APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/12

Costello J.
Faherty J.
Allen J.

Neutral Citation Number [2022] IECA 167

BETWEEN

JEAN CONNORS

PLAINTIFF

AND

DANIEL KINSELLA

AND

DAVID TARRANT AND ANDREW TARRANT

PRACTISING UNDER THE STYLE AND TITLE OF

TARRANT AND TARRANT SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 25th day of July, 2022

Introduction

1. This is an appeal by the plaintiff against so much of the order of the High Court (Sanfey J.) made on 15th December, 2021 as ordered that the plaintiff should pay the first

defendant's costs of a failed application for an interlocutory injunction and directed an inquiry as to the damages suffered by the first defendant by reason of the making of an interim injunction which was later discharged.

2. The elements of the order against which the plaintiff has appealed were the subject of a written judgment delivered on 15th December, 2021 [2021] IEHC 791. Previously, on 8th November, 2021 [2021] IEHC 696 Sanfey J. had delivered a written judgment on the substantive application, against which there is no appeal. In the judgment under appeal the judge emphasised that it was to be read in conjunction with his judgment on the substantive application.

Prologue

3. This is the latest battle in a long running and bitter family dispute. The plaintiff is a solicitor who acts for herself. The first defendant is one of her brothers. The second and third defendants were not party to application for interlocutory relief. The dispute relates to the *inter vivos* transfer by the plaintiff's and the first defendant's mother to the first defendant of her home, which was her only asset, and the role played by the second and third defendants, a firm of solicitors, in the transaction.

4. The litigation has been in and out of the High Court for upwards seven years but the action has not been brought to the point that it can be set down for trial and certified ready for hearing. When the plaintiff's motion for interlocutory relief came before the High Court on 29th October, 2021, Sanfey J. was told that the plaintiff had intimated to the first defendant that she might wish to apply for non-party discovery by a firm of solicitors who the first defendant maintained had given independent legal advice in relation to the property transfer the subject of the proceedings.

5. The involvement of that firm of solicitors – Meagher Solicitors – was evident on the face of the impugned transfer and their alleged role in the transaction was pleaded in the first defendant's defence which was delivered as long ago as 11th July, 2016. As far as the judgment of the High Court shows, there was no indication that anything had been done between then and 29th October, 2021 to obtain the file and the answer to the question put by the court rather suggests that the plaintiff had not yet finally made up her mind whether she would apply for non-party discovery. In fact, the correspondence shows that the plaintiff had been in correspondence with Meagher Solicitors from 17th October, 2014; had tried, unsuccessfully, to force the disclosure by Meagher Solicitors of their file note by way of a complaint to the Law Society in 2015; and eventually, on 28th May, 2021, had secured the agreement of Meagher Solicitors to make voluntary non-party discovery.

6. If the plaintiff had – as she had – the agreement of the solicitors who had advised Mrs. Kinsella to make voluntary non-party discovery, it is difficult to understand the answer which was given to Sanfey J. when he asked whether the action was ready for hearing.

The action

7. Frances Kinsella, late of 10 Casement Park, Bray, County Wicklow, died on 2nd January, 2014, intestate. Mrs. Kinsella had been predeceased by her husband, Mr. Daniel Kinsella, and was survived by six children: Helen – the plaintiff, Jean, Daniel – the first defendant, Sandra, Alan and David.

8. On 16th September, 2014 the plaintiff took out a grant of letters of administration intestate to the estate of her late mother and by plenary summons issued on 23rd December, 2014 commenced these proceedings claiming, as administrator of the estate of Mrs. Kinsella, an order setting aside a voluntary conveyance of the house at Casement Park which had been

made by Mrs. Kinsella to the first defendant on 7th August, 2013 and which was said to have been procured by the undue influence and/or duress of the first defendant and the negligence of the second defendant who was said to have acted for both parties to the conveyance.

9. The house at Casement Park was the family home of Mr. and Mrs. Kinsella and their six children. It was originally occupied by Mr. and Mrs. Kinsella as tenants of Bray Town Council. In 1995 Mr. and Mrs. Kinsella had the opportunity to purchase the house under a tenant purchase scheme at a price significantly below the open market value. The first defendant put up the purchase money and the house was transferred by the local authority to Mr. and Mrs. Kinsella.

10. On 26th March, 1996 the first defendant drew up a form of *"Agreement for 10 Casement Park"* which was intended to set out the basis on which the purchase was to proceed. This was in form an agreement between the first defendant and his parents but was signed by three of the first defendant's siblings as well as by the first defendant and his parents. The agreement suggested, variously, that the house was being purchased by the first defendant on behalf of his parents, and for himself, but in his parents' names, who had – or were to have – a lifetime tenancy.

11. Following the death of Mr. Daniel Kinsella on 19th August, 2012 the property was registered in the sole name of Mrs. Kinsella and on 7th August, 2013 Mrs. Kinsella executed a transfer of the property to the first defendant, reserving a sole and exclusive right of residence for her lifetime. The execution of the transfer by Mrs. Kinsella was witnessed by Ms. Anne Marie Glynn, a solicitor in Meagher Solicitors. The second and third defendants acted for the first defendant. The plaintiff's case is that the second and third defendants acted for both transferor and transferee. This is disputed by the first defendant whose case is that Mrs. Kinsella was independently advised by Ms. Glynn.

12. While it is not at all relevant to the issue now before the court, I find the case pleaded against the second and third defendants enormously difficult to reconcile with a letter of 25th March, 2015 from Meagher Solicitors to the plaintiff acknowledging that they were asked by Tarrant & Tarrant to provide independent legal advice to Mrs. Kinsella, and that they did so.

13. Mrs. Kinsella, as I have said, died on 2nd January, 2014 and the action to set aside the transfer was commenced on 23rd December, 2014.

14. For some reason which has not been explained, the statement of claim was not delivered until 8th February, 2016. The first defendant's defence was delivered on 11th July, 2016 and the second and third defendants' defence on 4th August, 2016.

15. In his defence, the first defendant pleaded a preliminary objection that the statement of claim did not disclose a cause of action in duress or undue influence and asserted that the proceedings were frivolous and vexatious. A motion on behalf of the first defendant for an order dismissing the action as frivolous and vexatious and an abuse of process was refused by the High Court (Simons J.) for the reasons set out in a judgment delivered on 21st June, 2019 [2019] IEHC 451. In his judgment, Simons J. had something to say about the manner in which the case against the first defendant had been pleaded in the statement of claim, which was later amended quite extensively. The amended statement of claim is dated 17th July, 2019 although the correspondence suggests that leave to amend was not granted until 18th November, 2019. By the time the interlocutory motion came before Sanfey J. on 29th October, 2021 the defence had not been amended but it is clear from the judgment of Simons J. that the battle lines in the substantive action were by then well drawn, not least as to the role in the transfer of Meagher Solicitors.

The application for interlocutory relief

16. On 26th September, 2019 the plaintiff observed building work at 10 Casement Park which, in an affidavit sworn on 4th October, 2019 she described as *"construction/demolition work"* which *"include the removing 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"*. On the following day, 27th September, 2019, the plaintiff wrote to the first defendant demanding undertakings, by noon on that day, that he would immediately cease and desist from any and all demolition, construction and/or building and/or development works on the property; that he would within seven days restore the property to its condition prior to the commencement of the works; and that he would immediately remove all machines, equipment, tools and materials from the property. The plaintiff had that letter delivered by hand to the first defendant at 9:30 a.m. on 27th September, 2019.

17. On 30th September, 2019 she wrote again to the first defendant demanding, by noon on the same day, details of the precise nature of any and all demolition, construction and/or building and/or development work; the basis on which the work was being carried out; a copy of the planning permission; and expert reports from an engineer and/or architect confirming that the works were necessary and were being carried out in compliance with planning permission and the building regulations. That letter was sent to the first defendant by registered post at 17:19 on 30th September, 2019.

18. On 4th October, 2019 the plaintiff obtained an interim order from the High Court (O'Hanlon J.) in the terms of the undertakings sought by her letter of 27th September, 2019. At least with the benefit of hindsight, the orders requiring the first defendant to immediately cease and desist all work on the site and to remove all machinery and equipment was not altogether easy to reconcile with the order requiring the first defendant to restore the site to the condition in which it had been before the work started. Besides the interim orders, the

court gave leave to the plaintiff to issue a motion for interlocutory orders, returnable for 18th November, 2019. That was quite a long return date in the circumstances.

19. The affidavit of the plaintiff sworn on 4th October, 2019, on which the interim and later the interlocutory motions were grounded, ran to 56 paragraphs. The first 33 paragraphs dealt with the substance of the plaintiff's case as to the validity of the transfer of the property. Twelve paragraphs dealt with the writing and sending of the letters of 27th and 30th September, 2019. The works were described in two paragraphs. Later, the plaintiff deposed that the first defendant had obtained planning permission for a shed in the rear garden of the house and asserted, without explanation or elaboration, that the works being carried out were in excess of what was required to build a shed and that the failure and refusal of the first defendant to provide expert reports confirming that the works were necessary and were being carried out within the boundaries of the property meant that the balance of convenience favoured the plaintiff and that the status quo should remain pending the determination of the proceedings.

20. The plaintiff, at paras. 53 and 54 of her affidavit, averred:-

> *"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 (sic.) to pay damages to the first named defendant, that such damages that may be awarded will be paid.*
>
> *54. I say that there are no assets of the estate. I beg to refer to a true copy of the Letters of Administration marked with the letters and number JC 12 upon which I have signed my name prior to the swearing hereof."*

21. As to the adequacy of damages, all that the plaintiff said was that:-

"I say and believe that this is a matter whereby damages will be difficult to access (sic.) for both parties and in any event may not be an adequate remedy in the circumstances."

22. The first defendant is and for many years has been resident in Nantucket, Massachusetts, where he carries on a construction business. By reference to this, and her averment that the first defendant is a U.S. citizen and that his wife is a New Zealand citizen, the plaintiff suggested that the first defendant was *"a flight risk"*.

23. If the return date of 18th November, 2019 for the interlocutory motion appeared quite long, it was not until 11th December, 2019 that that the first defendant's replying affidavit was filed. It was short and focussed. As the trial judge observed, the first defendant did not engage with the merits of the action but confined himself to the motion. He averred that there was no risk that the construction works would devalue the property. Rather, he said, the works would increase the value of the property. For the avoidance of doubt, however, he added that if the works did somehow devalue the property he could compensate the plaintiff, which he undertook to do.

24. The first defendant described the works as the construction of a storage shed/garage to the side/rear garden of the house, together with associated works which included the demolition of existing outhouse buildings and he exhibited the planning permission and the planning file which, he suggested, recorded that the new garage would replace depilated old buildings and would enhance the property.

25. As I will come to, the plaintiff, much later, had something more to say about the work on the property but she never contested his averment that her brother could and would pay compensation in the event that the property was somehow devalued.

26. The order of 4th October, 2019 had recorded the plaintiff's undertaking as to damages. An issue was raised by the first defendant's solicitor in correspondence with the plaintiff as to

whether the undertaking had been given by her in her personal or representative capacity, and if in her representative capacity, how any damages could be paid out of an estate shown on the grant of letters of administration as having a nil value. This was adverted to by the first defendant in his replying affidavit and developed in an affidavit of his solicitor, who exhibited a letter from the plaintiff of 25th November, 2019 in which it was stated that the undertaking had been given by her in her capacity as administrator and that O'Hanlon J. had been told that the estate had a nil value. The first defendant's solicitor expressed surprise at the suggestion that the court would have accepted a worthless undertaking and sought an order for a transcript of the DAR for 4th October, 2019. That order was made by O'Hanlon J. on 19th December, 2019 but there was no evidence as to what the transcript showed. On the hearing of the appeal, the court was told that the DAR for 4th October, 2019 could not be located.

27. In much the same way as the parties appear to have allowed themselves to be diverted from progressing the action first by the motion to dismiss and then by the building work, the progress of the motion for the interlocutory injunctions appears to have been diverted by a motion by the plaintiff for the attachment and committal of the first defendant for alleged breach of the interim orders, and then a motion by the plaintiff to cross examine the first defendant on his affidavits filed on the interlocutory and attachment motions. It is not useful to dwell on the detail.

28. On 18th March, 2021 the plaintiff swore a supplemental affidavit in support of the injunction motion. It was another long affidavit, running to 88 paragraphs. The plaintiff deposed that she had first seen the first defendant's replying affidavit – which had been filed on 11th December, 2019 – on 2nd March, 2021.

29. The plaintiff in her supplemental affidavit devoted eighteen paragraphs to the history of the motions and then 37 paragraphs to the merits of the substantive claim. From there the

plaintiff moved to the condition of the property before the work started; the issue as to whether the interim order had been complied with; alleged difficulties encountered in March, 2021 in obtaining the first defendant's permission for an engineer to inspect the property and so forth: all of which accounts for 30 or so paragraphs.

30. Of the 88 paragraphs in the plaintiffs supplemental affidavit, three addressed the need for the interlocutory orders sought. At para. 84 the plaintiff deposed that the demolition and construction work carried on by the first defendant and his failure to reinstate the property had devalued it. At para. 86 the plaintiff referred to a drive-by valuation of the property on 4th February, 2021 which suggested that the market value of the property was €390,000 but that if planning permission were to be obtained for a house on that part of the garden on which the first defendant wanted to build a shed, the house might be worth €340,000 and a site to the side, with planning permission, might be worth €130,000. At para. 87 it was said that:-

> *"87. Your deponent states that in light of the works carried out by the defendant on the property damages, in particular as it relates to the interference with the neighbouring properties and boundaries and the potential to acquire planning permission to build a second property/dwelling house on the lands contained with the site of the property as opposed to a large shed/garage shall be difficult to quantify and assess and therefore not an adequate remedy in the circumstances."*

31. A further affidavit of the first defendant was filed which dealt in the main with the motion for attachment and committal but in which he reiterated his position that there was no risk of the works devaluing the property. The first defendant explained in some detail how he had endeavoured to comply as best he could with the order for the reinstatement of the dilapidated shed which had been demolished and pointed to the fact that the planning

permission for the works, which had been extended in November, 2019, would expire in May, 2022.

32. On 11th June, 2021 a second supplemental affidavit of the plaintiff was filed. The title to this affidavit suggested that it was filed in connection with both motions but in substance it addressed only the motion for attachment.

The High Court judgment on the substantive motion

33. The motion for interlocutory relief was eventually heard by Sanfey J. on 29th October, 2021 and judgment on the substantive application was delivered on 8th November, 2021 [2021] IEHC 696.

34. The High Court judge set out in some detail the background to the dispute and summarised the claim made in the action and the relief sought by the motion. Under the heading *"Other proceedings"*, the judge noted that one of the plaintiff's and first defendant's siblings was taking no part in the dispute but that the other three had *"a very decided view"*. Specifically, these three siblings had made a complaint to the Law Society on 28th July, 2016 of professional misconduct against the plaintiff arising out of her conduct of the administration of their mother's estate and the institution of these proceedings. A formal complaint made to the Solicitors' Disciplinary Tribunal on 29th January, 2019 was found by the tribunal on 2nd August, 2019 to disclose no *prima facie* case of misconduct and an appeal against that ruling was dismissed by the High Court on 6th March, 2020 [2020] IEHC 238.

35. Having set out the submissions of the parties and the restatement of the principles to be applied in determining an application for an interlocutory injunction in *Merck Sharpe & Dohme v. Clonmel Healthcare* [2020] 2 I.R. 1, Sanfey J. first considered whether the plaintiff had established a fair issue to be tried.

36. The case, the judge observed, was somewhat unusual in that the reliefs sought by the interlocutory motion did not equate with the reliefs sought in the action. Contrary to a submission made on behalf of the first defendant, the judge found that once the proceedings established a fair issue to be tried – whether or not the reliefs claimed by the proceedings were co-extensive with the reliefs claimed by the motion – the court could examine the conduct complained of in the application for interlocutory relief to see whether it gave rise to a situation in which the rights claimed in the proceedings were being infringed or impeded.

37. The High Court judge found, consequent on the earlier refusal to strike out the action as frivolous and vexatious, that the plaintiff had established a fair issue to be tried but, having evaluated all of the affidavit and documentary evidence, that she had not made out a strong case likely to succeed at trial that the transfer of the property had been procured by duress or undue influence.

38. The judge then turned to the balance of convenience. He first considered, and rejected, an argument offered on behalf of the plaintiff – by reference to the decision in *Allied Irish Banks plc v. Diamond* [2012] 3 I.R. 549 – that the works would infringe her property rights. The case, he said, was not analogous with *Diamond*. Whether the plaintiff had any rights in relation to the property depended entirely on her being successful in the action. As matters stood, it was the first defendant's established property rights which were being impugned by the action so that the principle in *Diamond* was not engaged. Moreover, if the plaintiff were to succeed in the action, the administration of the estate would most likely require that the property would be sold. If, in that event, the property were to be found to have been devalued by the works, an award of damages would compensate the estate for any such devaluation and would form part of the distribution.

39. The judge observed that the unsatisfactory state of the property was due mainly to the fact that the first defendant had been unable to complete the development and make it safe in

accordance with the planning permission. He noted that there was no evidence that the completed development would devalue the property.

40. As to the undertaking as to damages, the judge noted – as had been asserted by the plaintiff in correspondence and apparently accepted by the first defendant – that the undertaking had been given by the plaintiff in her representative capacity so that there was no reality to it.

41. The High Court judge found that the balance of convenience decisively favoured the first defendant. The first defendant owned the property and the development works were not likely to devalue the property. The judge accepted that an undertaking as to damages without substance was not an absolute bar to interlocutory injunctive relief but found that the plaintiff had not presented a compelling case to overlook the fact that her undertaking as to damages was of no value. He refused the motion and discharged the interim order.

42. As I have said, there was no appeal against the judgment and order of the High Court on the substantive application but it was necessary to examine it in some detail as it was the basis on which the High Court later determined the question of costs, which decision is the subject of this appeal.

The High Court judgment on costs

43. At the conclusion of his judgment on 8th November, 2021 the High Court judge afforded the parties fourteen days within which to file written submissions in relation to the issue of costs and any other matter arising from his judgment. Having received and considered those submissions, he gave a further written judgment on 15th December, 2021.

44. The submission on behalf of the plaintiff was that the costs of the interlocutory motion should be reserved or made costs in the cause. The first defendant urged that there

should be an award of costs in his favour, and that the plaintiff, personally, should be ordered to pay those costs. The first defendant also asked for an inquiry as to the damages sustained by him by reason of the making and continuation of the interim order.

45. There was no argument in the High Court – nor was there on the appeal – as to the applicable legal principles, which are to be found in O. 99 of the Rules of the Superior Courts and s.169 of the Legal Services Regulation Act, 2015.

46. Order 99, r. 2(3) requires the court to make an order as to the costs of an interlocutory application save where it is not possible to justly adjudicate upon liability for costs on the basis of the interlocutory application. Order 99, r. 3(1) requires the court, in considering whether to award costs in respect of *"any step"* in proceedings, to have regard to the matters set out in s. 169(1) of the Act of 2015.

47. It was submitted on behalf of the plaintiff in the High Court – as it was on the appeal – that the issue of duress and undue influence had had a key bearing on the outcome of the interlocutory motion and that this, as well as the attitude of the parties' siblings, was an issue which would be revisited at the trial. It was further submitted that in looking at the overall justice of the case the court should take into account the fact that the High Court had made interim orders, the costs of which had been reserved. It was argued that the interlocutory motion was something which it was reasonable for her to have raised, pursued or contested, and that having regard to the decision of Simons J. on the strike out application, it had not been reasonable for the first defendant to have contested the issue whether she had made out a fair issue to be tried.

48. It was submitted on behalf of the first defendant that the interlocutory application concerned issues which had no relevance to the issues in the action. The court, it was said, could and should deal with the costs in accordance with O. 99, r. 2(3). The outcome of the

interlocutory motion, it was said, turned on the adequacy of damages and the balance of convenience rather than on the merits of the underlying case.

49. As to whether an order for costs should be made against the plaintiff personally, the plaintiff relied on the decision of the Supreme Court in *In Bonis Morelli: Vella v. Morelli* [1968] I.R. 11 and those of the High Court in *Muckian v. Hoey* [2017] IEHC 47 and *Crowley v. Murphy* [2021] IEHC 645. Like *Vella v. Morelli*, it was said, this was a case which was proper for investigation and the litigation had been conducted *bona fide* so that a special order concerning costs could properly be made.

50. In support of his argument that the plaintiff personally should be ordered to pay the costs, the first defendant submitted that *Vella v. Morelli* does not apply to a case, such as this, where litigation is brought by an administrator who is also a beneficiary. Particular reliance was placed on the judgment of Herbert J. in *O'Connor v. Markey* [2007] 2 I.R. 194.

51. Having examined the cases, the High Court judge observed that it might be that what had been referred to as the rule in *Vella v. Morelli* existed in a broader context and was not limited to litigation concerning the validity and execution of a will, but identified the issue before him as whether what he called the extension of the principle should be applied to the costs of the interlocutory application in the present case, or that the costs should follow the event.

52. The High Court judge rejected the plaintiff's argument that the interlocutory application could not be considered separately from the proceedings as a whole. The interlocutory reliefs did not correspond with the reliefs sought in the action and bore no relationship to the core allegations of duress and undue influence. The carrying out of the works by the first defendant would likely enhance the value of the property and if the value was diminished, damages would clearly be an adequate remedy.

53. The judge suggested that the time which had been spent on the interlocutory motion would have been better spent getting the action on for trial. The interlocutory motion, he said, ought not to have been made, particularly where the undertaking as to damages was worthless. The judge noted that it might be, in principle, that an administrator who unsuccessfully pursued litigation might be indemnified from the estate but said that it was not possible or appropriate for the court to speculate as to the outcome of the action.

54. The judge concluded, at para. 33, adopting the *dictum* of Herbert J. in *O'Connor v. Markey*, that the proceedings were clearly a *"hostile lis inter partes"* and that if no order for costs was made against the plaintiff the first defendant would be left to bear the burden of the costs he incurred in defending the motion. He made an order for costs against the plaintiff – without qualification or restriction – but stayed execution on foot of that order pending the determination of the proceedings.

55. On the first defendant's application for an inquiry as to damages on foot of the plaintiff's undertaking, the judge made the order sought but adjourned the inquiry to the trial of the action. The judgment shows that he believed the adjournment of the inquiry to the trial of the action to have been by consent.

56. Finally, the judge refused an application by the plaintiff to stay the discharge of the interim orders pending a possible appeal.

The arguments on the appeal

57. The plaintiff's notice of appeal is admirably concise and focussed. It is suggested that the High Court judge both erred in fact and in law in:-

1. Adjudicating on the issue of costs in circumstances in which there were fundamental issues in dispute between the parties which would be revisited at trial;
2. Making an order for costs against the plaintiff, the administrator of the estate of the late Mrs. Kinsella, personally;
3. Deciding that the proceedings were hostile *lis inter partes* proceedings;
4. Failing to apply the law as set out in *In Bonis Morelli: Vella v. Morelli* and the expansion of the principles therein as identified in *Muckian v. Hoey* to the facts of the case;
5. In failing to engage with the plaintiff's submission that the enforcement of an undertaking as to damages must be considered prior to directing an inquiry as to damages.

58. The written and oral submissions of behalf of the appellant followed the notice of appeal and, save in respect of the inquiry as to damages, mirrored the arguments which had been made in the High Court.

59. As to whether the judge should have decided the issue of costs, two core arguments were made. First, it was submitted that the issue of duress and/or undue influence had a key bearing on the outcome of the interlocutory motion and would have to be revisited at trial. If the action were to succeed, it was said, *"the interlocutory application would have been approached very differently"*. Secondly, it was said, success in the action would lead to a very different view being taken of the undertaking as to damages.

60. As to whether the proceedings are a hostile *lis inter partes*, the plaintiff submitted that they are not. The action and the interlocutory motion, it is said, were brought by the plaintiff in her capacity as administrator. There are, it is said, reasonable grounds for the litigation and the proceedings are being conducted *bona fide*. The plaintiff points to the observations

by Meenan J. in his judgment on the appeal by the parties' siblings against the decision of the Solicitors' Disciplinary Tribunal that:- *"... the complaints made by the appellants against the respondent solicitor should be resolved by civil proceedings ..."* and that *"The appellants have failed to understand that the respondent solicitor, as an adult child of the late Frances Kinsella deceased, was entitled, pursuant to the Rules of the Superior Courts, to apply for a grant of letters of administration. It was open to the appellants to apply for a grant themselves, but they failed to do so. Further, it was also open to the appellants to seek to revoke the grant of the letters of administration, which they also failed to do."*

61. As to the inquiry as to damages, it is argued that the judge directed an inquiry *"without first setting out the basis for why the undertaking should be enforced."*

62. The first defendant argues that the judge was correct to decide the issue of costs; was correct to decide it the way he did; was correct to make the order against the plaintiff, personally; and was correct to order the inquiry as to damages. The respondent argues that in dealing with the issues on the appeal, this court should be very reluctant to interfere with the discretion of the trial judge. Reference was made in particular to *ACC Bank plc v. Hanrahan* [2014] IESC 40.

Whether the High Court ought to have made an award of costs

63. Counsel for the first defendant correctly draws attention to the judgment of the Supreme Court, delivered by Clarke J., as he then was, in *ACC Bank plc v. Hanrahan* where, at para 2.1, it was said that:-

> *"2.1 It was not disputed by counsel and the Court accepts that in general an appeal court should be slow to interfere with the way in which a trial court deals with a question of costs when there is either no challenge to the underlying substantive*

order made in the proceedings on the application in question or where any such challenge is unsuccessful. A trial judge is in a good position to take into account all relevant factors in determining where the justice of the case in respect of an award of costs lies. It follows that, in order for an appellate court to interfere with a trial judge's determination on costs in such circumstances, it is necessary that it be established either that the trial judge made an error in principle in the manner in which the question of costs was approached or that there was a clear and material error in the way in which the trial judge applied the appropriate principles in the adjudication of the question of costs in all the circumstances of the case. In other words, either the overall approach must have been wrong in some material respect or there must be a clear and material error in the way in which a proper approach was executed. It seems to me that the case law of this court on appeals against costs orders is consistent with that approach."

64. This is a case in which there is no appeal against the substantive order or the findings on which the motion was decided. If the fair issue to be tried which the plaintiff needed to show so as to engage the jurisdiction of the court to consider the making of the interlocutory orders sought was the substantive underlying issue in the action as to the validity of the transfer of the property to the first defendant, the immediate issue was whether the conduct complained of was something that might infringe the right claimed. There was no evidence that the carrying out by the first defendant of the works would devalue the property. Indeed, in the affidavit grounding the application there was not even an apprehension expressed that the property would be devalued. The suggestion, much later, that the value of the property might be enhanced if planning permission could be obtained for a house in the side garden was speculation. But more to the point, the hypothesis that the value of the property might be further enhanced by development otherwise than in the manner proposed did not mean that

the value would not be enhanced – still less diminished – by the development which the first defendant wished to complete.

65. In his first replying affidavit, the first defendant sought to forestall any apprehension that the works might devalue the property and he went on to undertake that in the event that they did, he would compensate the estate. As I have observed previously, the plaintiff never took issue with the first defendant's ability to pay damages, nor did she raise any issue as to the enforceability of the undertaking offered by her brother. As the judge observed, any diminution of the value of the property was something which – apart from the unchallenged value of the first defendant's covenant – could be dealt with in the course of the administration, in which, in the event of the action succeeding, the first defendant would be entitled to a one sixth share.

66. The issue in the action is whether the transfer of the property to the first defendant should be set aside by reason of duress or undue influence. The issue on the motion was whether the building work should be stopped and *pendente lite* the property restored. The judge allowed that the plaintiff might prove her case at trial. I accept, of course, that the parties' respective contentions in relation to the validity of the transfer – specifically as to the presence or absence of duress or undue influence – will be revisited at trial but the core issue on the motion as to whether the first defendant should or should not have been restrained from completing his development will not be.

67. There is no challenge to the conclusion of the judge that this was not a case in which the plaintiff could properly complain of an interference with her established property rights.

68. There is no challenge to the conclusion of the judge that if the action were to succeed, the proper administration of the estate will require the sale of the property and a distribution of the proceeds of sale. As the judge observed in his judgment under appeal, the case was one in which damages would clearly be an adequate remedy.

69. In my view, the judge was not only entitled to have come to the view, but was manifestly correct in the view which he came to, that the interlocutory motion was a discrete, stand-alone application, the merits of which would not be impacted upon whatsoever by the ultimate result of the action.

70. In practical terms, either of the alternative costs orders proposed by the plaintiff would have left the first defendant exposed to a risk of being mulcted with the costs of an interlocutory application which he had successfully seen off on the grounds set out in his initial replying affidavit. I cannot see that that would have been a just outcome.

71. The fact that the plaintiff on an *ex parte* motion persuaded the High Court to make interim orders which should never have been made is not relevant.

72. Neither are the observations of Meenan J. on the determination of the appeal to the High Court against the finding of the Solicitors' Disciplinary Tribunal relevant. The observation by Meenan J. that the complaint which had been made to the tribunal ought to be resolved by civil proceedings is not to be understood as a direction, or even an indication, that it should be. What Meenan J. said was said and is to be understood in the context of the jurisdiction of the High Court under the Solicitors Acts which was engaged in the proceedings before him.

73. Mercifully, I do not on this appeal have to grapple with the puzzle as to how the first defendant could have simultaneously complied with an order that he should on the one hand cease all work and on the other restore the property, or how, having immediately removed all tools and materials, he could have reinstated the property within seven days.

74. As to the argument that success in the action would lead to a very different view being taken of the undertaking as to damages, I fail to see how this might be so. I am bound to say that having regard to what was said at para. 53 of the plaintiff's grounding affidavit - that any damages that might be awarded would be paid – I was surprised by the plaintiff's

assertion, and the first defendant's acceptance, that the undertaking was given solely in the plaintiff's representative capacity. However, the High Court judge and this court were asked to deal with the application and the appeal on that basis. If the action were to succeed, the property would go to Mrs. Kinsella's estate and the undertaking as to damages would be redundant. If the action were to fail, I cannot see how this might precipitate a reappraisal of a worthless undertaking as to damages.

The "personal costs order"

75. Most of the argument was directed to the appeal against what was referred to as the personal costs order. As I will explain, and as I believe is evident from the judgment under appeal, the issue is more correctly formulated as being whether the judge ought to have made a special order restricting the costs order to the plaintiff's representative capacity.

76. As I have previously observed, there was no argument in the High Court or in this court as to the applicable legal principles. In short, the argument made on behalf of the plaintiff was that in the case of litigation in the course of the administration, for which there were reasonable grounds, and which was conducted *bona fide*, the administrator ought not to be made personally liable for the costs. This case was said to fall into that category. Counsel for the plaintiff emphasised the underlying cause of action and the fact that it had survived the motion to dismiss. This, it was said, established that there were reasonable grounds for the litigation and the first defendant's argument otherwise was said to have been unreasonable. Counsel for the first defendant did not contest the plaintiff's submission as to the principled approach which should be taken in relation to the underlying dispute as to the validity of the transfer but argued that the interlocutory motion was a discrete issue and that

the question of costs should be decided by reference to that discrete application, rather than by reference to the issues in the substantive action.

77. Specifically, the arguments in this case in the High Court and on the appeal did not address the issue as to whether an action by a representative plaintiff to gather in what may be thought – on reasonable grounds – to be the assets of an estate must be looked at – as between the parties to such litigation, as opposed to as between the administrator and the estate – as litigation arising in the course of the administration of the estate. In the case of a valuable estate capable of bearing the costs of an action which, although brought on reasonable grounds, might fail, the question may have no practical consequence. But in the case of an estate of negligible or no value the issue might be very much live. On the one hand, an administrator who was personally exposed to the costs of an action in the event it were to fail might be deterred from bringing meritorious proceedings. On the other hand, a rule or presumption that the representative plaintiff on behalf of a worthless estate should not be at risk of an order for costs in the event that the proceedings should fail would give rise to an inequality of arms which might compel the defendant to concede or settle a claim which otherwise he would have defended.

78. I have identified this much wider issue to emphasise that it was not argued and is not to be thought to have been addressed, still less, decided in this case.

79. The starting point of the plaintiff's argument is the well-known – but, I venture to suggest, less well understood – decision of the Supreme Court in *In Bonis Morelli: Vella v. Morelli* [1968] I.R. 11. That was an appeal by a plaintiff who had unsuccessfully challenged a will on the grounds that it had not been duly executed and had not been allowed his costs from the estate. The plaintiff's case was, and it was accepted by the Supreme Court, that there was a well-established practice formulated in the 19th century and stated in *Miller's Probate Practice (Maxwell: 1900 Ed.)* that:-

"Two questions are to be considered with reference to an application for costs of the unsuccessful party:- (1) Was there reasonable ground for litigation? (2) Was it conducted bona fide? Where both these questions can be answered in the affirmative it is the usual practice of the Court, without having regard to the amount or the ownership of the property, to order the general costs to be paid out of the personal estate."

80. From there, counsel moved to the judgment of Herbert J. in *O'Connor v. Markey* [2007] 2 I.R. 194. That was a case in which the plaintiff, by order of the High Court, brought before the court by special summons, an issue which had arisen between the defendant executors in the course of the administration of an estate. The issue was whether the ultimate liability for certain several debts lay with the estate, or with the first defendant. If the liability lay with the first defendant, the money would come out of his share of the estate. If it lay with the estate, the residuary gift to the second defendant would be reduced *pro tanto*. Herbert J. had previously determined that the first defendant was obliged to indemnify the estate in respect of the debts and the case came back for argument as to the costs.

81. At pp. 199 and 200 of the report, Herbert J. quoted extensively from the judgment of Kekewich J. in *In re Buckton; Buckton v. Buckton* [1907] 2 Ch. 406 in which the judge had identified three broad *"classes of cases"* which came before the court on summonses. The first comprised those cases in which trustees of a will or settlement asked for guidance to ascertain the interests of the beneficiaries, or some other question which had arisen in the course of the administration of the trust. The second, which were said to differ in form but not in substance from the first, comprised those in which the applicants were some of the beneficiaries and the trustees were respondents. And the third was a class which differed in substance and in form from the first, and in substance but not in form from the second, in which the issue brought before the court by a beneficiary by summons might otherwise have

been the subject of an action. In the first two classes of cases, the costs of all parties would generally be regarded as having been necessarily incurred for the benefit of the estate, but in the third, where truly the court was asked to determine a dispute between adverse litigants, the unsuccessful party would be ordered to pay the costs.

82. Herbert J. found that the issue which he had been asked to decide – which was ultimately whether the money should come from the gift to the first defendant or his sister but immediately whether the first defendant was liable to indemnify the estate – fell into the third class of cases and that *Vella v. Morelli*, on which the first defendant's argument was founded, was clearly distinguishable.

83. *O'Connor v. Markey* is said by the plaintiff to *"qualify"* the *"rule"* in *Vella v. Morelli*.

84. From *O'Connor v. Markey*, the plaintiff's argument moved to the decision of Keane J. in *Muckian v. Hoey* [2017] IEHC 47. That was a case in which a former administratrix, who had been removed by order of the court, sought an order that her costs should be paid out of her late husband's estate.

85. Keane J. started by examining – and forensically dismantling as far as Irish law is concerned – a passage from *Scanlon, Administration and Mortgage Suits in Ireland* (Dublin, 1963) which suggested that executors, administrators and trustees were entitled to their costs out of the estate as a matter of course unless a charge of misconduct was established.

86. The plaintiff relies in particular on what Keane J. said at paras. 12 and 13:-

> *"12. Nor do I accept that there is any absolute or inflexible modern rule whereby an administratrix is entitled to her costs of an administration out of the estate unless a finding of misconduct, expressed as such, is made against her. I do accept that there is an obvious public interest in the application of a general principle whereby, once there is a reasonable ground for litigation by an administrator, executor or*

trustee, and once that litigation is conducted bona fide, that party should have an order for his or her costs out of the estate or trust though unsuccessful in the action. The public interest concerned is a broader manifestation of that identified by Budd J. in the narrower context of the circumstances surrounding the execution of wills in In Bonis Morelli: Vela v Morelli [1968] I.R. 11 (at 34). That is to say, it is the wider public or community interest in the proper administration of estates and trusts generally. Administrators, executors or trustees should not be unduly deterred from seeking to have genuine problems or issues in the administration of any estate or trust judicially resolved because of the risk of a personal liability for the costs of the appropriate litigation.

13. There is another relevant principle. It is that an application which bears all of the hallmarks of a hostile lis inter partes – whether between beneficiaries under a will, under a trust or on an intestacy – may, depending on all of the circumstances, attract the unvarnished application of the usual rule that costs follow the event. That is the principle that I understand Herbert J. to have identified in O'Connor v Markey [2007] 2 I.R. 194 and Laffoy J. to have applied in Rennick v Rennick [2012] IEHC 589."

87. *Muckian v. Hoey*, it is said, expands *Vella v. Morelli* to non-will cases. The plaintiff, it is said, has reasonable grounds for the litigation, which she has been conducting *bona fide.* An order for costs against the plaintiff, personally, it is said, would be at variance with the principle and public interest in the proper administration of estates that the plaintiff should not be unduly deterred by the risk of personal liability for the costs from seeking to have a genuine problem or issue in the administration of the estate judicially resolved.

88. The plaintiff points out that in the course of the proceedings several orders for costs have been made both in her favour, in her capacity as administrator, and against her in – it is

said – her capacity as administrator. She says that no previous application was made by or on behalf of the first defendant that any order for costs should be made against her in her personal capacity.

89. This last argument can readily be disposed of. The suggestion that the costs orders previously made against the plaintiff were made against her in her representative capacity is entirely premised on an assumption that they were. Even if the previous costs orders were so limited, I cannot see how anything previously done might affect the first defendant's right to ask that later applications should be dealt with on a different basis. With no disrespect, the argument goes nowhere.

90. The thrust of the first defendant's argument is that this is a case which falls into the category of hostile litigation *inter partes* and that whatever basis there might be for the substantive action, it does not apply to the interlocutory motion on which the issues were quite different.

91. It seems to me that there is a more fundamental issue with the plaintiff's argument.

92. The general legal proposition on which the plaintiff relies is that where there are reasonable grounds for litigation and the litigation is conducted in good faith, the costs should be paid by the estate or the fund. But in this case, there is nothing in the estate.

93. The rule or practice is directed to cases in which genuine problems or issues have been identified in the administration of estates or trusts. As I have already said, the question as to whether a representative plaintiff is entitled to conduct litigation – albeit in good faith and on reasonable grounds – with impunity is not one that was raised on this application. I can easily see that the institution and maintenance of the action against the wishes of the majority of the beneficiaries and, perhaps, the manner in which the litigation has been conducted could be characterised as issues in the administration of the estate, but those are issues with which the defendant *qua* defendant would not be concerned.

94. This is an action by which the administrator of an estate seeks to set aside an *inter vivos* transfer of property by the deceased. The respondent happens to be a beneficiary under the transferor's intestacy but that, it seems to me, is irrelevant in the assessment of the nature of the litigation. If, as between the beneficiaries of the estate – and notwithstanding the vehement objection of two thirds of them – it might be said that the action has been brought for the benefit of the estate, it is, as between the plaintiff and the first defendant, a dispute as to the rightful ownership of the house in Bray.

95. I accept the argument advanced on behalf of the first defendant that the issues raised by the plaintiff's motion seeking interlocutory injunctions were discrete and separate from the merits of the underlying action and I am satisfied that the approach taken by High Court judge in determining the liability for the costs of the motion was correct.

96. On the argument made on behalf of the plaintiff, the issue before the High Court and on the appeal is whether the case is one which falls within the third category of cases identified in *In re Buckton; Buckton v. Buckton* and *O'Connor v. Markey*. It makes no difference to the outcome, but I think that it might be more correct to ask whether it can be characterised as a case which falls within either of the first two categories. I am firmly of the view that it cannot. If the validity of the transfer of the house is an issue which has arisen in the course of the administration of Mrs. Kinsella's estate, the plaintiff's failed interlocutory motion to prevent the first defendant from carrying out the work for which he had secured planning permission was not.

97. If, as I have said, the costs had been reserved or made costs in the cause, the first defendant, if he were to lose the action, would have been exposed to liability for the costs of an application on which he prevailed and which the High Court has found ought never to have been made.

98. I am satisfied that the High Court judge was perfectly correct in his conclusion that this is hostile *inter partes* litigation to which the ordinary rules as to costs apply. *Vella v. Morelli* is not, nor are any of the other cases relied on, authority for the proposition that a representative plaintiff is not or should not be responsible for the costs of failed litigation or failed interlocutory applications, or that the liability of such a plaintiff is limited to the value, if any, of the estate.

99. It is important to note that the judge left open the possibility that the plaintiff, *qua* administrator, might be entitled to be indemnified from the estate. This underlines the difference between rights and liabilities of the parties to the litigation and the rights and liabilities between the plaintiff and the estate.

The inquiry as to damages

100. When the case came back to Sanfey J. for costs and final orders, the court was asked to order an inquiry as to the damages sustained by the first defendant by reason of the making of the interim order, which was discharged. That inquiry was sought by the first defendant on foot of the plaintiff's undertaking as to damages. The judge made an order for the inquiry and adjourned it to the trial of the action.

101. I pause here to observe that if the plaintiff's undertaking as to damages was limited to her representative capacity, it is not altogether easy to understand why the first defendant wants an inquiry. If the action were to fail, there would be nothing in the estate to pay any damages. If the action were to succeed, the estate would own the house. Perhaps it is that the first defendant contemplates that if he loses the house, he will at least salvage the difference between the building costs he would have incurred in 2019 and the total cost of completing the development.

102. Similarly, if the plaintiff's undertaking as to damages was limited to her representative capacity, any apprehended exposure to pay damages could only arise in the event that the action were to succeed. In that event, the estate would be the owner of the improved house and the exposure on foot of the undertaking would be for any difference that the first defendant could establish between the cost he would have incurred if he had proceeded with the development as and when he had planned and the ultimate cost of completing it. If it could be said that the first defendant, in embarking on the development of a property which was the subject of pending litigation, was assuming the risk that the action might succeed, it can hardly be fair that he would be saddled with any additional cost incurred by reason of an interim injunction which the High Court has found that the plaintiff ought not have obtained.

103. The application was dealt with by the judge at para. 35 where he said:-

> *"35. The first named defendant seeks an inquiry as to damages on foot of the plaintiff's undertaking in this regard as set out in her grounding affidavit. It seems to me to be appropriate to order an inquiry, as the interim injunction was granted expressly on the basis of the plaintiff's undertaking as to damages. Happily, both parties are agreed that the inquiry should be adjourned to the trial of the action, and I will make an order to that effect. It goes without saying that the first named defendant must particularise his claim for damages, and furnish all appropriate vouching documentation, well in advance of the trial."*

104. The judge had already found, at para. 75 of his judgment on the substantive application, that the first defendant had incurred significant expense and delay in the completion of the works as a result of the orders to date.

105. The plaintiff complains that the judge failed to engage with a submission that the court should first consider whether to enforce the undertaking as to damages before directing an inquiry, specifically, that he failed to explain the reasons for enforcing the undertaking.

106. The plaintiff relies on the judgment Clarke J., as he then was, in *Estuary Logistics v. Lowenergy Solutions Ltd.* [2008] 2 I.R. 806 which approved, as representing the law in Ireland, the decision of Court of Appeal in England in *Cheltenham Building Society v. Ricketts* [1993] 1 W.L.R. 1545.

107. Clarke J. in *Estuary Logistics* cited and approved a long paragraph from the judgment of Mann L.J. in *Cheltenham Building Society* which set out eight principles concerning the enforcement of an undertaking as to damages. The appellant places particular reliance on the seventh of these but to properly understand the context in which each of the principles is to be understood it is necessary to set out all of what was said by Mann L.J. and approved by Clarke J. I have taken the liberty of reformatting the text with a view, I hope, to making it easier to follow:-

> *"(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does.*
>
> *(2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted.*
>
> *(3) The undertaking is not given to the party enjoined but to the court.*

(4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so.

(5) The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued.

(6) In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial. Even then, as Lloyd LJ pointed out in Financiera Avenida v Shiblaq, *The Times, 14 January 1991; Court of Appeal (Civil Division) Transcript No 973 of 1990 the court may occasionally wish to postpone the question of enforcement to a later date.*

(7) Where an interlocutory injunction is discharged before the trial the court at the time of discharge is faced with a number of possibilities.

> *(a) The court can determine forthwith that the undertaking as to damages should be enforced and can proceed at once to make an assessment of the damages. It seems probable that it will only be in rare cases that the court can take this course because the relevant evidence of damages is unlikely to be available. It is to be noted, however, that in* Columbia Pictures Inc v Robinson *[1987] Ch 38, Scott J was able, following the trial of an action, to make an immediate assessment of damages arising from the wrongful grant of an* Anton Piller *order. He pointed out that the evidence at the trial could not*

be relied on to justify ex post facto *the making of an* ex parte *order if, at the time the order was made, it ought not to have been made: see p 85H.*

(b) The court may determine that the undertaking should be enforced but then direct an inquiry as to damages in which issues of causation and quantum *will have to be considered. It is likely that the order will include directions as to pleadings and discovery in the inquiry. In the light of the decision of the Court of Appeal in* Norwest Holst Civil Engineering Ltd v Polysius Ltd, *The Times, 23 July 1987; Court of Appeal (Civil Division) Transcript No 644 of 1987 the court should not order an inquiry as to damages and at the same time leave open for the tribunal at the inquiry to determine whether or not the undertaking should be enforced. A decision that the undertaking should be enforced is a precondition for the making of an order of an inquiry as to damages.*

(c) The court can adjourn the application for the enforcement of the undertaking to the trial or further order.

(d) The court can determine forthwith that the undertaking is not to be enforced.

(8) It seems that damages are awarded on a similar basis to that on which damages are awarded for breach of contract. This matter has not been fully explored in the English cases though it is to be noted that in Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd *(1981) 146 CLR 249, 267 Aickin J in the High Court of Australia expressed the view that it would be seldom that it would be just and equitable that the unsuccessful plaintiff 'should bear the burden of damages which were not foreseeable from circumstances known to him at the time'. This passage*

suggests that the court in exercising its equitable jurisdiction would adopt similar principles to those relevant in a claim for breach of contract."

108. *Cheltenham Building Society* was a case in which the High Court had discharged a *Mareva* injunction and ordered an inquiry as to the plaintiff's liability, if any, on its undertaking. On appeal, the Court of Appeal concluded that the judge fell into error into in ordering an immediate enquiry. The substantive cause of action in that case was fraud. Mann J. said:-

"In my judgment, however, the flaw in the argument [that the application for Mareva relief was a discrete matter which had no direct connection with the merits of the action] is that it overlooks the nature of the building society's case. It is true that at trial the building society's case may be shown to be misconceived and I am most anxious to express no view on the merits. If the building society prove to be right, however, the defendants were engaged in an enterprise of obtaining money from the building society by the fraudulent overvaluation of assets. If that case is proved the danger of the misapplication of the loans made by the building society may be very obvious."

109. Mann L.J. stressed that the enforcement of an undertaking was itself a form of equitable relief which was to be considered on equitable principles. The trial judge, he said, would be in a position to see the picture as a whole. In particular, the trial judge would be able to decide whether it would be right to enforce the undertaking having regard to all the circumstances of the case, in particular the risk, if any, which faced the plaintiff at the time it applied for the interim injunctions and – what at the conclusion of the trial would be – the proved conduct of the defendant.

110. *Estuary Logistics* was another commercial case. The plaintiff, on its usual undertaking to damages, had obtained an interlocutory order for the supply of product but

that order was later discharged when the plaintiff was shown to have acted in a manner inconsistent with it. The defendant, by its liquidator, sought to summarily recover the price of goods previously supplied in reliance on the undertaking as to damages. Having examined the evidence and the applicable principles Clarke J. concluded that:-

> *"5.1 Where the choice rests between immediate enforcement and a postponement of a determination to the trial, it seems to me that the court has to balance all material factors. These include:-*
>
> *(a) whether there is a significant possibility that the trial judge may be in a better position to assess all relevant factors;*
>
> *(b) whether the nature of the damage alleged is such that it will fall to be considered at the trial in any event; and*
>
> *(c) whether the immediate payment of any damages might give rise, in the circumstances of the case under consideration, to a risk of injustice."*

111. Applying those factors to the case before him, Clarke J. found that the justice of the case required that the decision whether to enforce the undertaking as to damages ought to be reserved to the trial judge who – for the reasons which he had set out in detail – would be in a much better position to take into account all the appropriate factors. In that case there was a substantial claim for damages which, if action succeeded, would be set off against the sum claimed by the defendant. If, however, the plaintiff were to immediately pay the money claimed, that money was at risk of being swallowed up in the liquidation. While the events which had given rise to the discharge of the interlocutory injunction were discrete and unconnected with the underlying merits of the action, the losses claimed in reliance on the undertaking were intimately connected with the issues in the substantive proceedings.

112. The position taken by plaintiff in the High Court was that in this case, as had been done in *Estuary Logistics,* the decision as to the enforcement of the undertaking as to damages should be reserved to the trial judge. Two reasons were offered:-

(1) That the issue as to duress/undue influence was key to the court's consideration of the application for the interlocutory injunctions and was intimately connected with the substantive proceedings; and

(2) That the outcome of the motion for attachment and committal, which had been adjourned to the trial of the action, would be a material consideration in the context of damages.

113. As to the enforcement of the undertaking as to damages, the starting point is that it is the price the plaintiff offered to pay for the interim orders and that in a case, such as this, where it has been determined that the order ought not to have been made, it is likely to be enforced.

114. I accept the argument on behalf of the plaintiff that upon the discharge of an interim or interlocutory injunction the court has a discretion, to be exercised in accordance with equitable principles, not to order the enforcement of the undertaking. However, the focus of an application to enforce must be on the equities relevant to the enforcement sought and not the conduct of the parties generally.

115. *Cheltenham Building Society* and *Estuary Logistics* were complex commercial cases. A significant factor in the consideration of the Court of Appeal in *Cheltenham Building Society* that the decision whether to enforce the undertaking as to damages ought to have been deferred, and in the decision by the High Court in *Estuary Logistics* to defer the decision, was the risk in the former and the almost inevitability in the latter that the plaintiff would be compelled to pay damages before the trial of the action which could, in the event that the action were to succeed, be set off against the established liability of the defendant to

the plaintiff. Secondly, both were cases in which it was found that the trial of the action would entail an appraisal or reappraisal of the evidence tendered by the plaintiff at the time the injunctions had been granted.

116. The order in this case was to enforce the undertaking as to damages but to adjourn the inquiry to the trial of the action, so the timing of the determination of any liability on the part of the plaintiff is not material. There is no question, in this case, that the trial judge might revisit the risk apprehended by the plaintiff when she applied for the interim orders which have been discharged.

117. I have already given extensive consideration to the plaintiff's argument that the decision on the motion turned on the issue of duress or undue influence and that this is something that will be revisited by the trial judge and for the reasons given, I have rejected that argument. I am satisfied that the same considerations apply to the argument that the decision on the substantive merits of the case might be relevant to the exercise by the court of its discretion as to whether to make an order for the enforcement of the undertaking as to damages. This is a case in which damages would always have been an adequate remedy and that position was copper fastened by the undertaking promptly given by the first defendant that he would compensate the estate for any loss in the event that the works somehow devalued the property.

118. The fundamental premise of the plaintiff's argument that the decision whether or not to enforce the plaintiff's undertaking as to damages should have been deferred is that the plaintiff may succeed. On that premise, the issue in practical terms would be whether, if the first defendant were to lose the house, he might have to bear, also, any additional expense he incurred by reason of the making of the interim order. I cannot see how the outcome of the action might be material to the enforcement of the undertaking as to damages.

119. I am not persuaded that, on that ground, the trial judge will be better placed to decide whether the undertaking ought to be enforced or that the justice of the case required that the question be left to the trial judge.

120. As to the motion for the attachment and committal of the first defendant, I have pointed earlier to what I believe would have been the difficulties of complying with the orders sought and obtained by the plaintiff. I observed earlier that some of the evidence tendered on the motion for attachment leaked into the affidavits filed on the injunction application. The works said to have been carried out, and not carried out, by the first defendant are described in excruciating detail. For example, one of the plaintiff's complaints as to the alleged non-compliance with the interim order is that the old side gate which was removed by the first defendant was hinged, but that the new gate is propped in a frame.

121. In the course of the oral argument on the appeal counsel for the plaintiff was pressed as to the circumstances in which an undertaking as to damages might not be enforced. The argument was that if it could be shown at the trial of the action – or perhaps at the conclusion of the plaintiff's motion to attach the first defendant, which has been adjourned to the trial – that the first defendant failed to comply with the interim order, this might disentitle him to rely on the undertaking as to damages. Counsel did not – whether in argument on the appeal or in the written submissions filed in the High Court – identify any authority for this proposition but is correct in his contention that the High Court judge did not expressly engage with it.

122. Counsel for the respondent pointed out, correctly, that any inquiry would address any issues of quantum and causation but went on to suggest that the court could then deal with any issue as to the impact on the assessment of damages of any contempt that might be established – including any issue as to whether any such contempt might dissolve the undertaking as to damages. The argument is superficially attractive but what the appellant

says should be put back is question as to whether the undertaking should be enforced at all. It is clear from *Estuary Logistics* that the subject of an injunction which has been discharged is not entitled to damages as of right but that the court must first decide whether the undertaking should be enforced.

123. Putting aside the wisdom and expense of embarking on an enquiry as to whether the first defendant complied with an interim order which has been discharged, the issue for present purposes is whether the determination of that issue against the first defendant would be material to a proper consideration of whether the plaintiff's undertaking as to damages should be enforced. Having carefully considered the question, I am satisfied that it would not. The primary purpose of the jurisdiction of the High Court to make orders for attachment and committal is coercive. Regularly, if not routinely, motions for attachment and committal are dealt with by undertakings to comply with the order. In cases in which non-compliance is established (beyond reasonable doubt) the order of committal will always leave open to the contemnor the possibility that he may purge his contempt by undertaking to comply with the order. Although the application for attachment will have been moved by the party who has obtained the order, the power invoked, and in appropriate cases exercised, is a power of the State to ensure compliance with court orders. Similarly, in the minority of cases in which the punitive jurisdiction is invoked, it is exercised as a State power to punish disobedience.

124. If in this case, following the discharge of the interim injunctions, the motion for attachment and committal were to be pressed, it would be impossible for the first defendant to purge his contempt by undertaking to comply with a discharged order. If the plaintiff should urge that whatever did or did not happen in late 2019 in the side garden of the house they grew up in together warranted the imprisonment or the imposition of a fine on her brother, that would be a matter between the first defendant and the High Court. I cannot see that in

any circumstances the just determination of the motion to attach and commit could engage the justice of the enforcement of the plaintiff's undertaking as to damages.

125. If the judgment under appeal did not address the plaintiff's submission that the enforcement of her undertaking as to damages should be deferred, the submission was simply that the issues on the motion were intimately connected with those in the substantive proceedings – which they were not – and that the outcome of the contempt application would *"be a material consideration in the context of damages"* – which it could not be.

126. The time and effort which have been lavished on this case are utterly disproportionate to value of the property, *a fortiori* to the value of the concrete shed or garage in the side garden. The postponement to the trial of the decision whether the undertaking as to damages is to be enforced would rise to a further hearing and even more costs. If the High Court judge may have misunderstood the nuance of the plaintiff's position or might have spelled out his reasons for his decision to enforce the plaintiff's undertaking as to damages, I am quite satisfied that the decision was correct.

Conclusions

127. I am satisfied that the High Court judge was correct in his conclusion that the case was one in which he could justly adjudicate upon liability for costs on the basis of the interlocutory application and that he was correct in the allocation of those costs. I am also satisfied that the judge was correct in making the order for costs against the plaintiff, personally, without qualification or restriction. I would dismiss the appeal on those grounds.

128. I am satisfied that the decision of the High Court judge to enforce the plaintiff's undertaking as to damages was correct.

129. For the reasons given, I would dismiss the appeal on all grounds.

Costs

130. Provisionally, it seems to me that the first defendant has been entirely successful on the appeal and is entitled to his costs.

131. Provisionally, it seems to me that the issues on the appeal – no less than the issues in relation to the order the subject of the appeal – cannot be said to have been arisen in the course of the administration of the estate but were attributable to an unsuccessful appeal against orders made following the determination by the High Court of a hostile *inter partes* interlocutory motion and, like the costs below, should follow the event.

132. In the event that the plaintiff wished to contend for any other order as to costs, I would allow the plaintiff ten days from the date of electronic delivery of this judgment to give notice to the Court of Appeal office and the first defendant's solicitors, in which event a short further hearing will be convened.

133. I am authorised by Costello and Faherty JJ. to say that they agree with this judgment and with the orders proposed.