THE HIGH COURT

[2021] IEHC 383

[2018 No. 449 SP]

IN THE MATTER OF THE ESTATE OF J.J., DECEASED

AND

IN THE MATTER OF SECTION 117 OF THE SUCCESSION ACT, 1965

BETWEEN

E.S.L. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND A.L.)

PLAINTIFF

AND

J.H.

DEFENDANT

AND

P.J. AND A.D.

NOTICE PARTIES

JUDGMENT of Mr. Justice Twomey delivered on the 3rd day of June, 2021

INTRODUCTION

1. Should an Irish court prevent the transfer of the assets of the ancillary administration of a deceased's estate (in Ireland) to the principal administration of his estate (in England), where he had lived and worked? That is the question for consideration in this case. The order is being sought on the grounds that the creditors of the deceased who are based in England would be statute barred under Irish law if the court permits the Irish assets to be administered in Ireland, but those creditors are not statute barred under English law from claiming against those assets if the estate is administered in England. Accordingly, the effect of the court order would be to prefer the beneficiaries of the deceased's estate over the creditors of his estate.

2. This issue has not previously been addressed by the Irish courts and it arises in circumstances where the substantive proceedings involve a claim by the plaintiff, the deceased's daughter, pursuant to s. 117 of the Succession Act, 1965 for proper provision to be made for her from the deceased's estate in Ireland.

3. In seeking the order preventing the transfer of the assets to the principal administration in England, this Court is being asked to follow the decision of the English Court of Appeal in *Re Lorillard* [1922] 2 Ch. 638. In that case, there was a refusal by an English court to transfer the assets from an ancillary administration (in England) to a principal administration (in America), where the debts of the deceased were not statute-barred in America, but they were statute barred in England.

4. For the reasons set out below, this Court declines to follow *Re Lorillard* and this Court refuses to make an order preventing the transfer of the Irish assets to England, which if granted would be to the detriment of those creditors in England. It is noted hereunder that the effect of the order sought would be to facilitate a form of legal arbitrage and forum shopping, whereby the testator and his beneficiaries preserve wealth in their family to the detriment of creditors by taking advantage of the differences in the legal protection for creditors in disparate jurisdictions.

SUMMARY

5. This case involves a testator (J) who died domiciled in England in May 2017 at the age of 56 having executed two wills. The first will executed by J dealt with his property in Ireland and his second will disposed of J's property in England (for ease of reference, the wills are referenced herein as the "Irish will" and the "English will", respectively). As J was domiciled in England at the time of his death, the English administration of his estate is the principal administration and the Irish administration of his estate is the ancillary administration.

6. J's estate in England appears to be insolvent and therefore his English creditors are unlikely to be fully paid if they are to have recourse only to his English assets. In contrast, J had few, if any, creditors in Ireland (since he lived and carried on business in England) and his Irish estate is estimated by the Irish administrator to be worth €1.14 million.

7. Even though the deceased's wife (P) from whom he was separated, and his daughter (E) (that he had with his former partner (A)) are also resident in England, both P and E are nonetheless seeking an order from the Irish courts to have his Irish property administered in Ireland under Irish law, rather than having the assets of the ancillary administration (in Ireland) sent to the principal administration (in England) where J was domiciled, as would usually happen in these situations.

8. P is the residuary legatee under J's Irish will and therefore stands to gain €1.14 million approx., subject to the claim of J's daughter, E, for proper provision (under s. 117 of the Succession Act, 1965) against J's estate, which claim P is resisting.

9. It seems clear that P and E, who live in England, are not seeking to have the Irish property in J's estate administered in Ireland for sentimental reasons but rather for financial reasons since the net effect of the court order they seek would be to deprive the creditors of J based in England (the "English creditors") of the right to claim against the €1.14 million in Irish assets, and thereby entitle P to this sum, subject to E's claim on those assets. Although P and E are provided for under the English will, as this part of the estate appears to be insolvent, they are unlikely to receive any benefit from J's estate out of the English assets.

10. The reason an order from this Court (preventing the transfer of Irish property to J's estate in the country in which he was domiciled) would have this beneficial financial effect for P and possibly for E (if her s. 117 claim were to be successful), is because of the different limitation periods which attach to claims by creditors against a deceased's estate in the two jurisdictions.

11. In England, the limitation period for such claims is six years, while in Ireland it is two years. In this case, two years have already passed since the date of J's death and so it is likely that the English creditors will be statute barred in any claim they might make against the Irish estate of J, if his estate was not to be administered as a whole, but was to be administered separately in Ireland and England.

12. However, if J's estate was to be administered as a whole in England, the place of the principal administration, the English creditors are unlikely to be statute barred in any claim they bring against J's estate in England, as six years have not passed since the date of J's death.

13. The likely net effect therefore of the court order which is sought by P and E is that P (and possibly E) would become entitled to the €1.14 million worth of Irish assets at the expense of the English creditors, who would not have their debts fully paid by J's estate.

14. There is no Irish authority on whether a court should refuse to transfer assets from an ancillary administration (in Ireland) to a foreign principal administration because the debts of the deceased in the principal administration (in this case, England) would be statute-barred in Ireland. However, P and E place particular reliance on the persuasive, but non-binding, authority of *Re Lorillard,* since in that case, England was the location of the ancillary administration and both the English High Court and Court of Appeal refused to transfer the assets of the Deceased to the principal administration in America since the debts of the Deceased's estate in America would have been statute barred under English law, even though they were not statute barred under American law.

DETAILED BACKGROUND

15. It is helpful for an understanding of the claims made by the respective parties, to set out some background facts. These can be summarised as follows:

- The deceased (J) died in late May 2017 and was domiciled in England at the time of his death. Although J was born in England, he spent a large portion of his childhood in Ireland having moved here at the age of six and he was an Irish citizen. He returned to England in his late teens and remained living there up until the time of his death at the age of 56. However, J maintained a connection with Ireland and owned a number of properties in the country.

- J died having made two wills. The first was executed in Ireland on 24th April, 1999. The second was executed in England on 23rd November, 2007.

- The Irish will relates only to J's Irish property. The English will relates to J's property not disposed of in the Irish will. Each will therefore relates to separate property. The English will also specifically states that it revokes '*my earlier Wills and Codicils except those that I have in the Republic of Ireland disposing of property of mine in that country'.*

- J was survived by his wife, P, who lives in England. J did not have any children with P. J had been separated from his wife for some time at the time of his death, although it is common case that he continued to provide financial support to her following their separation, including, *inter alia*, making mortgage payments on her behalf.

- J was also survived by his three children. The eldest of his children is J's daughter, E, who is the plaintiff in the substantive proceedings, in which she seeks a

declaration under s. 117 of the Succession Act, 1965 that J failed in his moral duty to make proper provision for her.

- E is now 16 years old. E and her mother (A), who is J's former partner, live in England.

- J also has two younger children, S, aged 12, and AL, aged 11, with a woman called SO, but these children and their mother are not party to these proceedings.

- J's Irish will provides that all property owned by him, both real and personal, in Ireland is to be left to his wife, P. The Irish will provides also for the amount of IR£50,000 to be left to J's parents. However, as J was predeceased by both of his parents, that money fell to the estate. The Irish will appointed the defendant herein ("Mr. Hally") as the sole executor of that will.

- J's English will provides for the creation of a life interest in the income produced by the investment of two separate sums of £1,000,000 for the benefit of his wife, P, and A (his former partner and E's mother), respectively. The English will also provides for the creation of a trust, under which J's assets are to be held for the benefit of his three children, E, S and AL. The English will appoints the firm of the second named notice party ("Mr. Adams") as executor and trustee. However, as noted hereunder, if the Irish assets are not transferred to the English administration, resulting in the Irish will and English will being administered separately, then it appears that the English estate alone is insolvent and none of these bequests will be made to P, A or indeed E, S or AL.

- A Grant of Probate was extracted in respect of the Irish will on 19th April, 2018 and granted to Mr. Hally.

- A grant *ad colligenda bona* was made to the English personal representative, Mr. Adams, on 22nd December, 2017. A full Grant of Probate was extracted in respect of the English will on 23rd January, 2020.

- The Irish estate is valued at an estimated €1.14 million. It does not appear that J had any creditors in Ireland.

- It is claimed that the English estate may now be insolvent. There are a number of creditors remaining in England who may not be paid unless they have recourse to the assets in the Irish estate and Mr. Adams therefore seeks for the assets from the Irish estate to be transferred to the English administration of J's estate in order to meet the debts in England.

- Mr. Hally claims that those debts are statute barred in Ireland due to the two-year limit imposed pursuant to the Statute of Limitations 1957 and s. 9 of the Civil Liability Act, 1961. However, under English law it seems that the equivalent limitation period is six years and so those debts are not expected to be statute barred in that jurisdiction.

- In summary, the following are the relevant parties for the purpose of the proceedings:

  - ☐ J – the Deceased
  - ☐ P - the Deceased's separated wife
  - ☐ E - the Deceased's eldest daughter
  - ☐ A - the Deceased's former partner and mother of E
  - ☐ S - the Deceased's son
  - ☐ AL - the Deceased's youngest daughter
  - ☐ SO - the mother of the Deceased's children S and AL
  - ☐ Mr. James Hally ("Mr. Hally") - the administrator of the Irish will
  - ☐ Mr. Aidan Adams ("Mr. Adams") - the administrator of the English will

Separate submissions were made in this case on behalf of Mr. Hally, on behalf of E (through her mother, A) and on behalf of P. Counsel acting for each of these parties adopted the submissions of the other parties, since they all seek the same outcome, namely to have this Court exercise its discretion to refuse the transfer of the Irish assets to the English administration of J's estate. For ease of reference therefore in referencing the points made in this case, these three parties will be collectively called the Applicants.

16. Submissions were also made on behalf of Mr. Adams, the English personal representative and administrator of the English estate, as he opposed this Court exercising its discretion to prevent the transfer of the Irish assets to the English administration. For ease of reference Mr. Hally will be referred to as the Irish administrator of the ancillary/Irish administration and Mr. Adams will be referred to as the English administrator of the principal/English administration.

APPLICABLE LAW

17. It is common case between all the parties that the legal position, as stated at p. 458 of the leading Irish text of Binchy*, Irish Conflicts of Law* (Dublin, 1988) applies to this case, namely:

> "Where an Irish ancillary personal representative has finally collected the assets and paid off the debts here, normally he 'will hand over the residue to the foreign administrator or to the person or persons who, according to the foreign law, will take the place of personal representatives.'"

As J was domiciled in England at the date of his death, the principal administration is in England and Ireland is the location of the ancillary administration. On this basis therefore, the normal or default rule is that Mr. Hally as the administrator in the ancillary Irish administration would hand over the assets he has collected to Mr. Adams the administrator of the principal English administration.

18. It is also common case that an Irish court has a discretionary power to prevent the ancillary administrator from handing over the balance of the Irish estate to a foreign administrator. The authority for this proposition is the decision in *Re Lorillard,* which is

dealt with as part of the analysis of the law and the facts in this case, which will be considered next.

SHOULD THIS COURT PREVENT THE TRANSFER OF THE ASSETS?

19. The key issue for determination in this case is whether this Court should exercise its discretion to prevent the default transfer of the Irish assets in J's estate to the administrator in England, where J was domiciled.

Re Lorillard

20. The facts of *Re Lorillard* were that the testator, who was domiciled in New York, died in England. He executed one will which was proved in America and in England. He left assets and creditors in both jurisdictions. Administration proceedings were taken in both countries. In England, after payment of the testator's creditors, there was a surplus available for the beneficiaries of his estate. In New York however, certain creditors were left unpaid. Their debts, which were over 20 years old, were statute barred under English law, but they were not statute barred under New York law.

21. The Applicants rely on *Re Lorillard* for two reasons. First, in that case the English Court of Appeal established that there is a discretion on the part of a court to prevent the transfer of assets to a foreign administrator. In the High Court, Eve J. had refused to order the transfer of the assets to the American administrator. As regards the existence of the discretion on the part of the Court to order/refuse to order such a transfer, Sterndale M.R. noted at p. 644:

> "This is an unusual question arising in certain administration proceedings in this country and in the United States of America. It seems to me to **be entirely a matter of discretion**, and I do not see my way to differ from the decision of Eve J." (Emphasis added)

There is no controversy regarding the Applicants' reliance on *Re Lorillard* for this reason as it is common case that the law does grant a discretion to the Court to refuse to transfer the assets, and as noted by Professor Binchy in *Irish Conflict of laws* at p. 459:

> "But it is clear that the Irish Court has a discretionary power to prevent the ancillary administrator from handing over the balance."

22. The second reason the Applicants rely on *Re Lorillard* is because in that case the Court of Appeal upheld the High Court's decision to refuse to order the transfer of the Deceased's assets out of England to New York, because the debts of the estate in the foreign principal administration (New York) would have been statute barred under the law applicable in the ancillary administration (England). At p. 645 Sterndale M.R. stated as follows:

> "For the creditors in New York it was contended that as the testator was at the time of his death domiciled there the American administration was the principal proceeding to which the English administration was merely ancillary, and that accordingly the applicant as administrator in New York was entitled to receive the surplus assets in England remaining after the satisfaction of the testator's debts in

order that they might be applied in paying the debts of *bona fide* creditors in any part of the world and for this purpose they ought to be transferred to America. The authorities do not throw much light on the question as to the duty of the English administrator. **It would seem to be his duty to see that the debts are paid – *i.e.*, debts which are due according to English law."** (Emphasis added)

23. Thus, the approach of the English Court of Appeal in 1922 was to look at the position of creditors, not from the perspective of the country in which the Deceased was domiciled and where he had done business with those creditors (America), but rather from the perspective of the law in the country of the ancillary administration where he happened to have property (England). The effect of the Court of Appeal decision is that the beneficiaries of the Deceased were preferred to his *bona fide* creditors in America and the court refused to order the transfer of the assets to New York.

24. Particular reliance is placed by the Applicants on the *Re Lorillard* decision, since it is claimed that this case is on all fours with *Re Lorillard,* since the debts of J's estate in the foreign principal administration (which is in this case, England) would be statute barred under the law applicable in Ireland, the country of the ancillary administration.

25. While the decision in *Re Lorillard* is not binding on this Court, as a decision of a foreign jurisdiction, the Applicants have urged this Court to follow the outcome reached in that case by exercising its discretion to prevent the transfer of the Irish assets, in light of the similarities between that case and the present one.

26. For his part, Mr. Adams made a number of submissions regarding the increased costs which would be incurred by the estate if this Court prevented J's estate from being administered as a whole in England, and instead the estate was to be administered partly in Ireland and partly in England. In this regard, he made submissions regarding the rights of the creditors of J's estate under English law.

No evidence regarding English law

27. However, there was no evidence provided to this Court regarding the relevant provisions of English law in this regard. In particular, the following submissions were made regarding the increased costs which would be incurred by the estate if this Court did not allow the transfer, *i.e.,*

- creditors in England would be likely to seek judgments against J's estate in England and then seek to enforce those judgments in Ireland, and/or,

- the allegedly insolvent English estate would be placed into insolvency administration and a trustee in bankruptcy would be appointed in England to seek to assert its right to assets in Ireland, and/or,

- unsatisfied English creditors would embark on tracing claims in England against P and E in relation to any assets they receive from the Irish estate.

28. It was submitted that some or all of these options are likely to be pursued by, or on behalf of, the English creditors, for the simple reason that none of these options would be subject to the two-year limitation period (unlike a direct claim by the English creditors against the Irish estate). On the basis of these submissions, Mr. Adams claimed that the failure of this Court to permit the transfer of the Irish assets would lead to significant costs for the estate as a whole.

29. However, the Applicants objected to these submissions being treated as evidence as there was no expert evidence before the Court on whether this indeed constituted the state of English law. This Court agrees with this objection and so it must treat the foregoing as constituting submissions, rather than evidence that can be relied upon.

30. However, in relation to one area of English law, namely limitation periods for creditors, the position is somewhat different. While there was no expert evidence on the law in England regarding limitation periods in respect of debts owed by a deceased person, there does not appear to have been any objection by the Applicants to submissions made on behalf of Mr. Adams that, while there was a two-year limitation period in Ireland for such debts, the equivalent period in England was six years.

31. Indeed, it is not surprising that the Applicants did not contest the claim that the limitation period in England is longer than in Ireland (six years v. two years), since the fact that there is a lesser limitation period in Ireland, for debts against a person's estate, than in England, is the very *raison d'être* for this litigation. This is because if the creditors were statute barred in England and in Ireland at the same time, i.e. both after the expiry of two years (or indeed both after six years) from the date of death, then there would be no advantage, for P and E, to have the Irish assets administered in Ireland, rather than being transferred to England.

32. It seems clear that if there were no difference in limitation periods between Ireland and England, there would be no reason for the eldest child of J and his separated wife, who both live in England, to seek to have the administration of their father's/separated husband's estate administered in Ireland.

Why do two English residents want estate of J domiciled in UK administered in Ireland?

33. This raises the question of the reason why P and E support the application. It seems clear to this Court that the main, if not the only, reason why two residents of England (P and E) are seeking to have the estate of their separated husband and father, who was domiciled and died in England, administered in Ireland is because by so doing, J's creditors in England will be statute barred, by virtue of the shorter limitation periods which apply in Ireland. This would not be the case if the default rule, of administering those Irish assets in the principal administration in England, applied.

34. As with a lot of litigation, it appears to come down to money. In this case if one 'follows the money' then if the Applicants are successful, P as the residuary legatee of J's Irish will becomes entitled to a sum of approximately €1.14 million (*albeit* that E has a claim to some of that sum, on the grounds that J failed in his duty to provide for her). One or both

therefore stand to gain a considerable amount of money at the apparent cost of English creditors who will be not be paid in full if this application is successful.

Application of fairness/equitable principles

35. In seeking to have this Court exercise its discretion to prevent the transfer of the assets to the English administration, counsel for the Applicants urged this Court to take account of the financial circumstances of P, who works in a low paying job and indeed the financial circumstances of A (E's mother), who also works in a low paying job, as well as the fact that E is dyslexic and has been diagnosed as being on the autism spectrum. It is suggested that, as E is in need of provision from J's Irish estate. It is claimed on her behalf (in the written submissions) that '*no provision was made [for her by her father] under the terms of his UK will'*, and so this Court should make an order preventing the transfer of Irish assets to the English administrator. In this way, it is submitted that J's separated wife and eldest daughter will be looked after, since the English creditors would be statute barred under Irish law, and in *Re Lorillard*, this was sufficient reason for the English Court of Appeal to refuse to transfer assets to a foreign principal administration.

36. However, J did in fact provide for E under his English will - it is simply that J did not die a wealthy man and his estate in England appears to be insolvent. It therefore appears that E may get nothing out of this part of his estate. In this regard, E is in no different a position than many children who have a father who makes a provision in his will that his children will get money on his death, but this does not transpire as his debts exceed his assets.

37. Of course, if this Court were to prevent the transfer of the assets, the primary beneficiary would be P, the separated wife of J, since under the Irish will, she is the residuary legatee, with E being a 'contingent' beneficiary, since E may or may not be successful in her action under the s. 117 claim that J failed to properly provide for her.

38. If, however, one is to consider equitable principles, one would have to have regard to those persons who are out of pocket as a result of their dealings with, or on behalf of, J. This is because equity does not, in this Court's view, mean that this Court should exercise its discretion in favour of a child of a testator, to the detriment of his creditors, simply because she is a minor who is dyslexic and on the autism spectrum or in favour of a separated wife, simply because she works in a low-paying job. This is because those creditors, who unlike E or P, are actually out of pocket as a result of their dealings with J, may themselves be, or have families relying upon them who are, in similar or worse circumstances than E or P and they may be just as worthy recipients of money from J's estate. This is in addition, of course, to the even more significant fact that creditors paid out of an estate are simply being returned their own money or money due to them from the Deceased.

***Re Lorillard* was 'widely criticised'**

39. More generally, as observed by Professor Binchy at p. 459 of Irish Conflict of Laws, it is to be noted that the refusal in *Re Lorillard* to permit the transfer of assets to a foreign administrator was 'widely criticised':

> "the [*Re Lorillard*] decision has been widely criticised for enriching beneficiaries at the expense of creditors entitled to payment in the country of the principal administration, on account of the chance fact that the beneficiaries happened to reside in England, where the Statute of Limitations was classified as procedural."

Indeed, it seems to this Court that when one considers the consequence of following the decision in *Re Lorillard* against the background of the facts in the current case, that criticism is wholly justified, since it is hard to escape the conclusion that the primary effect of the order sought is to seek to keep wealth in a family to the detriment of *bona fide* creditors, which in this case include J's debts to a school (for E's school fees) as well as monies due from J to a letting agent, to an architect, to an accountant, to a solicitor etc.

A form of legal arbitrage arises if *Re Lorillard* is followed

40. The reason this Court believes *Re Lorillard* should not be followed in this jurisdiction is because, if on the authority of *Re Lorillard* a transfer of assets from an ancillary administration to a principal administration is refused, simply because the creditors of the deceased (in the principal administration) would be statute barred if they were to claim against the ancillary administration, this leads to a form of 'legal arbitrage', as illustrated by the facts of this case. This form of 'legal arbitrage' arises since the differences between limitation periods in jurisdictions end up being used to ensure that a testator's family/legatees benefit from his estate, at the cost of creditors.

41. While there is no evidence that such an arbitrage was in J's mind when he made his will, nonetheless the consequence is that an arbitrage has arisen. If the 'arbitrage' was planned, it would involve testators seeking to take advantage of the differences in the legal protection for creditors in disparate jurisdictions, by making wills and perhaps even buying properties in certain 'favourable jurisdictions' in order to prefer a testator's family/beneficiaries over his creditors. This would be *akin* to a fraudulent preference of creditors in the company law context, where an insolvent company prefers one creditor or group of creditors over others. It is important to note that in this case, while the effect of the order that is being sought is that J's family would be given preference over his creditors, there is no evidence before the Court, nor was any suggestion made in Court, that J purchased property in Ireland and made a separate Irish will with the intention of having his family preferred over his creditors upon his death. Nonetheless, since this is the effect of the order being sought, regard must be had by this Court to the consequences of this order in this case.

42. While not determinative of the decision in this case (since this Court's focus is on the consequences for J's beneficiaries and his creditors and not the future consequences of this Court's decision), this Court would nonetheless observe that the Applicants' claim to have *Re Lorillard* confirmed as good law in Ireland would be to create an opportunity for legal arbitrage by testators to protect family assets from creditors.

Why this Court will not exercise its discretion to prevent the transfer of the Irish assets

43. If, in this case, this Court was to use its discretion so that a creditor of J in England is effectively denied the right to claim against the whole estate of J, by effectively treating his estate as two separate estates, this would be an incorrect use of its discretion, in this Court's opinion.

44. The Court reaches this conclusion because a *bona fide* creditor of J's in England who has not issued proceedings against the ancillary Irish administration within two years of J's death (for very good reason, *i.e*. as there is no such two-year time limit in England) would thereby be denied recovery of his *bona fide* debt from J's estate.

45. If the order sought by the Applicants were to be granted, it would, in this Court's view, run contrary to a core principle of Irish succession law contained in s. 45(1) of the Succession Act, 1965, namely that the estate of a deceased person is first and foremost available for the payment of his debts before beneficiaries become entitled to their share of the estate. The section states:

> "The estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the estate of which a deceased person in pursuance of any general power disposes by his will, are assets for payment of the funeral, testamentary and administration expenses, debts (whether by specialty or simple contract) and liabilities, and any legal right, and any disposition by will inconsistent with this section is void as against the creditors and any person entitled to a legal right, and the court shall, if necessary, administer the property for the purpose of the payment of the expenses, debts and liabilities and any legal right."

46. The importance which is attached by Irish law to the rights of creditors of a deceased and the fact that these rights always supersede the rights of beneficiaries of a deceased is clear from the express terms of this section. This is because the section provides that a gift to a beneficiary under a will is *'void'* insofar as it is inconsistent with the principle that the assets of the estate must first be used to discharge monies owed to creditors.

47. In addition, submissions were made by Mr. Adams that granting the order sought by the Applicants would run contrary to the principle that the debts of an estate are paid out of the estate as a whole and not just the estate in one jurisdiction and the principle that the existence of two wills does not split an estate into two for the purposes of creditors. This seems clear not only from the wording of s. 45(1) of the Succession Act, 1965, but also, although not determinative, from the margin note which summarises the section as *'[e]state of deceased to be assets for payment of debts and legal right'*. It is to be noted that neither the margin note nor the section refers to a 'part' of the estate of a deceased being available for the payment of debts and so, in this Court's view, it must be taken to refer to the whole estate of a deceased.

48. Further support for this submission is to be found in the case *of In the goods of Walter Dyas, Deceased* [1937] I.R. 479. In that case, the Deceased died domiciled in the Orange Free State in southern Africa and probate of his will was granted to his widow there. The Deceased had been a beneficiary under his father's Irish will. Thereunder, he inherited a

sum of money which was paid into court in Ireland. Upon the Deceased's death, his creditors in the Orange Free State were unable to obtain payment of the debt from the executrix (the Deceased's widow) and applied to the Irish High Court for a grant of letters of administration in order to have recourse to the Irish asset. It is relevant to note that the debt in question was over 50 years old and the Deceased did not have any creditors in Ireland. In his judgment, Hanna J. indicated that, subject to the applicant providing an Irish nominee, he would issue a grant of letters of administration *ad colligenda bona* to the nominee limited to applying to have the monies paid out to the nominee and subject to a direction that the sum be paid into the appropriate court of the Orange Free State. In doing so, Hanna J. considered that the applicant creditors '*must be put in a position, where, whatever their rights, they will be protected'* (at p. 482).

49. It is also relevant to note that while Hanna J. was conscious of the statute of limitations, the fact that the debts would appear to have been statute barred in Ireland did not prevent him facilitating the foreign creditors. At p. 482, he observes:

> "As this is a debt now over fifty years old, questions may arise under the equivalent, in Roman Dutch law, of our Statutes of Limitation."

However, this was not a bar to his granting of the order. This decision therefore provides support for this Court's decision to exercise its discretion to protect the creditors, wherever they are, rather than to prefer the deceased's family and irrespective of the fact that the statute of limitation position in the principal administration.

50. Uncontroverted submissions were also made by Mr. Adams that if J had not executed an Irish will, his Irish assets would be available to his English creditors without any of the issues raised in this case regarding limitation of actions. Bearing this in mind, Mr. Adams submitted that, if this Court's discretion was used in the manner sought by the Applicants, it would effectively mean that creditors of a deceased could be precluded from recovery from his *whole* estate by the simple expedient of the testator executing one will in his country of domicile (England) and a second will in a different country (Ireland) which had lesser protection for his creditors.

51. This Court does not believe that exercising this court's discretion in this manner could be regarded as an equitable exercise of its discretion or, most significantly of all, that it would be in keeping with the core principle of Irish succession law that priority is given to a deceased's creditors ahead of his family or beneficiaries.

If the position were reversed and it was Irish creditors v. beneficiaries in England

52. It is helpful to consider the order sought by the Applicants in reverse to fully appreciate the significance of what they are seeking. Consider the position if English law had a two year limitation period for creditors of a deceased, while Irish law had a six year limitation period. Assume therefore that an English citizen, who was domiciled in Ireland, ran up business debts here with Irish creditors and left his assets in Ireland subject to an Irish will but his larger estate in England was subject to an English will. If it is an appropriate exercise of this Court's discretion to refuse to transfer the assets to England in this case

(as suggested by the Applicants), then in this example it would be an appropriate exercise of the English court's discretion to allow the family of the English citizen to benefit at the expense of Irish creditors. If the Irish estate in this example were insufficient to pay those Irish creditors it would appear to this Court to be inequitable if those Irish creditors were to receive nothing, while at the same time the testator's beneficiaries under the English will were to receive the benefit of the English estate. This is, in reverse, what this Court is being asked to do to English creditors by the exercise of its discretion to prevent the normal or default transfer of the assets of the ancillary Irish administration to the principal English administration.

53. This example highlights perhaps more clearly the issues of fairness or equity which are involved in the exercise of this Court's discretion, rather than solely looking at this matter from the perspective of E who is presented by her counsel as a minor with learning disabilities and certain education needs who is seeking to invoke the jurisdiction of this Court under s. 117 of the 1965 Act to ensure that proper provision is made for her and from the perspective of P, who is presented as a woman on a low-paying wage.

54. It should be emphasised of course that it is not being suggested that the Applicants or their legal advisers are doing anything other than seeking to apply the differences in limitation periods between Ireland and England, over which they have control, to their best advantage, as is their right.

55. Of course, while it is the duty of the lawyers involved to act in the best interests of their client, it is the duty of this Court to consider all the parties involved, including the creditors (who are not represented) and so the actual effect of the order sought. As noted, it has the effect of a form of legal arbitrage to benefit a family over creditors (even though that might not have been J's intention, it seems clearly to be P's and E's intention) all *'on account of the chance fact'* (per Professor Binchy above) that creditors of a deceased in Ireland are subject to a lesser limitation period than in England.

56. In this context, it is to be noted that while the Applicants have complained about the lack of detail from Mr. Adams regarding the various debts incurred by J and claimed by his creditors, there is no evidence that these are not *bona fide* debts and in any case, it is not the role of this Court, in an application such as this, to determine whether creditors who are claiming under an English administration are *bona fide* debts that should be paid by an English administrator.

57. It is also important to emphasise that it is not being suggested that J intended to prefer his family over his English creditors, when he executed two separate wills in two separate jurisdictions separately dealing with the assets in both those jurisdictions. Rather it seems likely that as a result of his sudden death at a relatively young age, he ended up having more creditors than assets in England, while in Ireland, where he did not live or carry on any business, he had assets but not surprisingly, since he did not live or work here, he had no creditors.

58. Quite apart from the difficulties in principle which this Court has with the result in *Re Lorillard* (allowing for preferential treatment of a testator's family over that of his creditors) it is also the case that, there are certain significant differences of fact in the current case to allow it be distinguished from the decision in *Re Lorillard* (even if this Court felt it should be followed, which it does not), i.e.

- in *Re Lorillard* the debts were over 20 years old, while in this case the debts appear to be just a few years old (i.e. more than two years, but less than six years, old),

- in *Re Lorillard* the beneficiaries of the estate were resident in the country of the ancillary administration (England) and were seeking to benefit from that country's limitation periods, while in this case the beneficiaries are not resident in the country of the ancillary administration (Ireland). This is because P and E are both resident in England. However, they are seeking to benefit from Ireland's limitation periods and not the limitation periods in their country of residence. In one sense, P and E could be described as being involved in a type of 'forum shopping' in seeking to rely on the laws of Ireland, rather than of England where they live and J lived, since the Irish laws provide the weaker protection for the creditors of J's estate and thus provide an opportunity for P and E to financially benefit as a result.

Conclusion regarding *Re Lorillard*

59. In view of the foregoing, this Court shares the reservations expressed by Professor Binchy about the *Re Lorillard* decision, since in this Court's view it attaches insufficient significance to the overriding duty of the administrator of an estate to discharge creditors. It may well be the case that a decisive factor in *Re Lorillard* for the judges was the fact that the debts of the deceased were in excess of 20 years old and that, in a much less globalised world in 1922, the rights of far-away creditors in America were of insufficient importance to an English court to justify the transfer of the English assets to the New York administration.

60. However, whatever the decisive factor in that case, this Court concludes that, since under Irish law the rights of creditors are given clear precedence over the rights of any beneficiary (P) or any potential beneficiary (E), those creditors' rights should not lightly be set at nought by a testator executing one will in relation to his Irish property in Ireland and another will in relation to his English property in England. Otherwise, the testator would ensure (although there is no suggestion that this was J's intention) that his separated wife and one of his three children, who both live in England, become entitled to the assets of his estate which are in Ireland, in preference to his creditors in England.

For this reason and the other reasons set out in this judgment, this Court concludes that it would not be an appropriate exercise of this Court's discretion to prevent the transfer of J's assets to the English administration.

61. Thus, while this Court accepts the principle in Re Lorillard, that an Irish court has a discretion regarding the transfer of assets from an ancillary administration to a foreign principal administration, it does not accept that the exercise of the discretion in *Re*

Lorillard to refuse the transfer of the assets was the correct decision, because of the prejudicial effect on the creditors of the estate, and for the same reason it would not exercise its discretion in this case to prevent the transfer of the Irish assets to the English administration.

62. It is perhaps helpful at this juncture to consider a case which this Court regards as an example of the appropriate exercise of a court's discretion to prevent the transfer of assets to a foreign administrator, where there was no suggestion of any creditors of the deceased being prejudiced by the order.

Where it is appropriate for a court to exercise its discretion - Re Manifold

63. In *Re Manifold* [1961] All ER 710, a testatrix who had an English domicile of origin, but who was domiciled in Cyprus at the date of death, made a will in 1957 which was valid under Cypriot law. She made a subsequent will in 1958 under English law, wherein she revoked all former wills. However, while the execution of the 1958 will was good under English law, it was defective under Cypriot law.

64. It is clear therefore that the last expressed intention of the testatrix was to leave her estate in accordance with her 1958 will and to revoke her 1957 will. However, if the English court had transferred her assets to Cyprus, this would have resulted in her 1958 will being considered to be void under Cypriot law and thus would have resulted in her estate being divided in line with her 1957 will, which clearly was not her last expressed intention.

65. In the English High Court, Buckley J. noted at pp. 715 and 716 the existence of a discretion on the part of the court to order the transfer of assets from the ancillary administration to the principal administration:

> "I think that the position really is this: that the attorney-administrators in this country for the principal administrator over in Cyprus, when they have paid those expenses which they have to meet in connexion with the administration of the deceased's estate in England, and when they have paid the debt debts of the deceased in England, may be justified in paying over the balance to their principal, but I do not think it follows by any means that in every case they are bound to do so."

66. At p. 720, Buckley J. exercises that discretion as follows:

> "[…] I think, the court is justified in saying that the English attorney-administrators ought not to hand over money which they have available in their hands to the [the personal representative under the 1957 will], who would be unable to give effect to the dispositions contained in the 1958 will, because Cypriot law would not permit him to do so. It seems to me that the right course in such a case as this is for the English administrators to proceed to distribute the assets which they have in their hands in this country in accordance with what I think is the result of the provisions

of the Wills Act, 1861, that is to say, on the footing that the 1958 will is a valid and effective will and does effectively revoke the 1957 will."

67. Thus, the English High Court refused to order the transfer of the assets from the English ancillary administration to the Cypriot principal administration. However, in that case not only was there no prejudice to creditors, but the refusal of the transfer meant that the last-expressed intention of the testator (*i.e*. the replacement of the 1957 will with the 1958 will) was achieved, which would not have occurred if the assets had been transferred to the Cypriot administration. In this Court's view, this case therefore is a good example of a situation in which it might be appropriate for an Irish court to exercise its discretion to refuse to order the transfer of assets from an Irish ancillary administration to a foreign principal administration.

68. However, in this case, it could not be said to have been the testator's intention to favour his separated wife over the interests of his creditors in England. Indeed, even if this was J's intention, it runs contrary to section 45(1) of the Succession Act, 1965 and therefore it would not be a valid exercise of this court's discretion to seek to achieve this result.

69. If one considers J's intentions, as expressed in his wills, although P will be the primary beneficiary of J's estate (in the event of an order for the Irish property to be administered in Ireland), it could not be said, when one considers both wills, that it was J's intention to benefit P to the exclusion of others (which would be effect of the order sought, subject to E's claim under s. 117).

70. This is because, while J provided for P under the Irish will, under the English will, she was to receive the income of a £1 million trust fund, but in addition J's former partner A (E's mother) was also to receive the income of a separate £1 million trust fund. Furthermore, this aggregate trust fund of £2 million was to be held on trust for J's three children (and not just E), with the trustees paying them 5%, 10% and then the remaining 85% from this trust fund, as they each reach 18, 21 and 25 years of age.

71. It remains to be observed therefore that if the Applicants were to be successful, then J's two other children and his former partner A are likely to get nothing from his estate, while P will receive a legacy of *circa* €1.14 million, with a contingent claim against that sum by E. However, if the Irish property is transferred to the English administrator and if there is a surplus after the discharge of creditors, it should, according to Mr. Adams, be administered to take account of the claims of P and E, not to the exclusion of J's former partner A, and his two other children S and AL, but rather in conjunction with them in light of the terms of both the English will and the Irish will. In this regard Mr. Adams avers at para. 28 of his affidavit sworn on 16th October, 2020 that:

> "[…] it is in the interests of both Mr. Hally and myself to work together to ensure that all *bona fide* creditors of the Deceased are paid before any disbursements can be made, including any disbursements to a section 117 claimant."

CONCLUSION

72. For the foregoing reasons, this Court refuses to prevent the transfer, by the Irish administrator, of assets from J's estate to the principal administration in England.

73. The Order sought by Mr. Hally permitting him to administer the estate of J in accordance with the provisions of the Irish will is therefore refused, and Mr. Hally is directed to comply with any request to transfer assets from J's estate to the English administrator to discharge the debts owed to English creditors.

74. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be put in for mention one week from the date of delivery of judgment, at 10.30 am.