THE HIGH COURT

[2023] IEHC 215
Record No. 2018 No. 383SP

IN THE MATTER OF THE ESTATE OF JOHN T. CRONIN (DECEASED) and

IN THE MATTER OF THE SUCCESSION ACT 1965

BETWEEN

PADRAIG O'CONNELL

PLAINTIFF

- AND –

THOMAS O'CONNELL and BREDA (BRIDIE) MURPHY

DEFENDANTS

Judgment of Ms. Justice Butler delivered on 21st day of April 2023

Introduction

1. This judgment deals with the particularly thorny question of costs following the substantive judgment delivered by me in these proceedings ([2021] IEHC 127). The proceedings were instituted by special summons by the plaintiff as the executor of the deceased's estate. They concerned the question of whether a gift to the first defendant in the deceased's will, made in 1990, of Kerry Co-Operative shares included shares in Kerry Group plc acquired by the deceased subsequent to 1990 and held by him at the time of his death in 2013. If not, the Kerry Group shares would fall into the residue of the deceased's estate. Although the deceased had disposed of the residue of his estate to his siblings, because he had not made provision for what was to occur to the share of any of his siblings who pre-deceased him as seven of them did, the residual gift partially failed resulting in a partial

intestacy. The second defendant, being one of the residuary legatees, was appointed under O.15, r.9 to represent both her own interests and those of the other surviving residuary legatees, the estates of those who had pre-deceased the testator and all of those entitled on an intestacy. Notwithstanding that the case was brought by the plaintiff as executor, all of the argument was had as between the two defendants.

2. In the event I held that the gift of Kerry Co-Operative shares, which remained effective to confer upon the first defendant the benefit of some 390 shares in Kerry Co-Operative held by the deceased at the time of his death, did not also confer upon him the 8,937 Kerry Group shares held by the deceased. Thus, the arguments made on behalf of the second defendant prevailed and she and the group of persons whose interests she represented benefitted by the Kerry Group shares being included in the residue of the deceased's estate.

3. Whilst this outcome is, on its face, straightforward, it is complicated by the fact that the costs of the litigation which has produced it are very significant. This is not intended as a criticism of the lawyers involved. Indeed, a potentially complex issue concerning whether single farm payments to which the deceased would have been entitled passed with the farmlands or fell into the residue was resolved between the parties saving at least one additional day at hearing. However, litigation costs in Ireland are particularly high. I note that in a letter dated 15 April 2020 the solicitor for the second defendant estimated that €100,000 in legal costs had been incurred in the previous 12 months, which included the costs of an unsuccessful mediation. Assuming that the costs of all three parties to these proceedings are likely to have been roughly similar and assuming that at least an equivalent – but most likely a greater – sum was then incurred by each party in going to trial, the total costs of this litigation may well be somewhere in the region of between €600,000 and €700,000. Obviously, this is a very rough estimate which cannot predict what claims will

be made nor what sums might actually be allowed on adjudication but it does serve to illustrate such how significant the legal costs are likely to be.

4. As a result of this, the costs issue itself was the subject of written submissions and of a full hearing before the Court – which of course adds to the overall costs of the litigation. In teasing out the issues it may be useful at the outset to identify the position adopted by each of the parties.

The Positions of the Parties Regarding Costs

5. Initially the plaintiff, as executor, adopted what he characterised as a neutral position save as to his own costs. He pointed to the pre-litigation correspondence issued on his behalf by his solicitor which warned the parties that he could not give any commitment that the costs of the parties would be paid by the estate although noting that his costs, as executor, would be likely to be paid from the estate and, in particular, under s.45 and 46(3) of the Succession Act from the residue of the estate. Having outlined the legal basis on which the executor's costs should be met from the estate, he then outlined the alternative approaches available to the Court to direct payment of those costs either from the asset the subject of the litigation (i.e. the Kerry Group shares) under O.99, r.5 or, alternatively, from that portion of the estate subject to a partial intestacy in accordance with the rules as to the application of assets under s.46(3) and the First Schedule, Part II of the Succession Act 1965. The adoption of either of these approaches have somewhat different consequences for the residuary legatees and those entitled on intestacy but, in both cases, preserves the specific legacies to the first defendant.

6. However, after written submissions had been filed by all parties, the executor changed his position radically as regards the costs of the other parties. Supplemental legal submissions were filed on his behalf in which, instead of treating the defendants' costs as a

matter to be argued between the defendants, he made an extensive argument to the effect that the costs of all parties including those of both defendants should be paid by the estate and, specifically, that those costs should be paid from the residue of the estate.

7. Obviously, the effect of the plaintiff's change of position, if adopted by the Court, would be far reaching. The total costs, potentially amounting to €700,000 or more, would be paid out of the residue of the estate thereby depleting significantly the very asset which the second defendant had succeeded in establishing fell within the residue. Although successful, the second defendant and on those on whose behalf she acted, would bear the entire costs burden of the litigation. On the other hand, the first defendant whose claim had prompted the litigation and who had not succeeded in establishing it, would both have his costs paid and receive the entire of his inheritance under the will unaffected by the litigation. Whilst *prima facie* this outcome appears unjust, the plaintiff argued that it was necessary in light of the public policy objective identified by the Supreme Court in *Vella v. Morelli* [1968] IR 11 which is that, given the importance of the testamentary disposition of property to the community at large, where the circumstances are such that it is proper to seek the opinion of the Court the costs of doing so, including the costs of the unsuccessful party, should be allowed from the estate.

8. Unsurprisingly, the approach of the first defendant was very similar to that adopted by the plaintiff in his supplemental submissions. He argued that the normal *"costs follow the event"* rule does not apply to this type of litigation and that the discretion conferred on the Court under s.168(1)(b) of the Legal Services Regulation Act 2015 must be governed by the decision of the Supreme Court in *Vella v. Morelli* (above). The first defendant applied for his costs out of the residue of the estate on the basis that there were reasonable grounds for bringing the litigation and that it was conducted *bona fide* on his part, a proposition for which

he relied on multiple older authorities as summarised in *Millers Irish Probate Practice (Maxwell 1900 Ed.)* and *Vella v Morelli*.

9. Equally unsurprisingly, the second defendant opposed the first defendant's application for costs from the estate. She made discreet applications in respect of her own costs and in respect of those of the executor. She sought her own costs from the first defendant and that those costs be charged on the property the subject matter of the gift to the first defendant under the will. She accepted the plaintiff's entitlement to costs but sought an order directing that those costs be paid from or set off against the gift to the first defendant under the will. The second defendant relied on the *"costs follow the event"* principle to which statutory effect is given by s.169(1) of the Legal Services Regulation Act 2015 (the 2015 Act) and argued that there was nothing in s.168(b) or in the jurisprudence which meant that litigation of this nature was exempted from the application of the general rules. She also argued that the litigation had been instituted by the plaintiff because the first defendant demanded that it be so instituted, that the only person who stood to benefit from the first defendant's claim was the first defendant himself and that the conduct of the first defendant warranted making a costs order against him. The conduct referred to was two-fold, namely a shift in the legal basis for the first defendant's claim between the pleading and the arguing of the case and the rejection by the first defendant of an offer made by the second defendant on a *"without prejudice save as to costs"* basis.

10. Whilst both defendants were afforded the opportunity to reply to the plaintiff's supplemental submissions, only the second defendant did so and, in doing so, queried the need for the plaintiff's supplemental submission in circumstances where neither defendant had disputed the plaintiff's entitlement to costs. The second defendant pointed out that the plaintiff and the first defendant are brothers, presumably for the purpose of inviting the Court to draw some adverse inference from this fact which, as it happens, was expressly attested

to by the plaintiff in the affidavit grounding the special summons which initiated the proceedings. I do not think the Court can take the view that the change between the position adopted by the plaintiff in his first and second submission is connected to his relationship with the first defendant. Indeed, given that this litigation arises out of a will, all the parties are related to a greater or lesser extent. The plaintiff's conduct throughout, particularly as evident from the correspondence sent to the various parties, has been neutral. The supplemental submission, whether ultimately accepted or not, is based on a public policy argument and an analysis of legal authorities which the plaintiff obviously believes point towards the appropriateness of a particular approach in a litigation of this type.

11. More significantly, the second defendant engaged with the authorities cited by the plaintiff and in particular questioned whether this was litigation brought for the benefit of the estate or was in the nature of a *lis inter partes* as between the two defendants.

12. As can be seen from this summary, there are discreet issues as regards the claim made by each party for their costs. It is agreed that the plaintiff, as executor, is entitled to his costs but there is a dispute as to whether those costs should come from the residue of the estate or from the gift to the first defendant. The defendants did not engage with the separate issue raised by the plaintiff as to whether his costs should be paid from the intestate portion of the residue or from that portion of the residue representing the value of the Kerry Group shares.

13. Neither the plaintiff nor the first defendant disputed the second defendant's *prima facie* entitlement as to costs, presumably because both ultimately adopted the position that all parties should get their costs. There is, however, a dispute as to whether the second defendant's costs should be paid from the residue or from the gift to the first defendant (or even personally by the first defendant). Obviously, payment of the second defendant's costs from the residue of the estate does not benefit the second defendant since the gift then available to her and to those whom she represents would be commensurately reduced. There

is also an issue which I have not touched on above as to the consequences, if any, of the fact that the second defendant opposed an application by the first defendant for the admission of oral evidence which evidence was ultimately heard by the Court on the second day of the trial.

14. Finally, there is an issue as to whether the first defendant should be awarded his costs with the plaintiff and the first defendant saying that he should and the second defendant saying that he should not. No argument was made as regard to which portion of the estate the first defendant's costs, if awarded, should come from. Again, an award of costs to the first defendant to be paid from his own portion of the estate would be largely meaningless so the issue is whether the first defendant should be awarded his costs from the residue of the estate which would be to the detriment of the second defendant and those she represents.

15. In order to deal with these issues, I propose to look more generally at the law relating to costs and then at the authorities relied on by the parties, the implications of which were seriously disputed by them.

Legal Services Regulation Act 2015, Part 11.

16. Having reviewed the arguments made by the parties it seems that behind their different approaches to the case law lies a fundamental difference between them as to the relevance and applicability of s.168 and 169 of the Legal Services Regulation Act 2015. Those sections appear in Part 11 of the 2015 Act which is headed *"Legal Costs in Civil Procedures"*, and they provide as follows:

> *"**Power to award legal costs***
>
> *168(1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings–*

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or

(b) where proceedings before the court concern the estate of a deceased individual, or the property of a trust, order that the costs of or incidental to the proceedings of one or more parties to the proceedings be paid out of the property of the estate or trust.

(2) Without prejudice to subsection (1), the order may include an order that a party shall pay—

(a) a portion of another party's costs,

(b) costs from or until a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and

(e) interest on costs from or until a specified date, including a date before the judgment.

(3) Nothing in this Part shall be construed as—

(a) restricting any right of action for the tort of maintenance, or

(b) restricting any right of a trustee, mortgagee or other person, existing on the day on which this section commences, to be paid costs out of a particular estate or fund to which he or she would be entitled under any rule of law or equity."

Costs to follow event

169.(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court

orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.

(3) Where a party succeeds against one or more than one of the parties to civil proceedings but not against all of them, the court may order, to the extent that the court considers that it is proper to do so in all the circumstances, that—

(a) the successful party pay any or all of the costs of the party against whom he or she has not succeeded, or

(b) the party or more than one of the parties against whom the successful party has succeeded pay not only the costs of the successful party but also any

or all of the costs that the successful party is liable to pay under paragraph (a).

(4) Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment.

(5) Nothing in this Part shall be construed as affecting section 50B of the Planning and Development Act 2000 or Part 2 of the Environment (Miscellaneous Provisions) Act 2011.

17. Those sections represent a substantial codification and partial modification of the law relating to costs as it existed prior to 2015 and put on a statutory footing a number of principles that had been developed judicially over an extended period of time. Order 99 of the Rules of the Superior Courts was in turn modified subsequent to the coming into force of Part 11. For present purposes the most significant element of the new O.99 is contained in r.3(1) which requires the Superior Courts in considering an award of costs to have regard to the matters set out in s.169(1) of the 2015 Act where applicable. The impact of this and the principles currently applicable to the awarding of legal costs in respect of proceedings as a whole (as opposed to the costs of interlocutory applications) is summarised by Murray J. in *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 183.

18. All the parties agreed that the 2015 Act was applicable to the proceedings notwithstanding that they were issued in 2018 before the commencement of the costs provisions of the 2015 Act in 2019. (Although the costs provisions of Part 11 of the 2015 Act did not come into force until 2019 I shall for convenience refer to the changes as the

2015 changes.) The point of divergence between the parties was the applicability of the "*costs follow the event*" principle to which statutory effect is given in s.169(1) to proceedings of this type. The type of proceedings was of some relevance to the arguments made and the parties have variously described the proceedings as being an administration suit, a construction suit, a wills suit or, more generally, as probate proceedings.

19. The second defendant's applications are based on the straightforward application of the costs follow the event principle under s.169. She contends that she succeeded entirely on the *"event"*, i.e. in circumstances where there were rival claims to the deceased's Kerry Group shares, she established that they fell within the residue of his estate, and thus she is entitled to her costs against the unsuccessful party, namely the first defendant. She also contends that the burden rests on the first defendant, as the unsuccessful party, to demonstrate by reference to the criteria in s.169(1) why an order for costs should not be made against him (see Heslin J. in *Maloney v. Cashel Taverns Ltd. (In voluntary liquidation)* [2021] IEHC 99). Needless to say, she contends that the first defendant has not discharged this burden.

20. The first defendant contends that s.169 does not apply to a wills suit relying on s.168(1)(b) of the 2015 Act and the Supreme Court decision in *Elliott v. Stamp* [2008] 3 IR 387.

21. The plaintiff originally cited ss. 168 and 169 of the 2015 Act as being relevant along with O.99, r.2, r.3(1), r.5 and r.10(3) of the Rules of the Superior Courts. He contended that as the proceedings were properly brought by him as executor and as he remained neutral throughout, he was entitled to his costs. The balance of his first submission concerned whether the plaintiff's costs should be paid from the shares the subject of the judgment or from the intestate portion of the residue. As previous noted, the plaintiff's supplemental submissions radically shifted his position as regards the defendants' costs and argued that

based on the *"special jurisprudence"* in respect of the costs of probate actions, that all parties should be awarded their costs and that these costs should be paid from the residue. The plaintiff relies in particular on the *"Buckton Rules"* (*In Re Buckton v. Buckton* (1907) 2 Ch. 406) and the classification of these proceedings within those rules along with the Supreme Court decisions in *Vella v. Morelli* (above) and *Elliott v. Stamp* (above). The plaintiff does not tease out how that jurisprudence, all of which predates 2015, might be affected by ss. 168 and 169 of the 2015 Act, the relevance of which he acknowledged in his first submission.

22. I think the starting point for consideration of these competing arguments must be the text of ss.168 and s.169 of the 2016 Act. The first defendant expressly argues that s.169 does not apply and, by implication, in failing to refer to s.169 in his supplemental submission, the plaintiff seems to adopt the same approach notwithstanding his earlier stance that both ss.168 and 169 were relevant. I have had some difficulty with this argument which effectively amounts to the contention that because of pre-existing judicial rules, a statutory provision of ostensibly general application should be read as if it were subject to a specific but unexpressed exclusion.

23. The 2015 Act represented a major legislative overhaul of the provision of legal services in Ireland. Two parts of that Act (Parts 10 and 11) deal with the costs of civil proceedings and make significant alternations in the manner in which legal practitioners can charge for the provision of legal services and in which disputed bills of costs can be adjudicated. By enacting ss. 168 and 169 which deal with legal costs in civil proceedings, the Legislature clearly intended to give formal statutory expression to certain – but not all – judicial principles which had developed over time as regards the costs of civil litigation. Those provisions are expressed in a very general way as being applicable to *"civil proceedings"*. That phrase is not defined in the 2015 Act but in the context of our legal system the natural and ordinary meaning of civil proceedings is legal proceedings that are

not criminal in nature. "*Proceedings*" – again a word not defined in the 2015 Act - refers to actions before the courts which, in a civil context, determine the rights and liabilities of the parties to the proceedings. Although the parties varied in their description of these proceedings as an administration suit, construction suit, wills suit or a probate action, none of them suggested that they were not civil proceedings, and I am satisfied that they are.

24. As these were civil proceedings, on a *prima facie* basis ss. 168 and 169 apply to the determination of their costs unless it is apparent from the terms of those sections that they should not be applied. The first defendant points to s.168(1)(b) as the applicable provision. Section 168 is headed "*Power to award legal costs*" and sub-section (1) identifies two particular circumstances in which a court is given an express power to award costs. Sub-paragraph (a) allows a court to make orders for costs against and in favour of any party to proceedings. Sub-paragraph (b) allows a court in proceedings concerning the estate of a deceased person or a trust to order that the costs of any party be paid out of the estate or the trust. The difference between sub-paragraphs (a) and (b) is that under the latter a costs order does not have to be personal to a litigant but can be levied against property which may be the subject of but which will never be a party to the litigation. Certainly, in a case such as this s.168(1)(b) provides a clear legal basis upon which a court can make an order for costs against the estate rather than against any of the parties to the proceedings. However, the power to make such an order is discretionary (the court *"may"*) and the mere fact that power to award costs in a particular fashion exists does not determine whether it is appropriate to exercise that power in the circumstances of any individual case.

25. I note that under s.168(3)(b) nothing in Part 11 is to be construed as restricting any right of a *"trustee, mortgagee or other person"* to be paid costs out of a particular estate or fund to which they were entitled on the date of commencement of s.168 under any rule of law or equity. No argument was addressed to the court under s.168(3)(b) and it was not

suggested that the case law relied on by the plaintiff and the first defendant constituted a rule of law or equity under which the first defendant was entitled to his costs from the estate. The court does not have to consider whether the plaintiff, as executor, comes within the category of *"trustee, mortgagee or other person"* (although it seems likely that he would) or whether the executor had an entitlement to costs arising under a rule of law or equity at the time s.168 was commenced as neither defendant disputed the plaintiff's entitlement to costs, although there was a dispute as to the portion of the estate out of which those costs should be paid.

26. Given that the power to award costs from the estate was undisputed, the more pertinent issue is whether s.169 applies to the proceedings. On the face of it, s.169 applies to all civil proceedings creating a default position whereby a party who has been *"entirely successful"* in civil proceedings is entitled to an award of costs against the unsuccessful party unless the court orders otherwise. It is, I think, significant that the entitlement of the successful party is not just to an award of costs but to such an award against the unsuccessful party, thereby reflecting the adversarial nature of our legal system. Of course, this default position is still subject to the exercise of the court's discretion and a court retains the power not to make an award of costs in favour of the successful party or against the unsuccessful party if the *"particular nature and circumstances of the case"* warrant the judge adopting a different approach. Whilst there was extensive argument before me on the application of some of the rules reflected in the older case law, there was no express consideration of how those rules sit within the architecture of s.169. I acknowledge that those rules were undoubtedly intended to reflect the nature and circumstances of particular types of case, but there is a significant difference between categorising cases into particular types to which rules are then applied and considering the nature and circumstances of each case individually in order to decide if the court should depart from a statutorily designated rule.

27. The second defendant relied in part on the open offer made to the first defendant before the case proceeded to trial and the first defendant relied on his *bona fides* in the conduct of proceedings, something which was acknowledged by me at different points in the substantive judgment especially as regards his testimony to the court. Those are undoubtedly relevant factors to which the court can have regard in exercising its discretion under s.169(1). However, the latter argument was based in part on the existence of a practice which the plaintiff and the first defendant contended amounted to a rule that costs should be paid from the estate where two criteria were met, namely that there were reasonable grounds for the litigation and that it was conducted *bona fide* (*Fairtlough v. Fairtlough* (1839) 1 MILW 36; Millers Probate Practice (Maxwell 1900 ed at p.438) and *Elliott v. Stamp* [2008] 3 IR 387). Obviously, part of the issue which I must decide is whether such practice survived the enactment of the 2015 Act and whether it did so as a rule which ought generally to be applied save presumably in circumstances of egregious conduct on the part of the executor or of the losing party.

28. Finally, while looking at the text of ss. 168 and 169 I note that s.169(5) contains an express proviso that nothing in Part 11 affects the special costs rules contained in s.50B of the Planning and Development Act 2000 or Part 2 of the Environment (Miscellaneous Provision) Act 2011. Both of those pieces of legislation give statutory effect to a requirement under the Aarhus Convention and European law that the costs of environmental litigation not be excessive which in turn is designed to further a policy objective of facilitating public participation in the making of environmental decisions. Whilst those statues are clearly not relevant to this case, it is potentially significant that there is an express carve-out excluding certain types of proceedings from the general costs rules applicable to civil proceedings under Part 11 of the 2015 Act. If the Legislature intended that other classes of case would

be similarly exempted one might reasonably have expected to see provision being made for this in the 2015 Act itself.

29. In light of these considerations, I think that the court's decision as to the costs of these proceedings is one which falls to be made within the framework of Part 11 of the 2015 Act. Thus, the court has power under s.168 both to make orders for costs as against the parties to the proceedings and to make an order that the costs be paid from the property in the estate. The scope of that power and the flexibility as to the type of orders which the court can make is evident from s.168(2) particularly as regards the breaking down of costs orders to reflect the extent to which it is appropriate that a party should recover or alternatively be required to pay costs in respect of particular periods of time or procedural steps or elements of the proceedings. The power to award costs from an estate under s.168(1)(b) is a discretionary one and in a statutory context it cannot be construed as a rule that costs should be paid from an estate in all cases concerning the estate of a deceased individual or in respect of all parties to those proceedings.

30. Therefore, in my view under s.169 the starting point for the court's analysis should be that, if the second defendant can be characterised as having been entirely successful in the proceedings, she is entitled not just to an award of costs but to an award of costs against the unsuccessful party. In this case the unsuccessful party is undoubtedly the first defendant, the plaintiff having remained neutral on the substantive issue. The onus of persuading the court that its discretion should be exercised so as not to make an order reflecting this default position lies on the unsuccessful party, the first defendant, but obviously the court must also consider arguments made by the plaintiff as to why the default position should not prevail.

Three Preliminary Issues

31. Before I move to consider the main arguments advanced as to why a different order to that *prima facie* required by s.169(1) should be made, I propose to address three issues which can be disposed of relatively briefly. Firstly, in her submissions the second defendant canvasses what was *"the event"* in these proceedings and whether she can be said to have been entirely successful on it. The other parties do not engage with this element of her argument, presumably because it would cease to be relevant if their argument that all costs should be paid from the residue of the estate were to prevail. Notwithstanding the second defendant's opposition to the first defendant's application to admit extrinsic evidence under s.90 of the Succession Act 1965 and the fact that such evidence was admitted (albeit on a *de bene esse* basis as explained in the judgment) I am satisfied that there was a single event in these proceedings. That event was the determination of whether the Kerry Group shares passed to the first defendant as part of the gift to him of Kerry Co-Operative shares or fell into the residue of the deceased's estate. The second defendant succeeded entirely on this event thus creating a statutory entitlement to be awarded her costs against the first defendant unless the court positively decides otherwise having regard to the nature and circumstances of the case and the conduct of the proceedings.

32. Secondly, I do not regard the fact that the focus of the first defendant's legal argument changed as between the affidavits and the written legal submissions to be material or to constitute conduct which should have any bearing on the court's decision as to costs. As these were proceedings instituted by the plaintiff by way of special summons there were, in fact, no pleadings as such filed by the defendants. Instead, each party filed affidavits setting out their position and exhibiting material they believed to be relevant to the issues in dispute. Affidavits are not intended to set out the legal arguments of the party on whose behalf they are filed. Those arguments are set out in the written legal submissions which, in this case,

were filed in advance of the hearing. Although the first defendant's written submissions included an argument made on affidavit which was not pursued at the hearing, they also included the arguments actually made and thus placed the second defendant on notice of the case which he had to meet.

33. I do however regard the first defendant's rejection of an offer made by the second defendant on a without prejudice save as to costs basis to be something to which I should have regard and I will return to this in due course.

34. Thirdly, it seems to have been an accepted principle in the older jurisprudence on the validity of wills that in general costs should be paid out of the estate regardless of the value of the estate or the ownership of the property. It was accepted by the parties that as this case did not concern the validity of the will, such jurisprudence was not directly appliable although the plaintiff argued that it should apply by way of analogy insofar as it was based on public policy considerations. Whilst I will look at the cases in question in more detail below, at this stage it is necessary to observe that I do not think it would be either fair or appropriate in the circumstances of this case to make orders for costs without having regard to the value of the estate relative to the likely costs of the proceedings and to the distribution of property within the estate and how that might be impacted by any order for costs.

35. The making of costs order is an integral part of the task entrusted to a court as regards any particular case which it is assigned to hear. That task must be approached on the basis that, subject to the requirements of the law, the court must strive to do justice as between the parties. Indeed, in one of only two post-2015 cases opened to the court, MacGrath J. in *Shannon v. Shannon* [2019] IEHC 604 on three separate occasions points out that the rules on costs *"are designed to achieve a just result"*, that the jurisprudence illustrates courts' attempts *"to effect justice between the parties"* and *"to ensure in so far as it is possible, that no injustice is caused"*. I do not think it possible to make costs orders which do justice

between the parties whilst maintaining a deliberate blindness as to effect that those costs orders will have on the parties *vis-à-vis* the subject matter of the litigation. Therefore, I have taken into account the practical consequences of the various orders which the parties have suggested I make in determining what is appropriate and just in all of the circumstances.

The Buckton Rules – Was this Case a *Lis Inter Partes*?

36. Although I have decided that I must determine these costs application within the framework of the 2015 Act, this does not mean that all of the jurisprudence pre-dating 2015 ceases to have any relevance. Such jurisprudence remains relevant insofar as the approaches traditionally taken by courts towards the issue of costs in similar cases illustrate attempts, as acknowledged by MacGrath J., to do justice between the parties. Consequently, that jurisprudence offers important guidance to the court as to what might be just or appropriate in similar circumstances. However, that jurisprudence can no longer be regarded as creating rules, the application of which produces an automatic outcome, the effect of which would be to deprive the court of the statutory jurisdiction and the discretion it has in relation to the making of costs orders.

37. The arguments based on the jurisprudence were largely two-fold and depended in both cases on the categorisation of the case in a manner which would lead almost inexorably to the making of costs orders in favour of all of the parties out of the residue of the estate. One strand involves looking at the case in the context of the *Buckton Rules* (above) and the other involves treating the questions identified by the Supreme Court in *Vella v. Morelli* (above) as a threshold which, once cleared, would result in the making of costs orders in favour of all parties from the estate. For the reasons I have already set out regarding the nature and general applicability of Part 11 of the 2015 Act, I do not accept the plaintiff's contention that

the correct starting point for this decision is the placement of the proceedings within any specific category of the *Buckton Rules*.

38. Kekewich J. in *Buckton v. Buckton* (1907) 2 Ch. 408 divided cases concerning a construction and effect of wills into three categories. These are, firstly, cases where the applicant is the trustee or executor of a will or settlement and asks the court to construe the will for their guidance; secondly, cases where the application is not made by the trustee/executor but by some of the beneficiaries but nonetheless arises due to a difficulty of construction or administration which would have justified an application by the trustees, and, thirdly, cases where an application is made by a beneficiary raising a claim adverse to the other beneficiaries. In the first two cases Kekewich J. took the view that *"the costs of all parties [are] necessarily incurred for the benefit of the estate"* and should be paid out of the estate. In particular, as regards the first category he regarded the trustees as being entitled to *"the fullest possible protection which the court can give them"*. The third category, however, he regarded as adverse litigation to which the general rule that the unsuccessful party be ordered to pay costs should apply.

39. The plaintiff argued that this case, as a construction suit, must necessarily fall within one of the first two categories in the *Buckton Rules* and consequently was legally incapable of coming within the third. Certainly, as a matter of form the proceedings were a construction suit in that they were issued by way of special summons by the plaintiff, as executor, seeking the opinion of the court as to the status of the Kerry Group shares in the context of the deceased's will. However, the second defendant argued, relying on the decision of Herbert J. in *O'Connor v. Markey* [2007] 2 IR 194 that the proceedings were, in effect, *"contentious litigation between beneficiaries"* and a *"hostile lis inter partes between two beneficiaries under the will"*. The first defendant sought to distinguish *O'Connor v. Markey* on the basis that it was not an ordinary administration suit involving the construction

of a will but rather pertained to the manner in which the estate was been managed and administered.

40. The proceedings in *O'Connor v. Markey* were issued by a special administrator who had been appointed by the court and who then sought directions in the course of the administration on issues which were in dispute between the defendants. Herbert J. regarded the special administrator as being *"in reality"* a nominal plaintiff who enabled the opinion of the court to be obtained by special summons. He pointed to the fact that issues of fact and law were litigated as a proceeding *inter partes* between the defendants on their own evidence and on the evidence of witnesses called by them and consequently concluded that the case fell within the third class of cases under the *Buckton Rules*. Neither the existence of the special administrator as plaintiff nor the form of the proceedings materially altered that situation. Thereafter, he had regard to the fact that the claim made by the first defendant was totally averse to the interest of the second defendant and concluded:

> *"In my judgment, it would be neither fair nor reasonable that the first named defendant, having failed in his claim in this application, should be awarded costs out of the estate or exempted from paying the costs of the special administrator and of the successful second named defendant, both of whom he caused to be involved in this litigation."*

I do not think that distinction sought to be drawn by the first defendant regarding *O'Connor and Markey* is entirely correct. Herbert J.'s decision is not based solely or even primarily on the fact that the underlying dispute was about something connected with the administration of the estate in question. Rather, his decision seems to have been largely based on the fact that the proceedings before him were conducted as a *lis inter partes* between the defendants and that it would be unjust to the successful defendant to make a costs order that would materially and adversely affect the gift that she was due to receive

under the will. There are many obvious parallels with this case. In this regard *O'Connor v Markey* also gives lie to the plaintiff's suggestion that only a *lis inter partes* action can come within the third class of the *Buckton Rules*. In the same vein I do not regard the comments of MacGrath J. in *Shannon v. Shannon* as supporting that proposition. Indeed, his observation that in a construction suit *"all things being equal, costs are more likely to be ordered to be paid out of the estate"* is somewhat equivocal and suggests a general practice rather than the strict application of a rule. Significantly, notwithstanding that *Shannon v. Shannon* was a construction suit MacGrath J. did not make an order that the costs of all parties were to be paid out of the estate. Instead, having regard to the particular circumstances of the case which included the fact that the executor was also a main beneficiary, he made no order as to the costs of either party.

41. I think that the *Buckton Rules* provide assistance in a general sense in identifying, on the one hand, cases which can be said to have arisen because of the way the testator framed his will or which raise questions which require to be answered for the benefit of the estate and, on the other hand, cases which in reality concern a dispute between the beneficiaries of an estate as regards their respective entitlements. I think the form of the proceedings, which was of some concern to Kekewich J., is of less importance in light of the decision in *O'Connor v. Markey* where proceedings which in terms of their form clearly fell within the first category under the *Buckton Rules* were, because of their substance, treated as being within the third. Thus, I do not regard the *Buckton Rules* as meaning that a construction suit is incapable of also being, in substance, a *lis inter partes*.

42. Having heard both the arguments and the evidence in this case I am satisfied that it was in effect a dispute between the first defendant and the second defendant (and those she represented) as regards their respective entitlements under the deceased's will. Very little of the argument concerned the actual construction of the will but instead concerned whether

a category of asset acquired subsequent to the making of the will should be characterised as falling within a category mentioned in the will on the basis of the presumed intention of the deceased which, as it happens, I did not find to have been established by the evidence which was called.

Vella v Morelli and Subsequent Jurisprudence:

43. The second line of case law relied upon comprised two Supreme Court decisions namely *Vella v. Morelli* and *Elliot v. Stamp*. In *Vella v. Morelli* the Supreme Court (Budd J.) recognised a community importance in seeing *"that wills which have not been properly executed are not admitted to probate"*. He held that where a case was a proper one for investigation and the litigation was conducted *bona fide* there should be a general principle that the costs of the litigation will be met from the estate. Budd J. observed:

> *"In our country the results arising from the testamentary disposition of property are of fundamental importance to most members of the community and it is vital that the circumstances surrounding the execution of testamentary documents should be opened to scrutiny and be above suspicion."*

44. The plaintiff relies on this judgment to argue, by analogy, that there is an equivalent public policy interest in ensuring that where a question arises on the construction of a will parties should not be deterred from litigating that question by reason of the possibility of an adverse costs order. On this basis the only circumstances in which *Vella v Morelli* would not apply are those identified in the case itself – i.e. where the case was not a proper one to bring in the first place or the litigation was not conducted *bona fide* neither of which apply here. A number of observations may be made about this. Firstly, all of the parties accepted that there was a distinction between the fundamental question as to whether a will has been validly made and the subsequent question as to what the contents of a valid will might mean.

The first question is intimately tied up with freedom of testation which can be regarded as an element of the property rights which are protected under Article 40.3.2 and Article 43 of our Constitution, and which is preserved under the Succession Act 1965, albeit subject to certain statutory limitations. The question of the construction of a will is less fundamental and whilst no doubt there are many cases in which the language used by a testator is less than ideal, the extent to which this will result in litigation necessarily depends on the attitude taken by those potentially entitled to benefit under the will. Thus, the views expressed by courts concerning the need not to discourage persons from putting the validity of a will in issue where there are proper grounds to do so, do not necessarily apply by analogy to the construction of the terms of an indisputably valid will.

45. This was recognised by Laffoy J. in two judgments in which she distinguished the cases before her from the circumstances which the principle expressed in *Vella v Morelli* was designed to protect. The first of these cases is *Young v Cadell* [2006] IEHC 49 in which she made no order for costs despite reliance by the plaintiff on *Vella v Morelli*. She regarded the principle as having no application to the proceedings before her and explained her reasons as follows:

> *17. The factors which arise in a probate suit which justify the special rule in relation to costs which was reiterated in Vella v. Morelli, the importance of ensuring that what are presented as testamentary documents are above suspicion and that legal costs are not a deterrent to pursuing bona fide beliefs or suspicions as to the validity of such documents, do not arise in administration suits, which, in the case of a death testate, proceed on the assumption that the testamentary document is valid, as was the case here. Therefore, in my view, the rule in Vella v. Morelli has no application to the resolution of the costs issues in these proceedings.*

She took a similar approach to the principle in *Cawley v Lillis* [2012] IEHC 70, although in the unusual circumstances of that case (which included the defendant's conviction for the murder of the deceased) she made an order for the plaintiff's costs to be paid out of a fund comprising assets which had previously been held jointly by the defendant and the deceased. She acknowledged that notwithstanding the non-application of the principle it could have some general relevance to the exercise of the court's discretion stating, at paragraph 3 of the judgment:

> *The guiding principle laid down by the Supreme Court in that case does not apply to these proceedings which are not concerned with execution of a testamentary document. That is not to say, however, that the Court, in the exercise of its discretion in relation to costs should not, where appropriate have regard to issues of the type involved in the questions posed by the Supreme Court.*

46. Secondly and perhaps more significantly given that the Legislature has now placed the rules on which courts must make decisions regarding the costs of civil proceedings on a statutory basis, it seems to me that it would be inappropriate to extend a judicial rule to a new category of cases if the effect of that would be to disapply the statutory provisions. As certain classes of case to which special costs rules apply are expressly identified and exempted from the application of Part 11 of the 2015 Act by s.169(5), the Legislature clearly considered the extent to which particular classes of case should be so exempted. The Legislature did not include probate cases or administration suits as types of case to which the general statutory rules should not apply.

47. The plaintiff and first defendant also rely on the more recent decision of the Supreme Court (Kearns J.) in *Elliot v. Stamp* [2008] 3 IR 387 approving and applying *Vella v. Morelli*. A plaintiff who had unsuccessfully challenged a will on the grounds of undue influence was awarded one third of her costs by the High Court. Despite the defendants making what

Kearns J described as a cogent argument as to why she should not recover costs based on the fact that the executor had made relevant information (including medical reports) available prior to trial and the need to protect small estates from being dissipated by the pursuit of proceedings when it should have been apparent that they could not succeed, the Supreme Court awarded the plaintiff her full costs. Kearns J. noted that *"going back to the time of the Prerogative Court, costs were awarded out of the estate of a deceased where it was deemed reasonable to bring proceedings."* He approved the underlying principle as expressed in *Vella v. Morelli* which he described as a *"special jurisprudence in relation to costs"*.

48. However, the actual decision of the Supreme Court to award full costs turned on the fact that the trial judge had not provided a clear, reasoned basis for limiting the award of costs to one-third. If continuing the litigation after the provision of information by the executor was unreasonable, then logically the plaintiff should not have been awarded any costs. On the other hand, if the plaintiff was entitled to recover her costs from the estate, then it should have been a full order for costs unless the trial judge provided an explanation for the reduction. Interestingly, Kearns J acknowledged (at p. 396 of the judgment) that while it may be reasonable to commence and bring proceedings, a point may arrive were as a result of disclosure further pursuit of the claim could no longer be regarded as reasonable. In those circumstances the trial judge undoubtedly had a discretion as to costs *"and should be free both to decline costs from the estate to an unsuccessful litigant or even to award costs against such a litigant from the time of disclosure"*. On evaluating the documentation which had been disclosed he did not think that the pursuit of the litigation beyond the point of disclosure was, on the facts of the case, unreasonable.

49. I am not certain that *Elliott v Stamp* adds significantly to the principle expressed in *Vella v Morelli*, at least insofar as it is potentially relevant to this case. *Elliott v Stamp* was

itself a case in which the validity of a testamentary document was placed in issue on the grounds of undue influence. Thus, recognition that a *"special jurisprudence"* applied to such cases did not extend the principle to cases where the was no dispute as to the validity of a will but instead an issue between the beneficiaries as to how the assets of the deceased fell to be distributed under the will. Given that it was decided in 2008, *Elliott v Stamp* clearly has no bearing on whether that special jurisprudence has survived the coming into force of Part 11 of the 2015 Act.

Effect of Offer on Costs

50. In addition to the fact that the first defendant was unsuccessful in the litigation *simpliciter*, the court must take account of his rejection of an offer made on behalf of the second defendant on a *"without prejudice save as to costs"* basis. In order to put this offer in context it is appropriate to acknowledge that at a very early stage in the proceedings (in 2017 and repeated in 2019) a without prejudice offer was made by the first defendant which was rejected by the second defendant on the basis that the second defendant and those she represented *"would receive little or nothing after the legal costs are discharged."* The original offer as made by the first defendant was not before the court.

51. A solicitor's letter written on behalf of the second defendant in May 2018 confirmed that she would represent the residuary beneficiaries and those entitled on the partial intestacy and invited the plaintiff and the first defendant to consider mediation. Mediation took place in March 2019 but was unsuccessful. In the aftermath of that mediation, the second defendant's solicitor sent a without prejudice save as to costs letter on 18 April 2019. The offer made was that the Kerry Group shares would form part of the residue of the deceased's estate but that the first defendant would be entitled to a one-twelfth share in the residue in addition to the other gifts made to him under the will and his entitlements on the partial

intestacy and that all of the parties' costs would be paid from the estate. That offer was rejected by the first defendant. It seems that the first defendant subsequently reiterated his availability and willingness to have further settlement and discussions in response to which on 30 March 2020 the second defendant's solicitor sent a further without prejudice save as to costs letter reiterating the earlier offer, including that element of it which would have allowed all parties legal costs to be paid from the estate *"notwithstanding the further significant legal costs accrued"*. That offer does not appear to have been formally replied to and the matter proceeded to litigation.

52. In light of the outcome of the proceedings, the offer made by the second defendant was undoubtedly fair. The first defendant was, in effect, to be treated as a residuary legatee in his own right and, thus, would benefit not only to the extent of a 1/12th share in the Kerry Group shares but also in the balance of the residue (which included approximately €83,000 in cash). The residue would have been reduced as a result of payment of the costs of all parties which, although significant, would not have included the trial costs ultimately incurred. The first defendant's other gifts would have been unaffected by the costs of the litigation and he would have continued to benefit from his entitlement to a share of his deceased mother's share of the residue and his entitlements on a partial intestacy.

53. This offer was made on the basis that it would be disclosed to the court in the event that it was rejected and the first defendant did not succeed in his litigation, both of which events have occurred. I note that Whelan J. regarded a Calderbank letter sent *"two years prior to the hearing at a point before a substantial bulk of the estate was committed to dissipation in a litigation cost"* as a *"material factor in determining whether an order for costs should have been made against the appellants"* (*Rippington v. Cox* [2017] IECA 331). The Court of Appeal upheld the costs order made by the trial judge against the appellants save that instead of ordering costs on a solicitor and client basis it ordered them on a party

and party basis. Thus, this offer is undoubtedly something to which the court can and should have regard.

54. It goes without saying that the plaintiff's position as regards costs cannot be affected by this correspondence. It does however have a bearing on the position of the first defendant. If, as the plaintiff and the first defendant contend, the costs of all parties must come from the residue of the estate unless the litigation is manifestly unreasonable or conducted in bad faith, then there is little incentive on a party in the first defendant's position to compromise. If he wins the litigation, he will benefit significantly but if he loses his own gift remains intact, he is not liable for any adverse costs and his own legal costs will be met from the residuary gift which the opposing party under the will. For the reasons discussed above, I do not think that this can be taken as the default starting position for the court's decision on costs post the 2015 Act. However, even if it were, then it must be possible for the ultimately successful opposing party to protect their inheritance by making a reasonable offer on the basis that the offer and its rejection will be considered by the court when deciding whether the unsuccessful party should get his costs or whether an order for costs should be made against him.

Summary of Applicable Principles:

55. In light of my consideration of the relevant statutory provisions and the jurisprudence the question of costs in a case such as this is to be addressed having regard to the following principles:

- The costs in probate actions/administration suits/construction suits come within Part 11 of the Legal Services Regulation Act 2015;

- The court's power to award costs under s.168 is discretionary and in addition to a power to award costs against parties includes, in a case of this type, a power to award the costs of any party out of the estate;
- The starting point for the court's consideration as to how the discretion under s.168 should be exercised must be the principle contained in s.169(1) of the 2015 Act, that an entirely successful party is entitled to an order for costs against the unsuccessful party;
- An executor (or a trustee) is in a *sui generis* position in that having issued litigation to have an issue determined which is necessary for the proper discharge of their role then, regardless of the outcome of that issue, they cannot be characterised as being either a *"successful"* or an *"unsuccessful"* party;
- The principle in *Vella v. Morelli, i.e.* that the costs of all parties should be paid from an estate unless it was unreasonable to have brought the litigation or where the litigation is not conducted in good faith, is based on public policy considerations applicable to the validity of testamentary instruments. The same public policy considerations do not apply to an administration suit or a construction suit in circumstances where there is no question as to the validity of the will and the only issue is the extent to which the respective beneficiaries should inherit;
- There are strong policy reasons why an executor who issues proceedings concerning an issue which has arisen in the course of the administration of an estate should, in general, recover the costs of doing so from the estate. Failure to make such provision for an executor's costs would make people reluctant to undertake that role or might constrain an executor in the proper exercise of their

duties. Nonetheless, there may be exceptional cases where a court decides that it is inappropriate to make such an order and retains the discretion not to do so;

- There may be an issue as to the extent to which *Vella v. Morelli* remains good law in light of Part 11 of the 2015 Act but this is not an issue which needs to be considered or determined in this case as it does not apply on the facts;
- The costs of a case such as this, whether it is characterised as an administration suit or a construction suit, are in the discretion of the court;
- In addition to the express requirement under s.169(2) that the court give reasons where it makes an order that the successful party is not entitled to an award of costs against the unsuccessful party, in general the court should give reasons for the exercise of its discretion in a particular manner;
- The discretion of the court in a case such as this is not fettered by a general rule that costs should be paid from the estate, although the court undoubtedly has power under s. 168(1)(b) to order that the costs of all or any party to such litigation be paid from the estate;
- In exercising its discretion, the court must do justice as between the parties;
- In order to do justice between the parties the court may have regard to the size of the estate relative to the costs of the litigation and to the impact that an award of costs will have on the inheritance of those actively involved in the litigation;
- The entitlement of the court to look at the effect that an order for costs will have is particularly relevant where the litigation has been conducted as a *lis inter partes* even if it nominally takes the form of a legal question posed in a special summons by the executor.

Application of Principles to the Costs of these Proceedings:

(1) The plaintiff's costs

56. The plaintiff, as executor, instituted these proceedings, admittedly at the direct request of the first defendant, in order to obtain the directions of the court on a question the resolution of which was necessary for him to discharge his duties under the will. He adopted a neutral approach to the issues raised in the substantive litigation. He was initially neutral on the question of costs although latterly adopted a position which is more beneficial to the first defendant than to the second defendant. There is no evidence to support the suggestion that he did this because of his relationship with the first defendant.

57. There are strong public policy considerations as to why an executor should recover costs from the estate save perhaps in circumstances of egregious conduct on his part or where he is also a beneficiary under the will and thus likely to benefit from the litigation (as was the case in *Shannon v Shannon* (above)) neither of which arise here. Whilst a testator in drawing up a will often appoints a professional person as executor (such as a solicitor or an accountant), more frequently the testator choses a family member or friend whom they trust to gather in and distribute their estate fairly as between the intended beneficiaries. Non-professional people would undoubtedly be reluctant to act as an executor and to accept the duties the law imposes upon them in doing so if they ran a significant risk of incurring costs which would not be met from the estate or of being made personally liable for the costs of other parties arising in the course of the administration of the estate. As Kekewich J observed in *Buckton v Buckton* (above) trustees – and by extension executors -"*are entitled to the fullest possible protection which the Court can give them*".

58. Therefore, I have no hesitation in accepting, as indeed both defendants do, that the plaintiff is entitled to an order for his costs and that those costs should be paid from the estate. The only issue is as to what portion of the estate should bear these costs. The first

defendant says that they should be paid from the residue, in other words– from the second defendant's portion. The second defendant says the plaintiff's costs should be set off against the portion of the estate devised to the first defendant. The plaintiff himself puts forward two alternatives, both of which affect only the residue and leave the first defendant's gift unaffected.

59. The plaintiff canvasses O.99, r. 5 and s.46(3) of the Succession Act, 1965 as alternate bases upon which an order for costs in his favour should be made. Order 99, r.5(1) provides as follows:

> *"5(1) The costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto shall be paid out of such legacy, money, or share unless the Court otherwise directs."*

It is perhaps significant that the rule uses the word "*inquiries*" rather than "*proceedings*" although from the executor's perspective the difference may not be material.

60. Section 46(3) of the 1965 Act provides as follows:

> *"(3) Where the estate of a deceased person is solvent, it shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities and any legal right in the order mentioned in Part II of the First Schedule."*

61. The plaintiff argues that the legal costs incurred by him in the proceedings can be categorised as an administration expense and thus should be paid from the residue in accordance with Part II of the First Schedule. That part lists the order of application of assets where an estate is solvent and is relevant to ascertaining the portion of an estate from which liabilities should be met. It lists firstly at sub-para. (1) the intestate portion of a deceased's estate and then at sub-para. (2) the residuary gift. It then moves through property specifically

charged, devised or bequeathed for the payment of debts and the fund for pecuniary gifts before reaching, at sub-para. (6), property specifically devised or bequeathed. Thus, real property specifically devised to a named beneficiary, such as the gift of the house, farm and the Kerry Co-Operative shares to the first defendant in this case, will only be used to meet the liabilities of the estate where all other assets and funds have been exhausted.

62. The plaintiff's arguments under both headings are predicated on the assumption that an order for costs in his favour would not affect the first defendant's inheritance ranking, as it does, sixth in the order from which assets as to be applied to meet the administration expenses of an estate. The plaintiff explained that an order against the Kerry Group shares under O.99, r.5 would be more disadvantageous to the second defendant whereas an order for costs under s.46(3) would be more disadvantageous to the residue generally and thus to the larger class of persons entitled to inherit on the partial intestacy. In circumstances where the second defendant is acting in a representative capacity for in excess of thirty people entitled either as residuary legatees, on intestacy or through a deceased parent and the shares form the bulk of the residuary estate, there may not be an appreciable difference either way but I accept that it is likely to be more beneficial to the second defendant to have an order for costs met from the intestate portion of the estate rather than from the Kerry Group shares. In some instances, the differences may be very stark but here because of the subsequent death of those residuary legatees who survived the deceased, there is a very significant overlap between the categories of person entitled to inherit on intestacy and the categories of person who will share in the residuary gift either directly or through a deceased parent.

63. I should note that in the course of the costs hearing an argument was made on behalf of the second defendant that the application of O.99, r.5(1) would not, in fact, result in an order for costs being met from the Kerry Group shares but should instead require that they be met from the Kerry Co-Operative shares since the only express gift made by the deceased

in his will was of Kerry Co-Operative shares and the argument unsuccessfully made by the first defendant was that that gift included the Kerry Group shares. Whilst initially I regarded that argument as somewhat cheeky, when I returned to it, it seemed more meritorious than I had initially thought since the only express gift of shares was of the Kerry Co-Operative shares and consequently the words which the court was required to construe were "*Kerry Co-Operative shares*". However, in reality the dispute between the parties here did not concern the ascertainment of the persons entitled to any legacy or share in the estate but rather the ascertainment of what that legacy or share comprised. Therefore, I do not think that O.99, r.5 should be applied so as to provide that the executor's costs should be paid either from the Kerry Group shares or indeed from the Kerry Co-Operative shares.

64. The second defendant also argued that the effect of s.168(1)(b) was to confer an enabling power on the Court to make an order for costs out of the estate but that it did not direct out of what portion of the estate nor in what proportions such an order should be made. She relied on the case of *Dean v. Bulmer* [1905] P.1 as authority for the proposition that the court has power to order the costs to be paid out of any part of the estate. Whilst this was undoubtedly the decision made by Jeune P. in that case, I note that the judgment turned on the effect of a new rule of court which expressly provided that *"In any probate action in which it is ordered that any costs should be paid out of the estate, the judge making such order may direct out of what portion or portions of the estate such costs shall be paid, and such costs shall be paid accordingly."* Although the second defendant did not identify any equivalent rule currently applicable in this jurisdiction, I note that Herbert J. in *O'Connor v. Markey* ordered that the costs of the plaintiff should be a charge on the real estate specifically devised the first defendant because, if the plaintiff's costs were simply awarded out of the estate, *"the burden would fall on the residuary bequest to the successful second named defendant thereby depriving her of all or a material part of the benefit preserved to her by*

the judgment of this court." Thus, while an award of costs which an estate must meet would normally fall to be discharged in accordance with s.46(3) and Part II of the First Schedule of the 1965 Act, the court has a discretion to direct the portion of the estate out of which the costs should be paid.

65. It seems to me that there is some merit in both of these positions. As executor, the plaintiff was of the view that he required the opinion of the court to resolve the issue as to whether the Kerry Group shares formed part of the residue of the estate or part of the gift to the first defendant. Even if the defendants had not become active participants in the proceedings, some costs would have been incurred by the plaintiff in seeking the opinion of the court in order to resolve this issue. Absent the first defendant's strenuous defence of the proceedings for the purposes of enhancing his own gift, the costs of the plaintiff would be met from the estate and, in normal course, either from the shares themselves or initially from the intestate portion of the estate. On the other hand, an order for the plaintiff's costs against the intestate portion of the estate would likely deplete that fund by as much as 25% which is a significant amount especially when regard is had to the very large number of persons due to inherit from the residue and the consequence diminution of the share which each person is likely to receive. Further, the plaintiff's costs have been increased by reason of the fact that the proceedings became an *inter partes* dispute in which oral evidence called by the other parties was heard over a day and a half instead of focusing on the resolution of a purely legal issue. Consequently, I think the fairest outcome in this case is to award the plaintiff his costs (to include all reserved costs and the costs of the costs application) from the estate and to direct that those costs be met 50% from the residue of the estate and 50% from the gift to the first defendant.

(2) The first defendant's costs

66. In the circumstances of this case, I do not propose making an order for costs in favour of the first defendant. Section 169(1) of the 2015 Act envisages not only that an entirely successful party will get an award of costs against the unsuccessful party but by necessary implication also envisages that the unsuccessful party will not recover his costs. Although section 168(1)(b) allows for an order for the first defendant's costs to be paid from the estate I am satisfied that I should not make such an order in this case. Apart from making an order against that portion of the estate due to be inherited by the first defendant, which would be meaningless, the effect of any order awarding him his costs from the estate would necessarily significantly reduce the amount of the residue available for distribution to those whose interests have been successfully represented by the second defendant in the course of this litigation. That would not, in my view, do justice as between the parties. In coming to this conclusion, in addition to the predominant fact that the first defendant was unsuccessful, I regarded the following as relevant factors.

67. Firstly, there was no issue in this case as to the validity of the testator's will nor was there any evidence adduced which suggested to the court that there was a *bona fide* concern as to whether the testator had capacity to make his will and did so free from any undue influence. Therefore, the case is not one which falls within *Vella v Morelli* or *Elliot v Stamp*. In reality, the litigation concerned a dispute between beneficiaries as to who should benefit from property held by the deceased which had significantly increased in value prior to the deceased's death. Had the deceased wished to make an express gift of this property he could have done so but, not having chosen to do so, the case that he had inferentially gifted the property through the making of a different gift was not particularly strong.

68. Secondly, although the first defendant was entitled to make the case he did, he did so entirely for his own benefit and, consequently, in my view he should not be entitled to expect that the other beneficiaries will have to bear the costs of his doing so.

69. Thirdly, in any case such as this, if the parties cannot reconcile their differences the resulting litigation will necessarily impact on the amount of the deceased's estate which remains available for distribution under the will. The evidence before the court showed that from the very first correspondence issued on her behalf, the second defendant was mindful of the potentially damaging effects the costs of litigation would have to the estate and suggested mediation before she had taken any other step in the proceedings. This can be contrasted with the position of the first defendant who, in effect, required the plaintiff to institute these proceedings in order that his claim to the Kerry Group shares could be determined. This is not to impute any sort of *mala fides* to the first defendant, it is merely to record that his actions have had material consequences both for himself and for the other parties to the litigation.

70. Fourthly, the offer made by the second defendant on a without prejudice save as to costs basis was a reasonable one. In rejecting it the first defendant must necessarily be understood to have undertaken the risk of adverse costs orders in the litigation if he did not ultimately succeed in his claim – a risk of which he was expressly advised in the correspondence making the offer. I am conscious that the nature of the claim was such that in reality the court could only decide 100% in favour of the first defendant or 100% in favour of the second defendant. The court could never have made an order on foot of the questions raised by the plaintiff in similar terms to the compromise proposed by the second defendant. However, compromise in such circumstances necessarily involves each party recognising that the cost of pursuing the litigation must be factored into the attitude they adopt in making or rejecting any offer even if the offer does not reflect a potential outcome to the litigation.

71. Fifthly and finally, in the course of running this case the first defendant made an application for the admission of extrinsic oral evidence under s.90 of the Succession Act. In the event, I found that there was a basis for saying that a change in circumstances in relation

to the deceased's property between the date of his will and the date of his death could give rise to an ambiguity which could, in principle, allow for the admission of extrinsic evidence for the purposes of resolving that ambiguity. However, I was not convinced that such an ambiguity had been demonstrated and I admitted that evidence on a *de bene esse* basis as I required to hear the evidence in order to determine whether it should be admitted. Even then, I did not find the evidence to be of practical assistance on the legal issue (although, as I remarked in my judgment, both of the expert witnesses' evidence was helpful in a broader sense in understanding the evolution of the Kerry Group and the mechanism through which Kerry Co-Operative shares were exchanged for Kerry Group shares.) Approximately two days of the four-day hearing were taken up with the argument as to whether extrinsic evidence should be admitted and the hearing of that evidence. Whilst this of itself does not amount to the conduct of litigation on a basis which was not *bona fides*, it added significantly to the length of the proceedings and thereby to their costs without assisting in their resolution.

(3) The second defendant's costs

72. As noted above, the second named defendant has been entirely successful in these proceedings and therefore has a *prima facie* entitlement to an order for costs against the first defendant. An order for costs in favour of the second defendant to be paid either from the residue of the estate or from the fund representing the value of the Kerry Group shares would be of little benefit to her as that would, in effect, require the second defendant to pay her own costs. Therefore, I think in principle the second defendant is entitled to an order for costs against the first defendant.

73. I have considered whether the costs to which the second defendant is entitled should be reduced to reflect the fact that the second defendant opposed the application for the admission of extrinsic evidence made by the first defendant. After the opening of the case

on behalf of the executor, most of the first day of the hearing was taken up with the dispute between the defendants as to whether extrinsic evidence should be admitted. The second defendant opposed the first defendant's application subject to the proviso that if extrinsic evidence was admitted then the second defendant wanted to call an expert witness on her own behalf. The application to admit extrinsic evidence is one which in any event had to be made by the first defendant regardless of whether the other parties consented or objected to it. Nonetheless, the fact that the second defendant objected to it made it a lengthier and more complex application than it would otherwise have been. Similarly, the fact that the second defendant called an expert witness to "*mark*" as it were, the evidence given by the first defendant's expert also made the case longer than it might otherwise have been.

74. Neither of these things were unreasonable in themselves but they did add somewhat to the length and complexity of the case. In circumstances where the orders for costs which I have already made or declined to make in these proceedings have been made on the basis of an awareness of the impact that any step in the litigation might have on the assets within the estate, I think it only fair that the order for costs to be made in favour of the second defendant should reflect the extent to which the second defendant might be said to have added unnecessarily to the length and complexity of the litigation. As I have already indicated, the application was one which the first defendant would have had to make in order to be permitted to call evidence so therefore I do not think that the second defendant should be unduly penalised in this regard. I propose making an order that the second defendant recover 90% of her costs of the proceedings (to include reserved costs) and all of her costs of the costs application to be adjudicated in default of agreement against the first defendant. I will also order that these costs be charged on the gift due to be paid to the first defendant under the will.