correct the register in this regard;
  3. the charge created over the said property by Ms. Pauline Gibson in favour of the Bank and registered over the said property is a fraudulent charge and is void ab initio;
  4. the Property Registration Authority will be directed to take such steps as are necessary to set aside this entry on the register;
  5. the consent of Dublin City Council to the vesting of the fee simple in the property in the plaintiff and her husband was procured by fraud and forgery and will be set aside as being void ab initio;
  6. the Property Registration Authority will be directed to take such steps as may be necessary to set aside such entry onto the register;
  7. there will be an order for judgment
    - i. In the sum of €5000 as compensatory damages to the plaintiff against the first defendant;
    - ii. In the sum of €30,000 for aggravated damages to the plaintiff against the first defendant;
  8. there will be an order for judgment against the second defendant in favour of the plaintiff in the sum of €75,000 as exemplary damages.
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