

Neutral Citation No: [2022] NICH 9

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*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 16/038039

Delivered: 10/06/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

FIONA MARY McKEE

Plaintiff

and

SAMUEL FORBES CARSON

First-named Defendant

and

SAMUEL JAMES McKEE

Second-named Defendant

Mr Power QC (Hunt, Solicitors) for the Plaintiff
Mr Shaw QC with Ms Ellis BL (McAtamney, Solicitors) for the First-named Defendant
Mr McCollum QC with Mr Lavery BL (Anderson Agnew & Co, solicitors) for the
Second-named Defendant

McBRIDE J

Introduction

[1] The plaintiff asks the court to set aside a transfer of lands on the grounds that the transfer was procured by forgery, misrepresentation, undue influence, or otherwise under the doctrine of *non est factum* and/or on the grounds that it was an unconscionable bargain. The lands comprise 19 acres of land situate at Ballee Road West, Ballymena, Co Antrim and consist of both registered lands, being contained within Folio 8693 Co Antrim, and unregistered lands (“the disputed lands”).

Representation

[2] The plaintiff was represented by Mr Power QC. The first-named defendant, Mr Carson, was represented by Mr Shaw QC and Ms Ellis of counsel and the second-named defendant, Mr McKee, was represented by Mr McCollum QC and Mr Lavery of counsel.

Background

[3] The case proceeded by way of a contested hearing and the court heard evidence from a number of witnesses. As appears from the oral evidence a number of important factual matters are in dispute; nonetheless, the following factual matters were not in dispute.

[4] The plaintiff, Mrs McKee, is married to the second-named defendant. The first-named defendant, Mr Carson is a neighbouring farmer. Mrs McKee was born on 23 March 1964 in Dublin. She had a difficult childhood and was placed in care. Whilst in care she suffered physical and sexual abuse and later made a claim against the Catholic Church and received £40,000 compensation. She used her compensation monies to purchase the Northern Ireland Housing Executive home in which she lived. She later sold this home and used the proceeds of sale to purchase a property in her sole name at Lisles Hill Road, Broughshane, Co Antrim.

[5] After the plaintiff left care she lived with her uncle who taught her how to work with horses. She subsequently met Mr Gowdy and they moved to live in Northern Ireland. She has two children by Mr Gowdy. Difficulties developed in her relationship with Mr Gowdy and they separated.

[6] In the early 2000s she met Mr McKee and they married in 2003. At that time she had her own cleaning business. Mr McKee was a farmer who owned a substantial land holding of approximately 200 acres. He had inherited these lands from his father and two uncles.

[7] After they married Mr McKee placed the lands he owned in joint names with Mrs McKee. Initially the parties lived at Eskylane Road, Ballymena but they later moved to live in the new house they had constructed at 26 Ballee Road West, Ballymena which adjoins the disputed lands. During the marriage most of the farm lands were sold as building sites. The substantial profits yielded from these sales were used by the McKees to fund a very lavish lifestyle with monies being spent on luxury cars and holidays.

[8] By 2004 the McKees had sold off all their lands save the disputed lands. They also continued to own their matrimonial home at 26 Ballee Road West.

[9] There were tensions in the marriage mostly due to Mr McKee's relationship with Mrs McKee's son. This led to her son leaving the matrimonial home.

[10] In and around 2013 Mrs McKee decided to set up a riding school at the Ballee Road West. She applied for a licence on 15 December 2013 and a licence was granted on 27 April 2015. Around this time Mr McKee carried out various works to the property to facilitate the running of a riding school including building stables, a walking area and an arena.

[11] The riding school was called Hillview Riding School and it operated from in and around 2014. Mrs McKee advertised on Facebook and offered riding lessons, pony treks, hacks, children's riding lessons and full livery services. The horses used the adjoining lands for grazing and Mrs McKee gave riding lessons. She also employed a stable hand to assist with the other works associated with the running of the riding school.

[12] On 15 April 2015 Mr Carson attended the McKee's home with documentation and a transaction took place at the kitchen table. The circumstances of this transaction are at the heart of the dispute between the parties.

[13] After the execution of the documentation various payments were made by Mr Carson; he paid a cheque to HM Revenue and Customs ("HMRC") on 16 April in the sum of £43,645.30 and in addition gave two cheques to the McKees, one for £1,000 and one for £2,000. Subsequently, he paid £10,000 by cheque dated 12 June 2015 and paid £5,000 by cheque dated 18 July 2015.

[14] In July 2015 the horses belonging to the riding school were sold by Mr McKee and Mr Carson assisted with the transport of the horses. The plaintiff denies knowledge of the sale of the horses.

[15] The plaintiff moved out of the matrimonial home in July to live with her daughter. On 4 August 2015 she obtained a non-molestation order against Mr McKee.

[16] In August 2015 Mr Carson took physical possession of the disputed lands and deposited stones on the laneway thereby preventing access to the riding school.

[17] Thereafter, correspondence passed between the parties' solicitors and a writ was issued on 28 April 2016.

The Plaintiff's Case

[18] In the amended statement of claim dated 6 October 2021 the plaintiff seeks to have the transfer of the disputed lands set aside on the following grounds:

- (a) The conveyancing documents were forged.
- (b) The doctrine of *non est factum* applies.

- (c) The transfer was procured by misrepresentation.
- (d) The bargain was an unconscionable bargain.
- (e) The transaction is the product of undue influence which arose as a consequence of the plaintiff's poor health, marital difficulties and grave financial circumstances.

[19] In summary the plaintiff's case is that she never intended or agreed to sell the disputed lands to Mr Carson. She believed that Mr Carson was giving her and her husband a loan so that they could pay an HMRC debt. She avers that she was unaware that she was divesting herself of the disputed lands and as it later transpired the riding school business also. At the time of the transfer she was under financial pressure as she had just been served with a statutory demand by HMRC and was threatened with bankruptcy. She further averred that she was suffering from poor physical health and was admitted to hospital in February 2015. On 26 July 2015 she was admitted to RVH following a heart attack and had six stents inserted. At this time she stated she was experiencing marital problems and had moved out of the matrimonial home on 28/29 July. Subsequently, she obtained a non-molestation order against her husband on 4 August 2015. She averred that she was a vulnerable person who entered into the transaction without the benefit of legal advice. She denied that she signed the relevant transfer documentation although she accepted she signed one piece of paper which had blank boxes on it. She subsequently averred that at her husband's request she signed another blank piece of paper which he then gave to Mr Carson. She made the case that the lands were sold at a significant undervalue. In all the circumstances she seeks to have the transfer set aside on the grounds set out in the amended statement of claim.

[20] The defendant's case is that the McKees agreed to sell the lands to him in the sum of £80,000. He instructed his solicitors to prepare the necessary transfer documents. He brought these documents to the McKees' home where they signed the relevant documents of their own free will in the presence of two independent witnesses. Mr Carson denied any misrepresentation or undue influence or unconscionability. He accepted the sale price of £80,000 was "keen" but he averred that this reflected the fact the McKees received an immediate payment of the HMRC debt and did so with discretion.

Issues in dispute

[21] As appears from the pleadings the following issues arise for determination:

- (i) Did the defendant misrepresent the nature, content and purpose of the documentation produced for execution on 15 April 2015 such that the plaintiff should not be bound by the terms of the contract ("the misrepresentation issue").

- (ii) Does the doctrine of *non est factum* apply (“*non est factum* issue”)?
- (iii) Were the circumstances of the transaction such that the plaintiff was subject to undue influence by the defendant? In this regard the court will determine whether the plaintiff was vulnerable, was under economic duress and/or had the benefit of legal advice (“undue influence issues”).
- (iv) Was the agreement an unconscionable bargain, having regard to its terms and, in particular, having regard to whether it was a sale at an undervalue, having regard to the circumstances in which it was entered into which included the plaintiff’s health, lack of legal advice, economic and marital pressures and other vulnerabilities?

[22] The claim of forgery was abandoned during the opening of the plaintiff’s case.

[23] The parties agreed that the determination of the issues in dispute depended upon the court’s assessment of the parties’ credibility in respect of the various factual matters in dispute.

Evidence

[24] The court heard evidence from Mrs McKee, Mr Carson, Mr Scozenka, Mr McKenna, Ms Baxter, Mr Ballantine (Solicitor) and valuation evidence from Mr Lynn and Mr McAlister. Mr McKee did not give evidence.

[25] At the end of the plaintiff’s case Mr McKee made an application of no case to answer. This application was dismissed and I will explain the reasons for this later in this judgment.

Evidence of Mrs McKee

[26] Mrs McKee gave evidence of her adverse life experiences especially during her childhood. This led to her having limited education. She outlined that she depended on her husband in respect of all financial matters. Throughout the marriage he dealt with all household bills, banking and accountancy matters.

[27] She recalled a woman attended her home and served her with a statutory demand from the HMRC. She could not recall the exact date when this was done but believed that it was a number of days prior to 15 April 2015. She discussed the demand with her husband who told her not to worry as he would sort it out.

[28] The next day her husband advised that Mr Carson, a neighbour was going to lend them money to pay the HMRC debt. The following day Mr Carson called to their home and said words to the effect “I hear you are having a bit of bother. I can

help. I wouldn't like to see you and Mr McKee losing the riding school." He then offered to lend the money to them to pay the HMRC debt. He called the next day and at that stage Mrs McKee said she agreed to accept the offer as she felt she had no alternative. She was adamant that she accepted the monies on the basis that it was a loan and not a sale of the lands and she made this clear to Mr Carson. She recalled they then discussed repayment and there was a conversation that the monies could be repaid either by Mrs McKee selling her house at Lisles Hill or by Mr McKee selling another site.

[29] On 15 April 2015 she recalled Mr Carson arriving at her home and he produced a cheque made out to HMRC in respect of the full amount due and owing. She again emphasised to him that she was accepting the money on the basis it was a loan and he replied; "yes, by right hand of God I don't want the farm. I am only here to help you."

[30] Mr Carson then produced two pieces of paper. She recalled signing one piece of paper which had blank boxes on it. She then recalled two witnesses were brought into the home by Mr Carson and they each signed the document. Mr Carson then advised her he was going to get his solicitor to get papers drawn up. She recalled that the whole transaction at the kitchen table took only a few minutes and that she did not have the benefit of any legal advice.

[31] Mrs McKee denied any discussion about the sale of the riding business and denied that she knew the horses were being sold. She said she only found out about this after the sale had taken place. She denied receiving any monies for the sale of the horse equipment.

Evidence of Mr Carson

[32] Mr Carson gave evidence that the McKees had debt problems. In January 2015 he said that they agreed to sell a two acre field to him for £10,000. He paid £10,000 in February 2015 to Mr McKee. After the conversation about the sale of one field discussions then moved on to the sale of the disputed lands. He mentioned a price of £80,000 and the McKees agreed. He indicated that he would continue to allow them to graze the lands so that they could keep the riding school going.

[33] He said the first time he heard about the HMRC debt was in March 2015. He then went to James Ballantine & Sons, Solicitors to have the transfer documents prepared. After he collected the documents from Ballantines he took them to the McKees' home. A discussion took place at the kitchen table and after this the documents prepared by Mr S Ballentine were signed by the McKees in the presence of two independent witnesses. After the transfer documents were signed he gave a cheque for £2,000 to Mr McKee and a cheque for £1,000 to Mrs McKee. He then paid the debt due by the McKees directly to HMRC by cheque. Thereafter, he paid the balance due by various cheque and cash payments to the McKees. When challenged that these payments did not total £80,000 he said that the balance was paid by

payment in kind namely permitting the McKees to have rent free use of the lands for grazing.

[34] Mr Carson denied that he ever represented to the McKees that the monies were being advanced by way of a loan. He said he was a 'poor farmer' and was not in a position to give loans.

[35] After the horses were sold he then deposited stones on the laneway thereby blocking access to the riding school. He said he did so at this stage as the horses had all been sold and the riding school was no longer operating. Mr and Mrs McKee did not object to his actions because in his view they both knew they had agreed to sell the lands to him.

[36] Mr Carson denied he exerted any undue influence over Mrs McKee. He said that she was "the boss" and denied that her ill health in any way prevented her working. He denied the sale was at an undervalue although he accepted that it was a 'keen price' but indicated that the McKees got immediate payment of their debt with discretion.

Key factual issues in dispute

[37] As appears from the evidence of the plaintiff and the defendant the following key factual issues are in dispute:

- (i) Whether Mrs McKee signed all the transfer documents in the presence of witnesses.
- (ii) Whether she did so without independent legal advice.
- (iii) Whether Mr Carson represented to Mrs McKee that the monies were advanced by way of a loan as opposed to a sale and in particular whether there were any discussions about repayment.
- (iv) Whether the disputed lands were sold at an undervalue.
- (v) The nature of Mrs McKee's circumstances at the time of the transaction in respect of her health, marriage and finances.

[38] The court faces a classic credibility conflict between the evidence of Mrs McKee and Mr Carson. In *Thornton v NIHE* [2010] NIQB 4 Gillen J provided guidance on how a court should approach considerations of credibility. He said at paragraph 12:

"[12] Credibility of a witness embraces not only the concept of his truthfulness i.e. whether the evidence of the witness is to be believed but also the objective reliability

of the witness i.e. his ability to observe or remember facts and events about which the witness is giving evidence.”

At para 13 Gillen J set out several factors to which the court must pay attention which include:

- “(i) The inherent probability or improbability of representations of facts;
- (ii) The presence of independent evidence tending to corroborate or undermine any given statement of fact;
- (iii) The presence of contemporaneous records;
- (iv) The demeanour of the witness e.g. does he equivocate in cross examination;
- (v) The frailty of the population at large in accurately recollecting and describing events in the distant past;
- (vi) Whether the witness has a motive for misleading the court.”

[39] In resolving the credibility conflict it is necessary therefore to consider not only the evidence of the parties and their demeanour but also the contemporaneous records and the evidence of the independent witnesses.

Evidence of Independent Witnesses

Mr Scozenka

[40] Mr Scozenka gave evidence that he attended at the McKee’s home on 15 April 2015. He recalled that there were a number of documents on the kitchen table. Although he did not read the documents in detail he recalled that they did refer to a sale of lands. He also recollected the documents were not blank although he accepted that some details including his printed name and address were inserted after the documents were signed by him. He confirmed that the documents were signed by both Mr and Mrs McKee in his presence.

Mr McKenna

[41] Mr McKenna gave similar evidence to Mr Scozenka. Both he and Mr Scozenka recalled that they arrived at McKee’s house. Mr Carson went into the house and

they both waited outside for approximately 5-15 minutes before Mr Carson then called them into the house to witness the signatures.

Donna Baxter

[42] Ms Baxter was an employee of CGM and gave evidence that the invoices produced which were apparently from CGM by the plaintiff were not genuine.

Mr Ballantine, Solicitor

[43] Mr Ballantine gave evidence that he was instructed by Mr Carson in early Spring 2015. He was unsure of the exact date when he was given instructions but thought it was early March as this was the date when he downloaded the map for the transfer. Mr Carson instructed him that his neighbours, the McKees, were in financial difficulties and that he wanted to assist them by paying the debt they owed to HMRC. Mr Carson advised that he was going to buy their land and that money had already exchanged hands. He asked Mr Ballantine to draft the necessary transfer documentation. Thereafter, Mr Ballantine drafted the documents which were collected by Mr Carson. At that stage Mr Ballantine understood that solicitors were acting for the McKees but Mr Carson said that he would pass the documents on. Mr Ballantine accepted that certain information in the transfer documents was not filled in by him including the purchase price. Mr Ballantine also gave evidence that Mrs McKee attended his office and spoke to him on two occasions. Mr Ballantine kept an attendance note of the first visit, which was undated but he recalled the visit took place after August 2015. In the note he recorded that Mrs McKee attended with her son and Mrs McKee advised Mr Ballantine that under the arrangement she had with Mr Carson it was agreed that she would be entitled to buy back the lands. On the second occasion when she attended with Mr Ballantine he recorded that she advised him that it was only meant to be "a loan and not a conveyance."

My assessment of the evidence of the independent witnesses

[44] I am satisfied that all of these witnesses gave their evidence in an honest and straightforward manner. On the basis of this evidence I find that the transfer documents for the sale of the land were prepared by Mr Ballantine in advance of the meeting in April 2015. I am further satisfied that the documents were not blank when they were signed although certain details were inserted later. I am further satisfied that the documents were all signed by Mrs McKee in the presence of two independent witnesses. I therefore do not accept her evidence that she only signed one blank document when witnesses were not present. I am further satisfied that Mr Carson was in the McKees' home for a period of between 5-15 minutes before he then brought in Mr Scozenka and Mr McKenna to witness the signing of the transfer documents. I am also satisfied that the transfer documents were not sent to a solicitor acting for the McKees because Mr Carson advised Mr Ballantine that he

would pass on the transfer documents. I am therefore satisfied that the McKees did not have the benefit of independent legal advice in respect of this transaction.

Valuation Evidence

[45] The court heard valuation evidence from Mr Lynn on behalf of Mrs McKee and from McAlister on behalf of Mr Carson. Whilst there were certain deficiencies in the evidence of both valuers I accept that both are experienced in valuing agricultural land holdings in this area. Mr Lynn placed a total valuation on the lands at £165,000 and Mr McAllister valued them at £110,000. Both of these valuations reflected the value of the disputed lands in 2015.

[46] Mr McAlister's evaluation was predicated on the lands having "no development potential." In fact, there was full planning permission, albeit lapsed for development on the property. Mr McAlister in cross-examination stated that this would not be a valuable site for a number of reasons and disputed the value for a site placed on it by Mr Lynn.

[47] I am satisfied that any valuation of the disputed lands should include a figure for development potential. I am satisfied that Mr McAlister did not include a figure for development potential in his valuation. Further, I am satisfied that Mr Carson stood in a position of 'special purchaser' as he owned the neighbouring land and all the experts agreed that a 'special purchaser' would yield an increase of approximately 10% on the value of the lands. Both valuers also accepted that in a 'fire sale' situation the value would be decreased by between 10% and 20%.

[48] Even on Mr McAlister's valuation of £110,000 a sale of the lands at £80,000 would be at a significant undervalue. When, however, one includes a figure for development potential together with a figure for a 'special purchaser' and allowing for a 'fire sale' discount, I am satisfied that the true value of the disputed lands is in or around £160,000. Consequently, I am satisfied that a sale of the lands at £80,000 would represent a sale at a very significant undervalue.

The independent/contemporaneous records

[49] During cross-examination Mr Shaw QC produced photographs showing Mrs McKee on the day of the transaction with Mr McKenna looking at horses in the yard. Other photographs were produced showing her climbing a gate and riding a horse. Mrs McKee denied that she was the person in the photographs. I am satisfied that Mrs McKee was the person in these photographs. The photographs, however, were put to her on the basis that they showed that she agreed to sell all the horses and was essentially closing the riding school and further on the basis that she was able to climb the gate and mount the horse and therefore was not suffering ill health.

[50] I am satisfied that she denied she was the person in the photographs because she believed that admitting same would indicate that she agreed to sell her horses

and was not suffering ill-health. I am not satisfied that the photographs establish in any way that she was agreeable to the sale of her horses. In fact, the riding school had a large number of horses belonging to it and the evidence indicates that it was Mr McKee who sold them when in the company of Mr Carson and this took place while Mrs McKee was recovering from surgery and was living away from the disputed lands. I am therefore satisfied she did not know about the sale of the horses at the relevant time. I further am satisfied that the photographs do not prove that she was a robust and fit person. The medical records indicate that she had suffered a heart attack and had had six stents inserted. I am satisfied that the medical records show clearly that she was a person who was suffering from very significant ill health at the relevant time.

Defence filed by Mr Carson

[51] On 8 September 2017, whilst acting as a litigant in person, Mr Carson filed a defence to the Statement of Claim. This stated as follows:

“My offer was, to buy the farm in total, for the consideration of £80,000. I agreed that Mr and Mrs McKee could continue to use the said lands and yard, and that I would not require payment for lands they had rented from me previously, nor would I demand any other monies outstanding. Their usage of the lands was conditional on their continued development of a riding school. ... Whilst discussions were proceeding over many weeks it was suggested that if, Mr or Mrs McKee should have a winning lottery ticket, they might like to buy back their farm. I made no objection to this. ... Mr and Mrs McKee continued to occupy the said lands until Mrs McKee went to reside in her own house some miles away. Mr McKee sold his livestock and I took possession of the lands. I excluded Mr McKee from the lands when I discovered, the riding school had no insurance suitable for such an establishment. ... The concept of me lending money to anyone is preposterous and the concept of my lending money, to a couple who had squandered Mr McKee’s massive inheritance is unthinkable. I am a farmer and not a money lender.”

[52] As appears from the transfer documentations none of the conditions in respect of the sale which are set out in the defence appear on that documentation. The lands were transferred without condition. There is therefore a significant discrepancy between the averments in the defence and the actual transfer documentation.

Inter-parte correspondence

[53] The first correspondence sent by Mrs McKee's solicitors to Mr Carson is dated 26 October 2015. In this letter they request a copy of the documentation which was signed by their client together with the request that Mr Carson confirm his understanding of the arrangements between the parties. By letter dated 20 November 2015 and 2 December 2015 her solicitors wrote to James Ballantine & Son, Solicitors, advising that their instructions were that Mr Carson offered to make a loan to Mrs McKee relating to the land. By correspondence dated 23 December 2015 to Mr McKee's solicitors her solicitors stated that their instructions were that "in respect of the agreement, Carson at all times indicated to our client that this was a temporary agreement to facilitate the parties' financial embarrassment at the time and that the property would be returned once the loan was repaid."

[54] The final relevant piece of correspondence is an email dated 3 March 2016 from Mrs McKee's solicitors to Worthington Solicitors who had acted in the sale of sites which stated "we note you are holding funds to make available to the defendant, Carson, in order to set aside the alleged transfers."

[55] Mr Shaw on behalf of Mr Carson submitted that the correspondence indicated that Mrs McKee did not advance the case that Mr Carson had made a loan. Rather in the correspondence she repeatedly accepted that there had been a transfer of the disputed lands. He further indicated that there had been significant delay by her in seeking to have Mr Carson removed from the lands. Although he entered into occupation in August 2015 no solicitor's letter was sent on behalf of Mrs McKee until October 2015 and it was not until December that she made the case that Mr Carson had no entitlement to be on the lands. Such delay he submitted evidenced that she initially accepted the lands were transferred to Mr Carson but later changed her mind and decided to bring the present action.

[56] I do not accept these submissions for a number of reasons. First, I am satisfied that the correspondence from the plaintiff's solicitors commencing in November 2015 refers to a loan and this assertion is repeated in the correspondence dated 23 December 2015. I am therefore satisfied Mrs McKee instructed her solicitors from the outset that Mr Carson advanced the monies to her by way of a loan. There was some delay by Mrs McKee in issuing correspondence about Mr Carson's actions in blocking the laneway but I am satisfied that she lacked knowledge of what was going on at the property because she was residing away from the property. In addition she was suffering ill health and had marital difficulties and I am satisfied she needed time to assess the situation before she could instruct solicitors.

[57] I accept there appears to be some confusion in the solicitors' correspondence as there are references to a sale/transfer of the disputed lands. I am satisfied that the correspondence refers to a transfer of the disputed lands because this is what

actually happened. The correspondence however also sets out that Mrs McKee believed the arrangement with Mr Carson was a loan and not a sale.

[58] I therefore find that the correspondence supports the view that Mr Carson advanced a loan albeit a loan secured on the disputed lands. I am further satisfied that the parties understood that the loan was secured on the lands and that is why Mrs McKee's solicitors sent the email dated 3 March 2016 to show that funds were now available to set aside the transfer of the lands.

Demeanour of the parties

[59] I consider that Mrs McKee has strength of character and has proved to be a survivor. She is not however an astute business woman. She lacks educational and financial expertise and throughout her marriage was dependent on her husband to attend to all financial matters. During cross-examination she was unable to understand much of what was being put to her concerning the statutory demand by Mr Shaw and I consider this demonstrated her lack of financial "know how."

[60] Although I do not accept all of her evidence I still consider her to be an honest witness. For example she denied she was the person in the photographs shown to her by Mr Shaw during cross-examination and I have found that she was in fact the person in the photographs. I am satisfied however her denial arose not from dishonesty but because she thought she had to deny she was the person in the photographs so that the court could understand she was suffering ill health and had not agreed to sell all the horses.

[61] Further, I do not accept her evidence that she only signed a piece of paper which had blank boxes on it. In light of the evidence of the independent witnesses I am satisfied she signed all the relevant transfer documentation in the presence of two witnesses. I further find the documents referred to sale of the lands, albeit all the details may not have been completed before signing. I consider that Mrs McKee gave inaccurate evidence about signing the transfer documentation for a number of reasons. The transaction took place some time ago. It took place at the kitchen table in an informal setting and at a time when she thought she was going to be made bankrupt, while she was suffering ill-health and when she was under significant pressure. I therefore accept that her memory was impaired and her inaccurate evidence arose not as a result of dishonestly but unreliability.

[62] I also do not accept her evidence that Mr Ballantine, Solicitor, was a liar when he said she attended his office with her son. I accept his evidence as recorded in his attendance notes that she did attend at his office with her son. Nothing, however, turns on this issue which is peripheral and I consider that Mrs McKee was simply mistaken about this matter.

[63] Mr Shaw also submitted Mrs McKee was not credible as she gave conflicting evidence regarding the date of service of the statutory demand and because she had

produced invoices which were not genuine as averred to by Ms Baxter, an independent witness.

[64] I am satisfied the invoices were not genuine but I am satisfied that they were given to her by Mr McKee. Mr McKee failed to give any evidence to refute her assertion to this effect. I am also satisfied that the statutory demand was served on her sometime in April 2015, probably a few days before the transfer documents were signed. This is because Mr Carson gave evidence that Mrs McKee held up the statutory demand and waved it about when he met her a few days before the transfer documents were signed and I therefore accept her evidence that the statutory demand was served shortly before the transfer documents were signed. Mrs McKee also gave evidence that all her solicitors were mistaken and Mr Shaw asked the court to draw an adverse inference from this. I am satisfied, however, that Mrs McKee was correct to say that her solicitors were mistaken about the nature of the transaction. It is clear from the correspondence that they did make mistakes about the transaction and, in particular, some of the correspondence indicates that the matrimonial home was part of the transaction when it was not.

[65] Having heard Mr Carson give evidence and having carefully observed his demeanour especially under cross-examination; having witnessed that he gave contradictory answers in respect of a number of issues and having noted that much of his evidence did not accord with the documentary evidence before the court I consider that his evidence is not credible. I do not accept that he was an honest, albeit mistaken witness. In many instances I observed that he simply made up the evidence as he went along. For example, when pressed in cross-examination that the documentation showed that he had not paid the full consideration of £80,000 for the disputed lands to the McKees he changed his evidence and then stated that the balance was paid in cash. When it was put to him that the inclusion of the cash payments did not amount to £80,000 he then said the balance was paid by way of rent free use of the disputed lands for grazing. Mr Carson then described himself as a foolish man as he did not keep an accurate record of payments. I am satisfied that Mr Carson is a very astute businessman who owns a substantial farm business, who has several rental properties and is knowledgeable about tax matters including CGT rollover relief. I therefore do not accept that the lack of records arose because he is a foolish man as he averred. I am satisfied that there is a discrepancy between what he said was the agreed consideration for sale of the disputed lands and the actual amount of consideration paid by Mr Carson. When he was later challenged in cross examination that according to the evidence of Mr Scozenka and Mr McKenna the McKees only had a very limited period of about 5-15 minutes to read the transfer documents Mr Carson changed his evidence about when he gave the documents to the McKees. Initially he gave evidence that he gave the transfer documents to the McKees on the day of the transfer. When confronted with the evidence of the two independent witnesses he then changed his evidence to say that he had given the transfer documents to the McKees the day before. His evidence in respect of this issue was contradictory and did not accord with the evidence of the independent witnesses. I therefore do not accept his evidence in this regard and I am satisfied the

McKees only had a very limited time to read the large bundle of transfer documents before they signed them.

[66] Further, Mr Carson told the court he did not have a joint account with his wife. Later evidence emerged from the copy cheques provided to the court that the cheques were drawn on a joint account with his wife. When this was pointed out to him by the court he then gave a long rambling incomprehensible explanation for this. I am fully satisfied that Mr Carson was less than honest with the court in many respects. I have no doubt that Mr Carson was seeking to take advantage of Mrs McKee. He knew that she was a vulnerable person and he did not give her adequate time to read and comprehend the documents before she had to sign them. He knew that she was under financial pressure and threatened with bankruptcy and was suffering ill health. He deliberately rushed the transaction knowing that she was of limited educational attainment and therefore was unlikely to notice the documents effected a transfer of the disputed lands. Mr Carson held Mrs McKee and her husband in contempt because they had as he put it “squandered their inheritance.” I am therefore satisfied that he never sought to help them out but rather sought to take advantage of Mrs McKee’s difficulties for his own gain.

My conclusions on the disputed facts

[67] On the basis of the evidence I make the following findings:

- (i) For the reasons set out above I am satisfied that the documents presented to the McKees was transfer documents which effected a transfer of the disputed lands by the McKees to Mr Carson. The transfer documents were not blank as alleged by Mrs McKee but were largely completed although some details of price were omitted and filled in later. I further find that the transfer documents were signed by Mrs McKee and her signature was witnessed by two independent witnesses.
- (ii) I am satisfied that the lands were sold at a significant undervalue for the reasons set out above.
- (iii) I am satisfied that Mr Carson represented to Mrs McKee that he was making a loan and was not purchasing the disputed lands and I further find there was a discussion about repayment. I do so for the following reasons:
 - (a) In his defence which was drafted by him whilst acting as a personal litigant he set out the terms of the agreement he entered into with the McKees. Under these terms the monies were advanced to the McKees and the disputed lands were transferred to Mr Carson but the McKees were entitled to continue to use the lands rent free and were entitled to have the lands transferred back to them when in funds. I am satisfied that this arrangement is not indicative of a sale/transfer but rather is indicative of a loan/mortgage arrangement. I am therefore satisfied that

this is the arrangement he represented to Mrs McKee. This, however, was a misrepresentation as none of the conditions set out in his defence were contained within the transfer documents. Mr Carson obtained a straight transfer of the lands and accordingly he obtained more than he had bargained for with the McKees according to his own pleadings.

- (b) Secondly, I find that Mr Carson did represent to the McKees he was offering to help them out as a good neighbour at their time of need and therefore represented he was advancing a loan and was not wanting the farm. Mrs McKee's evidence in this regard is corroborated by Mr Ballantine solicitor who also said Mr Carson told him he wanted to assist neighbours. I am satisfied he represented to Mrs McKee that he was advancing a loan as he was a good neighbour when in fact he knew the disputed lands were being transferred without condition into his name. Mr Carson therefore was not acting as a good Samaritan but rather took advantage of Mrs McKee's position by transferring the disputed lands into his name at a significant undervalue.
- (c) I further accept that the parties did discuss repayment. Mrs McKee's evidence that there was a discussion about selling her house or a site to pay back the loan is corroborated by the reference in Mr Carson's defence about having the lands transferred back if the McKees had a winning lottery ticket and is further corroborated by the email in which the McKees indicated they were now in funds to have the lands transferred back. The concept of repayment and redeeming the lands is all indicative of a loan or a mortgage rather than a straight transfer of lands.
- (iv) I am satisfied that Mrs McKee did not have the benefit of independent legal advice for the reasons set out earlier in this judgment.
- (v) I am further satisfied for reasons set out above that Mrs McKee was a vulnerable person who had limited educational attainment, was suffering ill health and was having marital difficulties at the time of the transaction

[68] I therefore find that Mr Carson represented to Mrs McKee that the monies were advanced by way of a loan. When the transfer documents were presented to her they recorded something different, namely a sale. She had no legal advice and limited time to read the documentation and to comprehend exactly what she was signing. Mrs McKee was not an educated woman and she lacked financial or legal expertise, she was in ill-health and under significant financial pressure at the time she signed the documents. I further find that Mr Carson knew the McKees were under financial pressure. He accepted he knew about her past history and her vulnerability and I find that rather than trying to assist the McKees he was seeking to "wipe their eyes" by promising a loan and then in reality having the lands transferred to him absolutely.

Relevant Legal Principles

[69] There was no dispute between the parties as to the relevant principles of law which were agreed as follows:

(a) *Non est factum*

The basic rule is that when a document is signed in the absence of fraud or misrepresentation the person signing it is bound and it is irrelevant whether they have read the document or not – see *L'Estrange v Graubart* [1934] 2 KB 394 at 403. The leading case dealing with the document *non est factum* is *Saunders v Anglia Building Society* [1973] All ER 961. In *Saunders* an elderly lady signed what she believed to be a Deed of Gift of her house to her nephew but which was in fact an assignment of sale to a third party who mortgaged the house to the defendants and kept the proceeds. Lord Reid at page 963 set out the nature of the plea as follows:

“The plea of *non est factum* obviously applies when the person sought to be held liable did not in fact sign the document. But at least since the sixteenth century it has also been held to apply in certain cases so as to enable a person who in fact signed a document to say that it is not his deed. Obviously, any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity. Originally this extension appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think that it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purpose of a particular document whether that be from defective education, illness or innate incapacity.”

[70] There must therefore be a radical difference between what the parties sign and what the signers thought they were signing. As Lord Reid observed at page 101(6):

“The essence of the plea *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different.”

[71] The degree of discrepancy between the document and the signers understanding is to be “fundamental, serious or very substantial.”

[72] The key elements for a successful plea of *non est factum* have been summarised by Chitty on Contracts at para 5.049 as follows:

- “(a) The belief of the signer that the person is signing a document of one character or effect whereas its character and effect were quite different.
- (b) The need for some sort of disability which gives rise to that state of mind.
- (c) A plea cannot be invoked by someone who does not take the trouble to find out at least the general effect of the document.”

Misrepresentation

[73] This tort was succinctly summarised in *AIC Limited v ITS Testing Services (UK) Limited* (“the Kriti Palm”) [2006] EWCA 1601 at para 398 by Buxton LJ as follows:

“The tort of deceit involves a perfectly general principle. Where a defendant makes a false representation, knowing it to be untrue, or being reckless as to whether it is true, intends that the claimant should act in reliance on it, then insofar as latter does so and suffers loss the defendant is liable for that loss.”

[74] Consequently, a party must show that there was a false statement which was made knowingly or recklessly; that the claimant acted in reliance on it, that they acted to their detriment and that the loss they claim is attributable to the making of the false representation.

Undue Influence

[75] This is an equitable doctrine which covers cases in which a transaction between two parties in a particular type of relationship may be set aside if the transaction is the result of an abuse of the relationship. Whether the transaction was brought about by the exercise of undue influence is a question of fact and in answering this question the court will carefully scrutinise the circumstances of the transaction.

Unconscionable Bargain

[76] In *Strydom v Vendside Limited* [2009] EWHC 2130 Blair J observed as follows:

“36. ... before the court will consider setting a contract aside as an unconscionable bargain, one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive. No single one of these factors is sufficient— all three elements must be proved, otherwise the enforceability of contracts is undermined ... Where all these requirements are met, the burden then passes to the other party to satisfy the court that the transaction was fair, just and reasonable ...”

[77] Generally a contract will not be set aside simply on the ground of mere impecuniosity or because an aggrieved party did not have independent legal advice. It is not enough to show a term is unreasonable, the terms must be unfair and unconscionable.

Consideration

[78] In their submissions all the parties accepted that the case was fact specific and turned on the court’s assessment of the credibility of the parties. The parties further accepted that if misrepresentation was established then the court did not need go on to consider the other grounds upon which the plaintiff’s claim was pleaded.

[79] In light of my findings of fact I find that Mr Carson did make a false representation to Mrs McKee, namely that he was advancing the monies by way of a loan. He knew this was untrue because he instructed his solicitor to draft documents of sale of the disputed lands. Secondly, I consider that he intended Mrs McKee to act in reliance on what he said because he knew that she had limited time within which to read the documentation at the kitchen table and therefore relied on what he had said to her at the earlier meetings. In all the circumstances it is clear that she suffered loss because the land was sold in the event at a very significant undervalue and she was unable to have the lands returned to her notwithstanding the fact she was in a position to repay the monies that were advanced. Having found the ground of misrepresentation is made out it is unnecessary for the court to consider the other grounds of claim pleaded by Mrs McKee.

Remedy

[80] Mrs McKee seeks rescission of the Deed of Conveyance and all related transfers and registrations of the disputed lands and consequential rectification of the Land Registry registrations. In the alternative she has a claim for damages. However, Mrs McKee’s focus has always been to get her lands back.

[81] I am satisfied that there should be equitable rescission in this case and that the parties should be placed back in their pre-contractual positions. What was in fact achieved by the impugned transaction however is not entirely clear. There is no certainty about the price and what monies were actually paid. There is no certainty about the terms of the buy back and for this reason the parties agreed that there should be further submissions before the court in respect of remedy. Accordingly, I invite submissions from the parties in respect of the remedy the court should give in light of its findings of fact.

[82] As referred to earlier in this judgment the second-named defendant applied to the court to be released from the proceedings after the close of the plaintiff's case on the basis that he had no case to answer. The court refused this application. The court was satisfied that the plaintiff had established a case to answer on all issues pleaded. The relief sought by the plaintiff was rescission of the transfer to which Mr McKee was a party. Mr McKee had refused to be a joint plaintiff and in these circumstances Mrs McKee joined him as a second defendant. The court considered that this was entirely appropriate as he needed to be a party to the proceedings because he would be an interested party in respect of the relief claimed and he also needed to be involved in any accounting exercise required if equitable rescission was granted. The second-named defendant indicated that he was consenting to the relief sought. Accordingly, the court decided he needed to be a party so he could make submissions in respect of the appropriate relief to be granted and to set out his position in relation to the accounting exercise.

Costs

[83] The court will invite submissions after the remedies' hearing.