

DEFENDANTS

THE HIGH COURT

[2023] IEHC 456

Record No. 2023 243 SP

Record No. 118 IA/2023

**IN THE MATTER OF THE ESTATE OF LAURENCE (OTHERWISE LARRY)
BRACKEN, DECEASED**

BETWEEN

**THOMAS (OTHERWISE TOM) BRACKEN, JOSEPH BRACKEN
(MINORS SUING BY THEIR MOTHER AND NEXT FRIEND MIRIAM BRACKEN)**

PLAINTIFFS

AND

FINTAN HINCH

AND

GERALDINE CLAFFEY

DEFENDANTS

Judgment of Mr. Justice Brian O'Moore delivered the 21st day of July 2023

1. Larry and Tom Bracken were brothers. Larry died on the 17th of May 2014. Tom died on the 24th of March 2016. The two men were obviously close. Indeed, Tom's will had only one beneficiary – his brother Larry. However, as Larry had predeceased Tom, the latter's estate fell to be administered in accordance with the rules of intestate succession.

2. Larry's will provided for a number of specific bequests. One of these was in these terms;

"I give devise and bequeath my house contents, livestock and all my lands to my nephew Colm Bracken (son of my brother John) for his lifetime and thereafter to his two sons Joseph and Tom , for their own use and benefit absolutely."

3. The relevant lands are located at Kilclare, County Offaly. They were registered in Tom's name. Given the difference in those entitled under Larry's will and those entitled as a result of Tom's effective intestacy (his nieces and nephews), a claim was made by Larry's personal representative (Mr. Hinch) against Tom's estate (represented by Ms. Claffey). This claim took the form of proceedings initiated on the 22nd of September 2017. In her Amended Defence, Ms. Claffey pleaded that;

- a. The arrangement between the brothers violated the provisions of the Land Act 1965 (as Larry was settled in, and possibly a citizen of, the United States at the time the lands were acquired). The consequence of this, it was pleaded, was that any resulting trust in Larry's favour was unlawful and ineffective.
- b. Tom had, in any event, acquired his own beneficial interest in the lands by virtue of his expenditure on them in the years before he died.

4. These pleas were very serious ones. If the first succeeded in full, then there would be no lands in Larry's estate to be transferred to Colm Bracken or his children. The second plea could, if successful, reduce to an unpredictable extent the value of this particular bequest.

5. Shortly before the 2017 action was to be heard, it was settled. The parties to the settlement were Mr. Hinch and Claffey. However, the settlement provided that;

“6....The Parties agree and acknowledge that the within Terms of Settlement may require the ruling of the High Court by reason of the age of minority of some of the beneficiaries of the Estate of the late Larry Bracken.”

6. The application for approval of the settlement came before me on the 13th of December 2022. As is recorded in the affidavit of Mark Scanlon (Mr. Hinch’s solicitor);

“...an application was made to the High Court for an order approving the Terms of Settlement by reason of the minority of the two beneficiaries, Tom and Joseph Bracken. The application was moved by counsel for Fintan Hinch in the presence of both counsel for Geraldine Claffey and counsel for Colm Bracken. Having heard the application, Judge O’Moore said that the case clearly involved difficult legal issues and a complicated factual background. He said that the resolution of the matter in those circumstances was both sensible and commendable. Counsel for Colm Bracken indicated that Mr. Bracken had no objection to the terms of settlement or to the application for the Court’s approval thereof...”

7. In making these observations, I was conscious of the fact that the Bracken children (Joseph and Tom) could have lost some or all of the value of the specific bequest to them. I was also conscious of the fact that, if the settlement was not approved, the litigation would in all likelihood proceed and involve significant costs which a sensible compromise would avoid.

8. The settlement, as far as is relevant, provided an acknowledgement in the recitals that the Estate of Larry Bracken “holds a two-third beneficial interest in the ownership of the Kilclare Lands”.

It then went on to provide for a sale of the lands, subject to very detailed arrangements and safeguards, with two thirds of the net proceeds of sale being remitted to Larry's estate and one third remitted to Tom's estate.

9. Both Mr. Hinch and Ms. Claffey have confirmed through the sworn evidence of their solicitors (and through counsel at the most recent hearing) that the share of the net proceeds of sale of the lands attributable to Larry's estate will be distributed to Colm Bracken and his two children. As this is "in substitution for the gift ... it falls to be distributed in the same way as the gift..."; paragraph 20 of Mr. Scanlon's affidavit. The value of Colm Bracken's life interest in the monies is to be assessed by the application of Schedule 1 of the Capital Acquisitions Tax Consolidation Act 2003. This was made clear by a letter from Mr. Scanlon to Keans Solicitors of the 23rd of June 2023. I will return to that chain of correspondence later in this judgment.

10. After the settlement was approved in December 2022, Colm Bracken (according to the affidavit of Paul McDonnell, Ms. Claffey's solicitor) "...has repeatedly requested and indeed demanded of [Ms. Claffey] that the Kilclare Lands be sold to him privately or that the Kilclare Lands be severed to ensure that he obtains a self-selected portion of them"; paragraph 17.

11. Ms. Claffey, quite properly, decided on a public sale of the lands. Of course, Colm Bracken was free to bid on the sale. She also, having taken advice, rejected the severing of the lands as this was contrary to maximising the achievable price for the entire parcel. A number of people other than Colm Bracken had an interest in the optimum price being achieved for the lands, namely the beneficiaries in Tom's estate and Colm Bracken's own children.

12. Mr. McDonnell avers, at paragraph 20 of his affidavit, that;

“Regrettably, in an effort to achieve his objectives, Colm Bracken has been engaged in a campaign to obstruct, prevent and frustrate the sale of the Kिलclare Lands to anyone other than himself.”

13. Colm Bracken attempted to have the lands sold privately to him at valuations which Mr. Scanlon describes as “low”; paragraph 23. When this was rejected, Mr. Bracken;

- a. Changed or interfered with the locks of the gates/house on the lands;
- b. Blocked the entrances to sheds and to sections of the lands;
- c. Harassed workers on the lands;
- d. Drove a Toyota jeep across the lands and refused to remove the vehicle from the lands.

14. Legal action was threatened by Ms. Claffey’s solicitor (Mr. McDonnell) and in a replying letter of the 21st of February 2023 Colm Bracken (through his then solicitors, Lyons solicitors) stated;

“In this regard, we are instructed to give an unequivocal undertaking on behalf of our client that he will not come upon, visit or otherwise attend at the property pending further agreement between the parties and [Ms. Claffey]”

15. The letter went on to propose mediation and to propose certain steps that might be taken in respect of legitimate tax avoidance. It also accepted that the earlier proceedings had settled and that the settlement was ruled “by reason of the age of minority of our client’s two sons...”

16. As Mr. McDonnell acknowledges at paragraph 24 of his affidavit, this left the removal of the Toyota jeep outstanding. Originally, Lyons solicitors had stated that Mr. Bracken was concerned that “a Northern Ireland registered Jeep [had been observed at the property.” This claim faltered when, in

reply, Mr. McDonnell pointed out that the Toyota vehicle had the registration number 06 WW 4027, and that this was understood to be Colm Bracken's property.

17. Notwithstanding this undertaking, there followed an extraordinary set of events. On the 30th of May 2023, someone broke into the house on the lands, reconnected a camera in front of the house (originally installed by Colm Bracken without the consent of Ms. Claffey and then disconnected), and the Toyota Jeep was moved and parked in an outhouse. Mr. McDonnell gives evidence (at paragraph 26 of his affidavit) that Colm Bracken was responsible for these acts, and this is also the belief of Ms. Claffey. It should be kept in mind that Ms. Claffey is the personal representative of the registered owner of the lands and (as such) is the person legally entitled to possession and management of the Kilclare property. It is also worth noting that, on the 22nd of May 2023, For Sale signs were erected at the property in anticipation of an auction to take place on the 7th of July. The sale of the lands was taking place in accordance with the terms of settlement.

18. These secretive activities do not constitute the most notable event that occurred around this time. On the 12th of June Padraic Murtagh (the auctioneer appointed under the settlement) reported that he had arranged for a builder (who in turn was a relative of prospective purchasers) to inspect the Kilclare Lands. The inspection by the builder (and the prospective purchasers) was taking place on Sunday the 11th of June when Colm Bracken arrived "and introduced himself as the owner of the Kilclare Lands." Mr. McDonnell goes on (at paragraph 27);

"I am further advised and believe that Colm Bracken proceeded to claim that the Kilclare Lands had been bequeathed to him under the terms of the Last Will of the late Thomas Bracken (and that consequently he was the legal owner of the Kilclare Lands). I am further advised and believe that Colm Bracken stated that the auction would not be proceeding and, if it was, he was buying the Kilclare Lands, and he advised that Keans Solicitors were acting on his behalf."

19. No objection is taken to the admission of this evidence. It is also not denied,

20. This was what Mr. McDonnell accurately describes as an “outrageous” breach by Colm Bracken of his earlier undertaking. Naturally, Mr. McDonnell then wrote threatening litigation unless appropriate undertakings were provided by Colm Bracken. A deadline of 4 pm on Monday the 19th of June 2023 was imposed. At two minutes to midnight on the 20th of June, Colm Bracken avoided injunctive proceedings against him by offering the undertakings sought by Mr. McDonnell on behalf of Tom Bracken’s estate.

21. Nothing further was heard from Mr. Bracken prior to an application (in the current action) by his wife for an interim injunction on the 7th of July 2023. I will shortly turn to that hearing. Before I do so, I should describe Mr. McDonnell’s evidence about Ms. Miriam Bracken’s knowledge of certain of these matters, and Mr. Scanlon’s important evidence about correspondence with Colm Burke’s solicitors.

22. Naturally, Mr. McDonnell does not give direct evidence about communications between Colm Bracken and Miriam Bracken. He does however say (at paragraph 31) that “it would be incredible to suggest, if she did, that [Miriam Bracken] was unaware of the communications set out above, living under the same roof as Colm Bracken and clearly sharing substantial information and the two Estates.” The “communications” are the numerous letters in connection with Mr. Bracken’s campaign to prevent the sale of the lands, except to him. Ms. Bracken’s response (at paragraph 12 of her second affidavit) is to refer to the relevant portion of Mr. McDonnell’s affidavit dealing with her husband’s activities and to swear;

“...I say firstly that if and to the extent that my husband has been engaged in the campaign described therein that I have neither taking (sic) part in any such campaign or encourage or facilitated my husband in any such campaign. I say, perhaps more cogently, that neither have our children.”

23. Miriam Bracken goes on to say, on oath, that she does not “...align myself with the conduct and objectives of my husband as alleged.”

24. Nowhere does Ms. Bracken deny knowledge of her husband’s activities, despite the fact that the question of her knowledge has been placed front and centre by the affidavit of Mr. McDonnell to which her second affidavit is a reply. At one point during the hearing of these motions, counsel for Ms. Bracken seemed to suggest that the court should take as a denial of any knowledge the phrase “if and to the extent...” but, as I understand it, wisely withdrew from that position.

25. On the evidence before me, I will proceed on the basis that Miriam Bracken was aware of her husband’s activities, though not perhaps of every detail.

26. Mr. Scanlon has placed before the court correspondence about the settlement. On the 8th of June 2023, Keans solicitors wrote “to protect the interests of not only Colm Bracken but his two children.” The purpose of the letter was to ensure that these three individuals would get “what they are entitled to under the terms of the relevant deceased’s will.” The discourtesy, in not referring to Larry Bracken by name, is unfortunate.

27. Keans asked a number of very relevant questions. In protecting the children’s interests, they noted that there was some “assistance” – by which I take it they mean “comfort” – to be taken from the fact that the court had ruled the settlement. They asked how the value of Colm Bracken’s life

interest was to be assessed, how the proceeds of the sale of the lands were to be distributed, and (as I understand the query) what the children would get.

28. I am told that, before the application on the 7th of July 2023, Miriam Bracken was aware of this letter, but did not possess a copy. Nowhere in the evidence does Ms. Bracken explain what steps she took to get a copy of the letter (from her husband), what enquiries she made about any response to the letter, and why she did not look for a complete set of any relevant correspondence. Given her obligation to make full disclosure, these are very serious failings.

29. On the 23rd of June, Mr. Scanlon replied to Keans. He explained that the estate would be distributed in accordance with both the terms of settlement and Larry Bracken's will. If there was any doubt about the Bracken children receiving the net proceeds of sale of two thirds of the lands (less a sum in respect of Colm Bracken's life interest) that would have been dispelled by the statement that the relevant life interest would be valued in accordance with the CAT legislation. There would be no purpose in carrying out that valuation if the balance of the relevant funds were not going to Joseph and Tom. It was also stated that the settlement terms would not be reopened. No suggestion to the contrary has been made by counsel for the parties to the compromise, the defendants to the current action.

30. This letter is very significant, in that it emphasises the unequivocal commitment by Mr. Hinch to paying the Bracken children the monetary equivalent of their entitlement under the will of Larry Bracken, as defined by the settlement. It is important to note that Ms. Bracken, in these proceedings, expressly makes no complaint about the one third/two thirds split of the net proceeds of sale between Tom and Larry's estates.

31. As noted, on the 7th of July 2023, an ex parte application was made to Barrett J seeking an interim injunction preventing the auction (that very day) of the lands Barrett J made that Order. The judge was not given any evidence about Colm Bracken's campaign to acquire the lands, at an apparent undervalue, by trespass and harassment. He was told nothing about Colm Bracken's attempts to disrupt the auction on the 7th of July, including his accosting of potential purchasers. He was not informed about Colm Bracken's breach of a solemn undertaking given through his solicitors. He was told nothing about the correspondence from Keans of the 8th of June. All of these matters are now set out on affidavit (by the solicitors for the defendants). Despite being done by her husband, none of these are facts of which Ms. Bracken says she was unaware. This is all the more surprising as much of the contents of Miriam Bracken's affidavit grounding the ex parte application constituted information which must have been made known to her by her husband.

32. Leaving aside what Ms. Bracken actually knew, there is much that she could have known had she made the simplest enquiries. That such enquiries should have been made is beyond doubt; see Gibson L.J. in *Brinks Mat Ltd v Elcombe* [1988] W.L.R. 1350. Here, there is no reason to believe that, had Miriam Bracken asked Colm Bracken for the suite of correspondence beginning with the letter of the 8th of June from Keans (and she knew of that letter, her counsel concedes), that her husband would have refused to share it. Indeed, if he had the court should have been informed of that fact.

33. On the materiality of this information and correspondence, it is simply facile to suggest that it need not have been put before Barrett J as the application to him was on behalf of the children, in defence of their interests. The standard set out by Clarke J (as he then was) in *Bambrick v Copley* [2005] 1 ILRM 81 is;

“Whether objectively speaking the facts could reasonably be regarded as material with materiality to be construed in a reasonable and not excessive manner.”

34. Objectively speaking, and taking a reasonable approach to materiality, it is clearly material to the decision to be made by a judge in the position of Barrett J that the person who had represented the interests of the children from a point prior to the settlement right up to three days before the application had (throughout most of that time) been making strenuous and unlawful efforts to interfere in the sale of the property and (recently) to prevent the auction on the 7th of July. A judge, presented with this information, would have had to consider whether the last minute application to stop the sale was not really a continuation of Colm Bracken’s campaign by other means, this time through the medium of his wife. Even more material would have been the letter of the 8th of June, raising certain of the questions which Miriam Bracken claimed to concern her, and the response from Mr. Scanlon of the 23rd of June which I have described a short time ago.

35. Having considered what was not before Barrett J, and before I analyse what was put before the court on the 7th of July, I should summarise the account given on Ms. Bracken’s side about the application. Her solicitor, Eamonn Bennett, swears that his office was contacted by Colm Bracken on the 4th of July 2023. This was ten days after Mr. Scanlon’s letter of the 23rd of June to which Keans had never replied. From the evidence, and the clarification of the evidence obtained during the hearing of these motions, Colm Bracken did not at any time tell Mr. Bennett of the correspondence between Keans and Mr. Scanlan’s firm. He also told Mr. Bennett nothing about his campaign to disrupt the sale of the lands, and to acquire some or all of the lands for himself. Mr. Bennett gives no evidence that he was ever told of the correspondence between Lyons and Mr. McDonnell’s firm, or Colm Bracken’s breach of undertaking.

36. Later that day, a consultation was held between Mr. Bennett, Colm Bracken, and Junior Counsel. Junior Counsel advised that Mr. Bracken did not have “a stateable cause of action”, though it is unclear what claim Mr. Bracken wanted to make. However, counsel “expressed the opinion that there was a real risk that [the children] might not receive the property ... because the manner in which [the] settlement ... had been constructed could cause the bequest fall (sic) and the property to be administered by way of intestacy.” Counsel advised, that because of Colm Bracken’s prior involvement in the proceedings, it would be better if Miriam Bracken sought legal advice.

37. On the evening of the 5th of July 2023, a consultation was held between Ms. Bracken, Mr. Bennett, and senior and junior counsel. Ms. Bracken instructed that proceedings be issued to protect the interests of her children. Based on the advice of counsel, the interests of the two minor Brackens were thought to be “irredeemably prejudiced” if the auction went ahead at 3.30 pm on the 7th. Mr. Bennett says that “taking the steps necessary to try to stop the sale were to (sic) the focus of all involved from the late evening of...the 5th of July last until the morning of...the 7th of July last.”

38. There was ample time over that period for Ms. Bracken to give proper instructions to her lawyers about her husband’s campaign, but she did not do so. She could also have told her lawyers about the letter of the 8th of June, but she held back that information. Indeed, the first acknowledgment that Miriam Bracken knew of that specific letter was an answer given by her Senior Counsel to a question from me at the hearing of the motions on the 19th of July 2023. In her second affidavit, she acknowledges that she knew of the Lyons and the Keans correspondence but understood that these solicitors were not acting on behalf of her children. How she came to that impression, precisely what she thought the correspondence was about, and whether she asked to look at the letters to see if they might be relevant are not questions which are addressed at all. In other words, it was eleven days after the ex parte application (when Ms. Bracken should have put all her cards on the table) that the defendants and the court were told that she had known of correspondence sent on her husband’s

instructions about (taking her account at its height) matters which must have related to Larry's estate. As a matter of logic, given that Colm Bracken's inheritance from Larry Bracken was intimately bound up with her children's inheritance, the correspondence was likely to have some relevance to these proceedings. It is difficult to imagine more significant correspondence. Not only was there ample opportunity for Ms. Bracken to tell her lawyers what she knew of the retainer of not one but two firms of solicitors, but there was easily enough time for her to seek copies of this correspondence from her husband.

39. There was also easily enough time to contact the solicitors for the defendants, and see what they had to say about the concerns identified (for the first time, on Ms. Bracken's account) on the 4th of July. Mr. Bennett does not say why no such contact was made. Ms. Bracken says (at paragraph 9 of her second affidavit) that this was not done "due to the shortness of time..." This is not credible. The problem identified by counsel could have been set out in an email running to a few paragraphs. Ms. Bracken's other rationale is that "the understanding of [Mr. Hinch] and his solicitor could not be determinative of whether the risk to my children's inheritance existed." It is not clear whether a conscious decision was made at the time to make no contact with the defendants because of the alleged reason, or it is an ex post facto rationalisation as to why no effort was made to get the defendants' views. I suspect the latter is the reality. In any event, it makes no sense. Whether determinative or not, the assurances about the intentions of the defendants (especially Mr. Hinch) which were given over the last week would have provided significant comfort to any litigant acting rationally. In addition, the analysis of the legal situation offered by the legal teams for the defendants should have assured Ms. Bracken that the concerns of her counsel were not well founded. There was every reason to notify the defendants of the newly found concerns on the part of the Brackens, and no sensible reason has been given as to why this was not done. The main (if not the only) reason offered, namely lack of time, does not hold water sense given Mr. Bennett's evidence about the devotion of effort exclusively to the Brackens between Wednesday evening and Friday morning.

Instead, the focus appears to have been on stopping the auction. Thus, of course, is what Colm Bracken wanted to achieve.

40. I will now deal with what I know of the hearing before Barrett J. As already noted, important correspondence and information was kept from him by Miriam Bracken. This would in itself have been enough for me to set aside the interim Order of Barrett J. The material non disclosure is profound, and the fact that it happened is very disturbing. However, what was put before the judge makes matters worse.

41. In his affidavit, sworn in the aftermath of strong complaints by each defendant about non disclosure at the ex parte stage, Mr. Bennett says (at paragraph 5);

“[Senior Counsel] brought to the attention of Mr. Justice Barrett that the matter had previously been dealt with by Mr. Justice O’Moore, and that Mr. Colm Bracken the father of the two minor plaintiffs herein was aware of the terms of settlement and had the benefit of legal representation in respect of same.”

42. One would expect that, given the allegations that Barrett J was not told everything that he should have been, exceptional care would be taken in drafting the affidavit of Mr. Bennett and the further affidavit of Ms. Bracken. However, what Mr. Bennett does not say is that Barrett J was told that the settlement was brought to this court for the purpose of considering and approving the settlement, that this was done as certain beneficiaries affected by the settlement were minors (namely the Bracken children), and that Mr. Bracken was (uniquely among the adult beneficiaries) notified of the application to approve the settlement because he was representing the interests of his children. Instead, it is blandly stated that I had “previously dealt with.” the matter. If this is all that was said to

Barrett J, he was very profoundly misled. Miriam Bracken, in her second affidavit, does not carry the matter further as she was not in court when the ex parte application was made to Barrett J

43. On the affidavit evidence, therefore, Barrett J was not given a remotely adequate account of the approval, by this court, of the settlement which is at the center of the case made by Ms. Bracken. If Mr. Bennett's affidavit is accurate, and I have no reason to believe otherwise, on the central issue of the ruling of the settlement Barrett J was given an account which lies somewhere between the misleadingly incomplete and the utterly false. On this ground alone, the Order of Barrett J would have been discharged.

44. It is difficult to know the exact legal basis urged on Barrett J to persuade him to make the Order restraining the auction. I agree with counsel for Ms. Claffey that it appears to be a failure, on the part of those agreeing the settlement, to consult (or, possibly, have regard to) the Bracken children. This uncertainty exists in large measure because of the various and contradictory legal bases put up on behalf of the Brackens in support of any relief.

45. Counsel for Ms. Claffey grounds his submission on Ms. Bracken's first affidavit, the only evidence before Barrett J. At paragraph 12, having recited the background to and history of the earlier proceedings on the basis of information which she can only have got from her husband, Ms. Bracken swears;

"I say that at no time during the period after which the said Grant to the Executor was made, and up to the time of the Settlement Agreement, was there any consultation with or agreement by, the beneficiaries herein, to the Settlement Agreement."

46. This is absolutely misleading, and probably deliberately so. It is misleading as it holds back the fact that after the settlement, this court was asked to carry out the exercise of approving the settlement and that this was done because of the need to protect the interests of the Bracken children. It is misleading because it does not tell the court that Colm Bracken was invited to attend this court hearing to represent his children's interests. It is misleading because it fails to inform the court that Colm Bracken, through counsel, had no objection to the settlement either on his own behalf or on behalf of his children.

47. It is probably deliberately misleading because of the way the paragraph is phrased, and because of the information available to Ms. Bracken. The paragraph is phrased to give the impression that the interests of the Bracken children were not considered at all, but the deponent (and possibly the drafter) are careful to confine the evidence to the period up to the settlement agreement and not beyond (to the court approval, some months later). When one knows of the approval process, one wonders why this limited time period is chosen for the evidence given in paragraph 12. Regardless of this close construction of the paragraph, Ms. Bracken must have known of the approval of the settlement involving, as it did, a significant bequest to her husband and her children. In the following paragraph, she values the loss of the bequest to her children at 2 million euro. It is fanciful to believe that she did not know of the ruling of the settlement by the court, and she nowhere in her second affidavit denies such knowledge of the approval process described in detail by Mr. Scanlon in his replying affidavit. In any event, had Ms. Bracken asked her husband what he knew about the settlement of the earlier proceedings, there is no reason to believe that he would not have told her.

48. Paragraph 12 of Ms. Bracken's affidavit is therefore a case of Barrett J being carefully misled about a central issue in the proceedings brought by Miriam Bracken. Even ignoring the other failings which I have described, the application to Barrett J had, as a central plank, the insinuation that her

children were not consulted with and (by implication) that their interests were not considered. This impression is, in the light of the facts, quite untrue.

49. The application before Barrett J appears to have coupled the evidence which I have just described with an argument that the gift to the Bracken children would fail if the auction went ahead. Mr. Bennett does not set out what authorities (if any) were opened to Barrett J, the precise nature of the submissions made, or the basis upon which it was decided that an arguable case had been made out on behalf of Ms. Bracken.

50. On the interlocutory injunction application, heard on the 19th of July, senior counsel for the plaintiffs crystalised Ms. Bracken's case and concerns by reference only to the potential failure of the gift to her sons. He disavowed any reliance on the doctrine of ademption. He accepted that there was a power to sell the land. He focused exclusively on two passages in the papers. The first was the bequest of the lands by Larry Bracken. The second is the recital to the settlement agreement. In the written submissions, counsel express these concerns about the interaction of these two phrases and the settlement agreement as a whole;

- a. There is no recognition that the lands were held by Tom Bracken in trust for Larry Bracken.
- b. Under the settlement agreement, "the devise to the Plaintiffs could fail as the devise is wrongly described in the Will, if it were to be taken that Laurence Bracken at the date of his death stood possessed of but a two thirds beneficial interest in the Lands."
- c. "The upshot of this is it could well be considered that the Lands as described in the Will of Laurence Bracken was incorrectly described, and that he was mistaken as to what the extent of Lands he actually had a beneficial interest in, and further that the Lands he did have an interest in were different from the devise in favour of the Plaintiff

beneficiaries, and that the principle of *nemo dat quod non habet* might apply, thus losing the devise to the minor beneficiaries.”

- d. If the agreement is correct, “no Trust existed during the lifetime of Larry Bracken, or at the time of his death.”
- e. There are a number of other beneficiaries or potential beneficiaries who may wish to make a claim against the estate of Larry Bracken, which could disentitle the Bracken children to their bequest, leaving them with nothing.

51. No caselaw is put forward by counsel to support any of this analysis. Some of the propositions are plainly misconceived. A proper consideration of the language used in the two instruments makes it clear that the alleged concerns of Miriam Bracken and her lawyers are completely groundless.

52. By his will, Larry Bracken bequeathed “all my lands” to Colm Bracken and his children. This would include any beneficial interest in the lands. Indeed, given that the lands were held in Tom’s name, the only interest in the lands which Larry could bequeath was a beneficial one. Larry could not effectively bequeath something he did not own. As it happens, his personal representative has agreed that Larry’s beneficial interest in the lands was limited to two thirds. That is therefore the interest which Larry has bequeathed to his nephew Colm (for life) and thereafter to his grandnephews Joseph and Tom.

53. This is the correct construction of the documents, and summarises their legal effect. This also represents the approach which Mr. Hinch says he will take in discharging his duties as personal representative. None of the other potential beneficiaries have indicated any intention to mount a claim against Larry’s estate along the lines set out by counsel for the Brackens; on the contrary, one of these beneficiaries (Ms. Claffey) has made it clear that she agrees with how Mr. Hinch proposes to respect the gift to the Brackens.

54. It is important to note that the case now made by the Brackens is not to say that the gift has failed, or would fail if the lands are sold. It is to talk instead of concerns, risks and possibilities. That position has evolved. In her grounding affidavit, at paragraph 13, Ms. Bracken swears;

“I say and believe and am advised, that the gift having failed, that [the Bracken children] will have no interest in the proceeds of sale of the Lands.”

55. This adamant position was not maintained in the hearing of the interlocutory motion. The written submissions of counsel for the plaintiffs summarise the case in this way;

“...there is a risk, due to the wording of the Settlement, that the anticipated partial proceeds of the sale of the Lands...could fall into intestacy...”

56. Later in the written submission, a section of them is introduced with these words;

“The following are the concerns which the Plaintiffs have with the Settlement Agreement...”

57. Among these “concerns” is that “there is a danger...” that “it is assumed that the gift of the land has failed as the land was never in the ownership of Larry Bracken, or was never in the ownership of Larry Bracken (sic).”

58. There was no serious effort made, at the interlocutory hearing, to stand up the case put to Barrett J that the Settlement Agreement had caused the gift to fail and that no monies would be paid to the children once the lands were sold. Instead, the court was asked to guard against possible consequences which, it was said, there was a risk might occur.

59. In light of my decision that the Brackens have simply misunderstood the legal effects of the settlement agreement, there is no need for them to seek (or be granted) any form of interlocutory reliefs. In addition, the grievous failures to make proper disclosure to Barrett J, and the active misleading of that judge, are factors which weigh against the grant of interlocutory relief. I would follow the approach taken by McCracken J in *Production Association Minsk Tractor Works v. Saenko* [1998] IEHC 36, where he considered the material non disclosure at the ex parte stage a factor to be taken into account at the interlocutory stage, albeit in the context of mareva applications.

60. For these two reasons, the application for interlocutory relief fails. However, even if these did not arise, the plaintiffs have not shown any arguable case that would support the grant of such an injunction.

61. The interlocutory orders sought would restrain the defendants from selling, disposing of, transferring or otherwise dealing with the lands. No case is made out which might entitle the plaintiffs to such injunctions. Even if the plaintiffs established that the disposal of the lands would lead to the loss of the bequest from Larry Bracken, the defendants cannot be restrained from carrying out an agreement which the court has approved and has approved having regard to the interests of the plaintiffs. The time and place for the plaintiffs to raise these concerns (or any worries) about the effect of the settlement agreement was the hearing in December 2022 to rule the settlement. This was not done. If there was any merit whatsoever in the current “concerns”, they should have been agitated before the court seven months ago. The failure to do so can only be laid at the feet of Colm Bracken and his then legal advisers. The Bracken children can, if there is any reality to the current case, only possibly have recourse to their father and his lawyers of the time. As it happens, I have in any event found that there is nothing of substance in these “concerns” but (if there was) these proceedings are not the proper way for the Bracken children to obtain redress for any loss they may have been caused.

In addition, the attempt in this action to frustrate a court approved settlement constitutes a collateral attack on the court approval.

62. The plaintiffs are therefore not entitled to the interlocutory reliefs sought.

63. There remains the question as to whether these proceedings are bound to fail, which is the issue raised in the motion brought by Ms. Claffey who wants the court to dismiss this action on these grounds.

64. The reliefs sought in the special summons, issued some six days after the obtaining of interim relief, are;

- a. An Order prohibiting [the sale, disposal of, transfer or dealing with] the lands;
- b. A Declaration that ...[Tom Bracken] held the Land on a resulting trust or a constructive trust for [Larry Bracken] and that the said land now forms part of the estate of [Larry Bracken].
- c. In the alternative a Declaration that the entire beneficial interest and ownership of the Land...does not form part of the Estate of [Tom Bracken] but rather forms part of the estate of [Larry Bracken].

65. I will pause here. For many of the reasons I have set out, the plaintiffs are not entitled to the relief at (a) either on a permanent or an interlocutory basis. With regard to (b) and (c), there has been another fundamental shift on the part of Miriam Bracken in the few days between the issuing of the Special Summons on the 13th of July 2023 and her second affidavit of the 17th of July 2023. In this latter affidavit, Ms. Bracken avers;

“4...I further say that I accept, in circumstances where an issue had arisen as to the ownership of the lands in question, namely whether the legal owner of the lands the late Thomas Bracken held it on trust for the late Laurence Bracken, that I have no complaint, on behalf of my children, to the fact that those proceedings were settled on the basis which would give the estate of the late Thomas Bracken and ultimately the beneficiaries on intestacy therefore, a sum equal to one third of the value of the lands in issue herein.”

66. As Miriam Bracken is no longer disputing the allocation of one third of the value of the lands to Tom Bracken or his estate, the reliefs at (b) and (c) are not being pursued. Certainly, it would make no sense for Ms. Bracken to do so given that she has said that she “would not be seeking to maintain these proceedings” at all were her children “assured of receiving their inheritance in any form...”

67. I will now consider the balance of the reliefs sought in the summons;

- d. An Order setting aside a Settlement Agreement which compromised proceedings ...entitled *Fintan Hinch v Geraldine Claffey*.
- e. In the alternative to (d) above, an Order varying the Settlement Agreement to allow for the Transfer of the land...to the Estate of [Larry Bracken] ...from the Estate of [Tom Bracken].
- f. In the alternative to (d) and (e) above, an Order varying the Settlement Agreement to allow for the Transfer of two thirds of the Land, some 148 statute acres, to the Estate of [Larry Bracken] from the Estate of [Tom Bracken].

68. These last orders are simply beyond the reach of any court. It was not explained, in either the written or oral submissions of the Brackens, how the court could vary or set aside a settlement agreement on the application of a non party to that agreement. In addition, the proposed changes to

the settlement agreement fly in the face of Ms. Bracken's subsequent acknowledgement that she has no objection to the transfer of one third of the value of the lands to Tom's estate and that she has no objection to her children receiving "a pro rata share of the proceeds of sale of those lands..." (paragraph 4 of her second affidavit).

69. These orders are incapable of being made and are not, in truth, being sought by Ms. Bracken. There is an element of coat trailing by Ms. Bracken, where she avers at paragraph 16 of her second affidavit (on the basis of tax advice which is not exhibited by her) that there would be an advantage the lands to be transferred in specie to Colm Bracken and (later) to her children. An identical "solution" is put forward by the Brackens' counsel in their written submissions. The fact that there is no problem for which this "solution" is required should not be overlooked.

70. Ultimately the position of the plaintiffs is that they want the court to order exactly what Colm Bracken has (by his bullying methods) been attempting to obtain. The fact that what is being sought is at odds with Ms. Bracken's own evidence, has not prevented her counsel from agitating for such an order.

CONCLUSION

71. The plaintiffs' application for interlocutory relief is refused because;
- a. The court was seriously and deliberately misled at the ex parte stage. This was so extreme that the plaintiffs should not be granted further equitable relief at the interlocutory stage.
 - b. The plaintiffs have not made out a serious issue to be tried.

- c. The motivation of the plaintiffs in bringing these proceedings, and in seeking interlocutory orders, is completely wrongheaded. There is no need for an interlocutory order to defend the interests of the plaintiff minors, and no purpose in making such an order.
- d. The interlocutory orders as sought would frustrate the implementation of a court approved settlement. They would therefore constitute a collateral attack on an earlier Order to which the minor plaintiffs did not object, despite having an opportunity to do so.

72. The proceedings against the second defendant, Ms. Claffey, will be struck out as it is bound to fail and therefore constitutes an abuse of process.