APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2023 78

Neutral Citation Number [2024] IECA 1

Costello J.

Pilkington J.

Allen J.

IN THE MATER OF THE ESTATE OF GORDON R. FARRELL, LATE OF MARKET STREET COOTEHILL IN THE COUNTY OF CAVAN, MERCHANT (RETIRED), DECEASED

AND IN THE MATTER OF THE SUCCESSION ACT, 1965
AND IN THE MATTER OF AN APPLICATION BY GORDON ADAMS AND MERVYN WEDLOCK, THE EXECUTORS NAMED IN THE LAST WILL AND TESTAMENT OF THE DECEASED

BETWEEN/

KAREN FARRELL

APPELLANT

- AND –

GORDON ADAMS AND MERVYN WEDLOCK

RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 4th day of January, 2024

Introduction

1. This is an appeal by Ms. Karen Farrell *("the appellant")* against the judgment and order of the High Court (Stack J.) of 13th February, 2023 by which the appellant was ordered to pay three quarters of the respondents' costs of an application to set aside a caveat which was lodged by the appellant in the estate of her father.

Facts

2. Gordon R. Farrell late of Cootehill, County Cavan, died on 16th November, 2019. The deceased was a widower and was survived by four children, including the appellant.

3. By his will made on 31st October, 2019 the deceased appointed his friends Gordon Adams and Mervyn Wedlock to be his executors and trustees and left all of his estate to his son.

4. The deceased was 87 years of age at the time he made his will but he was in good health. He died very soon after making his will as a result of injuries sustained in an accident on 10th November, 2019.

5. The deceased made his will in the office of the solicitor who had acted for him for many years and his execution of the will was witnessed by his solicitor and the solicitor's trainee.

6. The deceased had apparently made a previous will on 31st January, 2007 by which he had left his entire estate to his wife, and in the event that she should predecease him, to his four children in equal shares. Mrs. Farrell died in about May, 2019. It appears that the deceased never told his children – or at least never told the appellant – of his intention to make a new will or, having done so, that he had made a new will.

7. The appellant was shown a copy of the will on 23rd January, 2020. She decided that she wanted to *"check the veracity of the original will"* and thereafter – as she put it herself – relentlessly made telephone calls, wrote numerous letters, and sent numerous e-mails to the solicitor and the executors.

8. On Monday 27th January, 2020 the appellant telephoned the solicitor's office and was told that he was not in the office. On Wednesday 29th January, 2020 she telephoned the office six times and on Thursday 30th January, 2020 she and her husband telephoned the office five times. On the afternoon of Thursday 30th January the solicitor returned the calls. He said that he could not accommodate the appellant's request for an appointment on the following day, Friday 31st January between 16:00 and 17:00, but that the appellant could then collect a copy of the will and could inspect the original will in the week beginning 10th February, 2020. In an e-mail of 30th January, 2020 the appellant conformed that she would collect a copy of the will and continued:-

> ***"I am now instructing you that I wish to inspect the original will and to have it verified before you proceed any further to administer the estate of Gordon Farrell. Please respond to this email b[y] close of business on Friday 31st January 2020 confirming your acceptance of the above."***

9. The solicitor replied by letter dated 31st January, 2020 which the appellant collected with the copy will.

10. There followed, starting on 3rd February, 2020, a protracted exchange of e-mails and correspondence which failed to advance matters. There was some dispute as to whether all of the appellant's correspondence was received by the solicitor and all of the solicitor's correspondence received by the appellant but on the appellant's case, in the week commencing 3rd February, 2020 she sent about thirteen e-mails to the solicitor asking for an

appointment to *"see and check"* the original will on Friday 14th February, 2020 between 3:00 p.m. and 5:00 p.m.

11. It is not useful to rehearse all of the correspondence but it petered out at the end of July, 2020. In an e-mail of 22nd July, 2020 – sent three times, at 20:08, 22:15 and 22:58 – the appellant asked for an appointment to inspect the original will on any day between 4th and 7th August, 2020 between 11:00 a.m. and 5:00 p.m. and asked for a response by 5:00 pm on Friday 24th July, 2020.

12. In the meantime, on 26th February, 2020 the appellant lodged a caveat.

13. As I will come to, Stack J., in her judgment the subject of this appeal, and previously Butler J., in the course of the respondents' application for the removal of the caveat, were critical of the solicitor's failure to engage with the appellant's correspondence. While the appellant had not articulated any reason why she wanted to inspect the original will, there was no reason why she could not have been facilitated. On the other hand, it is clear from the extent and terms of the appellant's correspondence that she was not altogether easy to deal with. Besides telephoning, writing to, and e-mailing the solicitor, the appellant called upon and wrote repeatedly to the executors directly, seeking not only to inspect the original will but a commitment that all work on the administration of the estate would cease until *"this process is completed and confirmed by Karen Farrell."*

14. On 12th August, 2020 the appellant renewed the caveat. That was warned by the solicitor on behalf of the named executors on 24th September, 2020 and the appellant entered an appearance on 2nd October, 2020.

15. By letter dated 28th May, 2021 the executors' solicitor gave notice to the appellant that if the caveat was not removed within fourteen days proceedings would be issued to set it aside and that in such event an application would be made that the appellant should pay the costs of any such application.

16. A further letter was written on 16th June, 2021 by which the appellant was called on to specify the reasons for lodging the caveat and advised that it was improper to lodge a caveat unless she intended to oppose the formal validity of the will. She was invited again to withdraw the caveat and warned that an application would be made to fix her with the costs of any court application that might be necessary. To this letter the appellant replied on 29th June, 2021 that the respondents were well aware of the reasons for filing the caveat. I pause here to say that Mr. Wedlock in his grounding affidavit observed that the appellant had never explained the reason for filing the caveat but immediately moved on to the question of the inspection of the original will. If – as Mr. Wedlock suggested – the appellant never had any good reason to lodge a caveat, it could be fairly confidently inferred that she had done so, in part at least, because she had not been allowed to inspect the original will.

17. On 13th October, 2021 the executors' solicitors wrote a longish letter to the appellant. This letter and the correspondence which followed was relied on by the respondents in support of their application for costs, and by the High Court judge in acceding to that application.

18. The solicitors first of all suggested that although she had been previously asked to do so – and contrary to what had been asserted in letter of 29th June, 2021 – the appellant had never explained or clarified her claim. They then explained that a caveat may only be filed in circumstances in which it is intended to maintain an outright challenge to the formal validity of the will. They did not – they said – understand her request to verify and authenticate the will and asked that the appellant should explain what she meant by having the will verified and authenticated. They confirmed that the will had been executed by the deceased and enclosed affidavits of the attesting witnesses. The letter continued:-

> *"We are satisfied of the following:*

a. *That your father and nobody else signed his Will in the presence of two witnesses who then signed it in his presence and in accordance with the provisions of section 78 of the Succession Act, 1965.*

b. *That he was acting freely and voluntarily at the time.*

c. *That he had capacity to make his last Will.*

d. *That he knew and approved of the contents of his Will before he signed it.*

In the circumstances, we have attached hereto a consent to set aside the caveat, warning and appearance to the said warning."

19. The solicitors strongly recommended that the appellant should take legal advice; looked forward to receiving a signed copy of the consent within fourteen days; and warned that otherwise a court application would be necessary and that the letter would be relied on to fix the appellant with the costs of any such application. The appellant was also advised that it was the practice of the probate court to award costs against an individual who has inappropriately lodged a caveat.

20. The appellant replied by letter dated 22nd October, 2021. She first invited the respondents' solicitor to remove himself from the matter *"because of any potential conflict of interest or lack of impartiality."* She did not assert that there was in fact a conflict of interest, still less what it might have been. She continued:-

"I previously stated in my letter dated 29 June 2021, which was ignored by you, that the filed caveat will not be removed. To reiterate, ad nauseam, the reasons for filing the caveat were explained to you in copious correspondence. My letter to you dated 04 April 2020 (copy attached) sets out salient points concerning the need for the caveat. This letter dated 04 April 2020 was hand delivered to your office and sent to you by email which you also chose to ignore.

Mr. O'Reilly you are well aware that only since I asked to verify/check my late father's original will of 31 October 2019 that you deliberately blocked me from doing so. The evidence is clearly there. The executors and my brother Glenn had no issue with me having the original will verified/checked by an expert(s). You had ample opportunity to reschedule an appointment in order for me to verify/check the original will. On the basis of you blocking verification and checking of the original will, inevitably, there will a full and outright challenge to this will of 31 October, 2019."

21. The appellant's letter of 4th April, 2020 complained that the solicitor had ignored an e-mail sent by her – twice – on 27th February, 2020 in relation to an appointment which was said to have been set up for the following day for the inspection of the will and rehearsed previous attempts to fix an appointment, and so on.

22. On 3rd November, 2021 the solicitors replied. They protested – again – that they did not understand the reason for the proposed inspection but said that they would facilitate it. They had, they said, engaged a third party solicitor to provide facilities for an inspection and gave his contact details. The appellant was invited to make an appointment with this independent solicitor and to provide him with the identity and credentials of any solicitor or expert who might attend with her. It was proposed that the inspection should take place on or before 17th November, 2021 and that, thereafter, the appellant could sign the form of consent to the removal of the caveat, warning and appearance; failing which an application would be made to the High Court.

23. In a further letter of 17th November, 2021 the appellant alleged that her correspondence was being ignored and that there would be a full challenge to the will. She did not engage with the executors' solicitors' offer to make an appointment to inspect the original will.

24. On 2nd December, 2021 the respondents issued the High Court application which has given rise to this appeal.

25. I should say at this juncture that for some time prior to the deceased's death he and one or more of his immediate neighbours had been in discussion with a supermarket chain which wished to acquire a site in Cootehill, presumably for the construction of a supermarket. The proposed site included part of the garden of the deceased's home and after his death the negotiations were continued by his executors. By no later than August, 2020 the appellant became aware of these negotiations and on 17th August, 2020 – at a time at which it was said that the negotiations were at an advanced stage – the appellant sent an e-mail to the supermarket to say that there was *"a legal problem with the portion of the site"* owned by the deceased.

The High Court application

26. By notice of motion issued on 2nd December, 2021 and initially returnable for 13th December, 2021 the respondents applied for an order setting aside the caveat and alternatively an order pursuant to s. 27(4) of the Succession Act, 1965 giving liberty to the respondents to extract a grant of letters of administration *ad colligenda bona.*

27. The respondents' motion was grounded on an affidavit of Mr. Mervyn Wedlock which referred, generally, to the appellant's correspondence seeking an opportunity to *"check/verify/examine"* the original will and suggested that by letter dated 20th February, 2020 she had been offered an appointment for Friday 28th February, 2020. This letter was said to have been posted to the appellant at an address in Castleblayney – said to have been the only address the respondents had for her at that time – and it was said that the appellant did not attend the *"scheduled appointment."* To get this out of the way, the appellant later said that she did not receive this letter and there is no appeal against the finding of the High Court judge that she probably did not.

28. Mr. Wedlock did not dwell on all that had passed before February, 2020 or – as far as the proposed inspection of the will was concerned – on the later correspondence but picked up the narrative with the executors' solicitors' correspondence from 28th May, 2021, focussing on and quoting extensively from their letters of 16th June, 2021, 13th October, 2021 and 3rd November, 2021, and on the appellant's letters of 29th June, 2021, 22nd October, 2021, and 17th November, 2021, to which I have referred.

29. Mr. Wedlock referred to the negotiations with the supermarket and said that contracts had been concluded for the sale of part of the deceased's lands but that a grant of probate was required to complete the transaction. He referred to the appellant's correspondence with the supermarket and suggested that the appellant was deliberately attempting to frustrate and delay the administration of the estate. Without saying precisely how or why this might happen, Mr. Wedlock expressed concern that those attempts might lead to losses to the estate and said that the failure to extract a grant of probate could have far reaching and damaging consequences. Inferentially, the suggestion was that the proposed sale to the supermarket might be lost.

30. The motion papers were sent to the appellant by registered post on the afternoon of 7th December, 2021 – which was a Tuesday – and the appellant appeared in person before the High Court on the following Monday. The appellant's position was that the court application had come to her notice by e-mails from the respondents' solicitors on the previous Friday afternoon but that she had not received the papers in the post and had been unable to open the attachments to the e-mails. There was a dispute as to whether the registered envelope had been delivered. The respondents' solicitors claimed to have a form of receipt purportedly signed by the appellant. The appellant claimed that all that had been delivered was a slip which said that the item could be collected within five days and that she had not had time to collect it.

31. The motion – insofar as the respondents sought a grant *ad colligenda bona* – was put back for a week and otherwise until 31st January, 2022.

32. On 17th December, 2021 – in what was eventually to be the first of five affidavits – the appellant averred that she had not been served with the papers for the previous Monday and she objected to the application for the limited grant. The appellant suggested that the respondents had presented a false urgency in relation to the sale to the supermarket; that she could not trust the solicitor; and that there was no evidence that full value had been obtained for the proposed sale. She set out an account of the hearing before the High Court on the previous Monday and said that Butler J. had then identified as worrying factors the fact that the will had been made very close to the deceased's death; that he had disinherited his children; and *"the obvious blocking of the checking/verification of the original will of 31 October, 2019."* The appellant deposed that her father had been a completely healthy man, who had died as a result of a tragic accident. She said that her efforts for two years to have the original will checked and verified had been ignored by the executors' solicitor. She suggested that the solicitor was well aware of her concerns, although she did not say what those concerns were. She concluded by noting that *"… the matter of the substantive issue concerning the alleged will of my late father is scheduled to come back before the court on 31 January 2022"* but if there was an implicit suggestion that the will might have been invalid, she did not unequivocally say so, or what the alleged infirmity might be.

33. On 20th December, 2021 an order was made by the High Court (Butler J.) giving liberty to the executors to take out a grant of letters of administration *ad colligenda bona* limited for the purpose of gathering in all the assets of the deceased and to apply for first registration of the deceased's property with the Property Registration Authority and to complete any sales of property and to discharge all debts of the deceased including administration costs.

34. On 17th January, 2022 the appellant swore two further affidavits. The first dealt with the service of the motion papers. The appellant averred that her purported signature on the delivery docket had been forged and that she had collected the envelope from the postal depot on 14th December, 2021.

35. In her second affidavit of 17th January, 2022 – running to 40 pages – the appellant set out in detail all of her relentless engagement and attempted engagement with the executors' solicitor and with the executors directly from 27th January, 2020 and 4th August, 2020; starting with her thirteen phone calls in the week commencing 27th January, 2020 and ending with the delivery by hand to each of the executors' homes of a letter dated 1st August, 2020 in which she complained that her attempts to have the will *"seen and checked"* had been blocked by the solicitor – and, in the case of Mr. Wedlock, that contact from her by WhatsApp and message had been blocked. In the body of the affidavit, the appellant set out in full the text of all of her letters and e-mails during that period. She did not address the correspondence from the executors' solicitors on and after 28th May, 2021 or explain why she had not availed of the invitation extended on 3rd November, 2021 to inspect the original will at the offices of the third party solicitor.

36. As I have said, the respondents' motion to set aside the caveat, appearance and warning was adjourned from 13th December, 2021 until 31st January, 2022, when it was further adjourned to 28th February, 2022 and from then until 28th March, 2022. In the meantime the appellant had engaged solicitors and had instructed her solicitors that she was prepared to withdraw the caveat on terms that there would be no order as to costs against her. The executors were not prepared to agree to this, unless on terms that the appellant agreed not to pursue a claim pursuant to s. 117 of the Succession Act, 1965, which the appellant was not prepared to do. At about that time the appellant parted company with her then solicitors.

37. The motion came back into the High Court list on 4th April, 2022 for mention and was then listed for hearing on 27th June, 2022, with a further mention date in the meantime of 30th May, 2022. There appears to have been some discussion on 4th April, 2022 as to whether the appellant had disclosed her reasons for having filed the caveat in the three affidavits which she had filed.

38. On 20th May, 2022 – by then, again, representing herself – the appellant filed a fourth affidavit, which ran to 51 pages and comprised, in the main, a copy and paste of her previous affidavits. Starting at p. 47, the appellant gave an account of the hearing on 4th April, 2022, and on p. 48 she gave as her reasons for filing the caveat that she was a daughter of the deceased with an interest in the estate; that she had done so as a holding action to give her adequate time to make enquiries and obtain information; and that she *"needed to check the validity of the will which is a polar opposite to the earlier will of 31 January 2007."* She deposed that she had instructed her solicitors on 24th February, 2022 that she was prepared to lift the caveat on terms that *"the contents of my affidavits including the history [of] forgery of my signature be addressed by the court to fully understand the reason for filing the caveat"* and that no costs would be sought against her personally. She declared that her position – as of the date of filing of that affidavit on 20th May, 2022 – remained the same. The reference to forgery was to the appellant's purported signature on the An Post delivery docket for the registered envelope containing the motion papers.

39. On 21st June, 2022 the appellant filed a fifth affidavit, the declared object of which was to make matters more concise. She repeated her position that she had been prepared on 24th February, 2022 to consent to the removal of the caveat *"subject to a hearing of the substantive issues outlining the circumstances for the caveat and any delay was not my fault"* and she recalled that she had, on 30th May, 2022, consented to the withdrawal of the caveat

with no costs against her personally. She reproduced some of the test of her earlier affidavits and set out in a table a summary of the progress of the application.

40. It appears that the matter could not proceed on 27th June, 2022 by reason of illness and went back to 11th July, 2022 when an order was made by Butler J., by consent, setting aside all caveats and adjourning the question of the costs of the motion to 17th October, 2022, from when – for various reasons – it was eventually adjourned to 13th February, 2023.

41. When the case was called on the afternoon of 13th February, 2023 the appellant was in court, as was counsel for the respondents, but the respondents' solicitor had dialled in by video link. The solicitor does not appear to have asked in advance for permission to attend remotely and the solicitor who was so in attendance on counsel was not the solicitor dealing with the file. I will come back to the significance of this.

42. Having taken the appearances, Stack J. indicated that she had read the papers and had a very good general acquaintance with the facts. She suggested – and emphasised that it was a suggestion and not a direction – that there appeared to be three distinct issues. The first was the question of the opportunity or lack of opportunity afforded to the appellant to inspect the original will before the motion issued. The second was whether the appellant had been given adequate notice of the first listing. And the third was the rights and wrongs of the parties' conduct after the motion had been issued and definitely served.

43. Counsel for the respondents confirmed that the respondents were seeking their costs of the application and the appellant confirmed that she was seeking her costs; that is to say, as a litigant in person, her outlay and expenses. Counsel indicated that the respondents were seeking an order for their costs in the administration on a legal practitioner and client basis and what was described as an order over against the appellant, but on a party and party basis, to be adjudicated in default of agreement.

44. Counsel focussed on the executors' solicitors' letters of 13th October, 2021 and 3rd November, 2021, arguing that even if the court were to take the view that there had been shortcomings in the earlier engagement, they were all cured by those letters; which, it was said, had been written on the advice of counsel to address all conceivable concerns which the appellant might have and to provide an opportunity for the issues to be dealt with without the necessity for a court application. The question of the appellant's signature on the An Post delivery docket, he suggested, was a red herring which on any analysis had nothing to do with the respondents and in any event had been overtaken by the fact that the appellant was in court on the return date and the motion was adjourned to allow her time to deal with it.

45. The appellant's case was that what had started as a straightforward request to see and check her late father's will turned into a two year saga. She had, she said, consented to the removal on the caveat on 24th February, 2022 *"subject to a hearing on substantive issues outlining the circumstances for the caveat"* and any delay was not her fault. She pointed to her affidavit filed on 20th May, 2022 in which she had set out her reasons for filing the caveat. She had, she said, made every effort to settle the issues before filing the caveat and she summarised her affidavits and the progress of the application. As to the An Post delivery docket, the appellant asserted that her signature had been forged and that the respondents had presented the document to the High Court. She said that – contrary to what had been submitted by counsel – she had set out in her affidavits the reason why she had filed the caveat: which was that she had been blocked in her attempt to inspect the original will. The appellant had, she said, instructed her solicitors on 24th February, 2022 that she would withdraw the caveat on the basis that the contents of her affidavits would be considered by the court and that there would be no order for costs against her. The respondents' answer to that proposal – that they would not seek an order for the costs of the motion if she agreed not to pursue a s. 117 application – was, she said, disturbing.

46. Returning to the three issues which had been identified by the judge at the commencement of the hearing, the appellant submitted that she had been blocked for almost two years in her attempts to see and check the will; that service of the motion had not taken place until after the court date; and that by the time she was offered the opportunity to inspect the will in the offices of the third party solicitor she had had – as she put it – a bellyful of the executors' solicitor. It was, she said, very unfair and unreasonable. The appellant said that she was certainly was not *"accusing anyone of an invalid will"* because, she said, she had not seen the will.

47. The judge raised with counsel the question of the grant *ad colligenda bona.* Had it, she asked, been taken up? The answer was that it had not been. It was said that the office had been closed at the time and that there had been great difficulty gaining access to the office.

> *"There was lockdowns, so you couldn't actually get in and we tried to get in and my solicitor met with just logistical difficulties getting in and ultimately we made the decision not to proceed with the ad colligenda and the full grant was extracted subsequently."*

48. Asked by the judge whether this had an influence on the costs in any way, counsel replied:-

> *"I say it doesn't, judge, because what I needed to happen ultimately was the caveat to be withdrawn, so we take out the whole grant. I think it's my option whether it not to try and gather in the estate on foot of a full grant or a limited grant. And ultimately what I wanted to do was to enter into a contract with third parties and to try and …"*

49. In response to a further question from the judge, counsel clarified that the contract with the supermarket had not yet been signed.

The High Court judgment

50. The judge gave an *ex tempore* judgment. She returned to the three broad phases of the dealings between the parties which she had identified at the start of the hearing. The first was the period between the date of the deceased's death and the executors' solicitors' letter of 13th October, 2021 when the appellant was seeking to inspect the will. Stack J. said that she shared the concerns previously expressed by Butler J. that there had been, in that time, a lack of engagement by the solicitors. As I have previously said, the judge was not satisfied that the appellant had received the letter of 21st February, 2020 offering inspection of the original will on 28th February, 2020.

51. The second issue – which was identified by the judge as the most important issue – was whether the appellant had been properly advised and warned by the executors' solicitors of their intention to apply to set aside her caveat and given ample opportunity to consider her position before the motion was issued. The judge was satisfied that the executors' solicitors' letter of 13th October, 2021 had been received by the appellant and that it set out clearly their understanding that the deceased was of sound mind and had testamentary capacity. There was, she said, no concern about the deceased's capacity. Then appellant had been sent the affidavit of due execution which had been sworn by the solicitor and his trainee; so there was nothing to suggest that the signature might not have been his or that the will might not have been properly witnessed. The judge was satisfied that the executors' solicitors' letter of 3rd November, 2021 was received by the appellant no later than 5th November, 2021. This invited the appellant to attend at the offices of the third party solicitor on or before 17th November, 2021 to inspect the original will and advised her that if she did not, a court application would be made to set aside her caveat and related warning and appearance. The judge recalled that the appellant, when asked why she did not take up that opportunity, had said that she had a belly full of the solicitor. In the judge's view, the condition that any

expert who might accompany the appellant should provide his or her credentials was reasonable but the fact was that she did not attempt to negotiate the conditions or the time for the inspection.

52. The third broad phase of the examination was the progress of the proceedings. The judge noted that the track and trace report from An Post showed on its face that the registered envelope containing the motion papers had been successfully delivered on 8th December, 2021. The appellant, said the judge, was saying on the one hand that her signature on the delivery notice was forged, and on the other that she was not accusing anyone of anything. That, said the judge, was entirely unsatisfactory but she did not need to get into it because the appellant appeared on the return date and got an adjournment to allow her to deal with the application.

53. The judge identified the critical issue as being whether the respondents had to come to court. In circumstances in which the appellant had failed to set out in any clear way why she alleged that the will was invalid and had failed to take up the opportunity to inspect the original, the respondents had no choice but to come to court.

54. The judge expressed two misgivings about awarding all of the costs to the respondents. The first was the lack of engagement from early 2020 until the middle of 2021 which had given rise to an attitude of distrust on the part of the appellant. The second was that the order giving liberty to apply for a grant *ad colligenda bona,* which had been applied for in circumstances of urgency, had not been acted on. The judge emphasised that she did not see that there was anything wrong in applying for a limited grant but that it turned out, with the benefit of hindsight, not to have been necessary.

55. The judge said that she would award the applicants their costs of the application out of the estate from the date of the first warning letter of 28th May, 2021 on a legal practitioner and client basis, but excluding the costs of the appearances on 13th and 20th December, 2021.

56. As to the *"order over"* against the appellant, the judge recalled that the application for costs against the appellant was on a party and party basis which was – she said – far less expensive that the legal practitioner and client basis. In recognition of the fact that the appellant had not been taken seriously for a considerable period of time before 28th May, 2021, she limited the award to 75% of such costs.

The appeal

57. By notice of appeal dated 30th March, 2023 the appellant – who had in the meantime instructed another solicitor and counsel – appealed against the order for costs on seven grounds.

58. The first ground is that the judge erred in fact or on a mixed question of law and fact in finding that the appellant had failed to remove the caveat at an early opportunity and/or as soon as was reasonably possible. The appellant, it is said, had attempted to see the original will of the deceased for eighteen months without cooperation or engagement from the solicitor instructed in the estate and consequently was required to enter a caveat to protect her interest pending sight and examination of the will.

59. I should say that it is not clear whether the transcript of the judgment of the High Court was available at the time the notice of appeal was drafted or whether it was based on the appellant's note and instructions as to what was said but this ground does not reflect the judgment. The judge did not decide that the appellant had failed to remove the caveat at an early opportunity but that she had failed to do so after she had been reassured of the due execution of the will and – however belatedly – afforded the opportunity to inspect it. In fact, the appellant never doubted her father's testamentary capacity and never articulated any basis upon which she doubted or might have doubted the due execution of the will. Whatever about the rights and wrongs of her insistence on *"checking the veracity of the original will"* and *"seeing and checking"* the original will, the fact is that she persisted in blocking the

respondents' application for probate after it was shown to her that the will had been duly executed and after she had decided that she did not, after all, want to inspect the original. The proposition that the appellant was required to enter the caveat to protect her interest pending sight and examination of the original will is inconsistent with the fact that she later consented to the removal of the caveat without having inspected it.

60. The second ground of appeal is that the judge erred in fact or on a mixed question of law and fact in holding that the maintenance of the caveat was not justified *"despite the appellant and her two siblings having been removed as beneficiaries of the deceased's estate, and the appellant being a daughter of the deceased having been disinherited entirely."*

61. This is not legally sensible. In general, a will is ambulatory, which is to say that it does not take effect until the death of the testator and until that time it may be changed or revoked. I can understand that the appellant might have been disappointed to learn that her father had made a new will by which she considered herself to have been disinherited but legally, she had no right under the earlier will and on any view, her disappointment was premised on the validity of the will of 31st October, 2020. The caveat could not have been justified by reference to the terms of the will.

62. The third ground of appeal is that the judge erred in fact or on a mixed question of law and fact in finding that the appellant should be liable for the costs, or part of the costs, despite the fact that the appellant had consented to the application and had consented to the removal of the caveat *"in or about February 2022."*

63. This is plainly at variance with the evidence. The appellant's willingness to consent to the removal of the caveat in February, 2022 was on terms not only that there would be no order for costs against her but that the High Court would be asked to examine what she had to say about the service on her of the motion papers. As witness what eventually happened on

11th July, 2022, it was open to the appellant in February, 2022 to consent to the removal of the caveat and to ask the court to adjudicate on the question of costs.

64. The fourth ground of appeal is that the judge erred in fact or on a mixed question of law and fact in placing weight or undue weight on the respondents' submission that the appellant had been fully informed at all material times and the maintenance of the caveat was without merit.

65. The material time can only be the time from which the appellant was found to be liable to pay the costs of the application, which was the time at which the appellant was invited to withdraw the caveat and warned of the consequences if she failed to do so. The respondents' solicitors' letters of 13th October, 2021 and 3rd November, 2021 could not have been clearer. Until the caveat was eventually set aside on 11th July, 2022 the central issue on motion was whether it was without merit.

66. The fifth ground of appeal is that the judge erred in finding that while the appellant's consent in respect of the substantive matter was conditional on their being no order of costs, an order for costs was made against the appellant in any event.

67. There is absolutely no substance to this. While the appellant's willingness in February, 2022 to consent to the order sought was conditional on there being no order for costs against her, her consent to the order which was made by Butler J. on 11th July, 2022 was unconditional and the order expressly left over the question of costs.

68. I will come to the sixth ground.

69. The seventh ground of appeal was that the order for costs unfairly and unreasonably penalised the appellant *"who filed a caveat on sound legal grounds, which reasoning was clearly set out on the affidavits sworn by the appellant in respect of the High Court application."*

70. This, I am afraid, brings us back to the very beginning, when the executors' solicitors' were persistently insisting in correspondence – and later in argument on 4th April, 2022 – that the appellant had not given any reason for filing the caveat and the appellant was persistently insisting that she had. It seems to me that there was an ongoing failure to communicate. When the executors' solicitors were insisting that the appellant had given no reason for the caveat, they meant no good reason. When the appellant was insisting that she had given her reason, it was that she had not been permitted to inspect the original will. The proposition in the notice of appeal that the caveat was filed on sound legal grounds does not withstand scrutiny. The demonstrable objective fact is that the appellant never had any grounds on which to doubt the testamentary capacity of the deceased or the due execution of the will. As I have said, her complaint that she had been disinherited was premised on the validity of the will. No less, the appellant eventually consented to an order setting the caveat aside.

71. In the written submissions filed on behalf of the appellant, it is said that the deceased's last will was a significant departure from his previous will but I cannot see how that is relevant. It is said that the appellant had concerns in respect of the will but not what those concerns were – unless that the appellant's father had made a will which left nothing to her. It is said that the caveat was wholly justified given the departure from the previous will but the difference between the two goes to show only that the deceased changed his mind. If the deceased failed in his moral duty to make provision in his will for the appellant, this had nothing to do with the validity of the will. Indeed, the fundamental premise of any argument that the deceased failed in his moral duty to the appellant could only be that the will was valid.

72. It is said that the appellant sought sight of the will before she could be satisfied for the testamentary document to be admitted to probate but there is no indication of what she might have been looking for; and in the event, she allowed the will to be proved without looking at

the original. It is said that the estate unreasonably refused to allow the appellant to inspect the will but the submission does not engage with the fact that she was later given the opportunity to do so and did not do so.

73. It is said that in circumstances in which the appellant had been entirely disinherited it was highly foreseeably that she would consider making a claim pursuant to s. 117 of the Act of 1965. In the absence of any evidence as to why the deceased made the will he did or of the circumstances of the appellant and the deceased's other children, I find it impossible to make any sensible assessment of the likelihood of an application pursuant to section 117. More to the point, the premise of any s. 117 claim could only be that the will was valid.

74. It is submitted that the respondents' counterproposal to the appellant's offer to consent to the setting aside of the caveat without costs, that the respondents would not seek the costs of the motion if the appellant abandoned any claim pursuant to s. 117 was draconian. Variously, it is submitted that the appellant's agreement to such a condition would have deprived her of a statutory right and restricted her constitutional right of access to the court, and that any such condition would in any event have been void on the grounds of public policy. I am bound to say that I was not at all sure that the High Court or this court should have been told of what appear to me to have been attempts to settle the proceedings and any claim the appellant might have against the estate but in the end, there was no agreement. The appellant, by refusing to withdraw the caveat, had put the estate to expense. That expense would have been much less if she had done in February, 2022 what she eventually did in July, 2022 – which was to consent to the order sought and ask the court to rule on the dispute as to where the burden of the costs should fall.

75. Both in the written submissions filed in support of the appeal and in oral argument, counsel referred to the authorities and the commentators, notably the judgment of the Supreme Court in *In bonis Morelli; Vella v. Morelli* [1968] I.R. 11 and the *"Summary of the*

principles adopted by Courts in exercising their discretion to award costs in probate matters" at para. 7.63 of *Lehane Succession Law* (2022).

76. In *Vella v. Morelli* a plaintiff who had failed in an action to condemn a will on the grounds that it had not been duly executed, that the deceased had not known or approved of the contents of the will, and that it had been obtained by the undue influence of the defendant, was nevertheless allowed her costs out of the estate because there had been reasonable grounds for the litigation, which had been conducted *bona fide*.

77. *Lehane* (citing the relevant authorities) puts the first two of his sixteen principles thus:-

> *"(1) The costs follow the event, so that the successful party in the action should be entitled to recover from the unsuccessful party to the action his costs and expenses of the hearing.*
>
> *(2) If the Court is satisfied, however, that the unsuccessful party had genuine suspicions that a purported will is not valid, he should be able to have the circumstances surrounding the execution investigated by the Court, without the fear of having to bear the burden of a heavy costs bill if unsuccessful in his claim and the Court should award him his costs out of the estate, if satisfied of the reasonableness of his conduct generally. Where so satisfied the Court will award the unsuccessful party his costs out of the estate."*

78. This useful summary underlines that the rule is that costs follow the event and that the discretionary power is the exception.

79. It is submitted on behalf of the appellant that given the terms of the will it was perfectly reasonable for her to have concerns as to its validity as a testamentary document. I would not disagree that the appellant might have been disappointed that her father had made a valid will which left nothing to her but if the suggestion is that the terms of the will might

have given her cause to doubt the validity of the will, I could not agree. The appellant was shown a copy of the will on 23rd January, 2020. It was regular on its face and had been made with a solicitor and executed in the presence of the solicitor and his trainee. The appellant has never said that she doubted for an instant that the signature on the will was not her father's. There was never any suggestion that the deceased might have lacked testamentary capacity or that his will might have been procured by undue influence.

80. In his oral argument, counsel submitted that the appellant might have been confused between a challenge to the validity of the will and a claim pursuant to section 117. The thrust of this submission was that when, in her letter of 22nd October, 2022, the appellant stated that *"there will be a full and outright challenge to this will of 31 October 2019"*, what she really meant was that she would make a s. 117 application. I am bound to say that I am by no means persuaded of that but assuming that it was so, the premise of any s. 117 application could only have been that the appellant acknowledged the validity of the will. And if she did, it followed that there was no justification for maintaining the caveat.

81. Eventually, counsel had to concede that he could not identify any reasonable basis for maintaining the caveat.

82. Counsel touched on the relatively short window of opportunity to inspect the original will offered by the respondents' solicitors' letter of 3rd November, 2021 but accepted that there was no connection between the conditions set out in the letter and the fact that the appellant had not inspected the will.

83. The appellant never had any reasonable grounds to challenge the validity of the deceased's last will. Even if the caveat might have been justified by reason of the manner in which her request to inspect the original will was dealt with – or not – the High Court judge was correct in her conclusion that the respondents' solicitors' letters of 13th October, 221 and

3rd November, 2021 reset the clock by allowing the inspection relied on as having theretofore justified the filing of the caveat.

84. The appellant had failed to demonstrate any error in the analysis and conclusions of the High Court judge and the appeal must be dismissed. There is one minor tweak that should be made to the High Court order. The High Court judge allowed the respondents their costs from the estate and ordered the appellant to pay the respondents' costs with effect from 28th May, 2021 – which was the date of the first letter calling on the appellant to withdraw her caveat. On the oral hearing of the appeal, counsel for the respondents conceded that the appropriate date was 13th October, 2021 and the High Court order should be varied to that limited extent.

The cross appeal

85. The respondents opposed the appeal on all grounds and cross appealed against the exclusion from the costs order of the costs associated with the appearances on 13th and 20th December, 2021. They did not cross appeal against the restriction of the costs order against the appellant to 75% of the party and party costs.

86. The court appearance on 13th December, 2021, it is submitted, was simply the first return date for the application to set aside the caveat. The application did not then proceed in circumstances in which the appellant claimed that she had not been properly served, a proposition on which the judge later cast considerable doubt. The court appearance on 20th December, 2021 was the date on which the order was made giving liberty to the respondents to apply for the limited grant. That relief, it is said, was sought at a time when there was a perceived time sensitivity relating to the proposed sale to the supermarket chain. Then it is said that:-

> *"The ad colligenda grant was not ultimately extracted however, because, although the papers were lodged with the High Court Probate Office in a timely manner,*

there was no evident sign of progress in respect of the said ad colligenda bona grant issuing and same had not issued by the 11th July, 2022, when Ms. Justice Butler made her order on consent setting aside the caveat. In such circumstances, it was deemed more prudent to simply withdraw the application for an ad colligenda bona grant at that stage (in the absence of any progress, in the issue of same) and simply lodge an application with the local district probate registry for a standard grant of probate. This was done and the grant of probate issued on the 7th November, 2022."

87. It was submitted on behalf of the respondents that they were entitled to the costs associated with the court appearances on both dates and that there was no compelling reason why these should be excluded from the *"order over"* against the appellant.

88. I said earlier that I would return to the appellant's sixth ground of appeal. This is that the judge erred in making an order for costs against the appellant in respect of the application for the grant *ad colligenda bona* in circumstances in which orders were made in favour of the respondents but which were never acted on. In fact, the judge excluded the costs associated with the limited grant but in view of what counsel said to the High Court, I can understand how the appellant was under the impression that the order made on 20th December, 2021 was not acted on.

89. As to the costs of the hearing on 13th December, 2021, this was, as the respondents submit, the first return date for the motion. On one view, the respondents' motion was directed principally to the removal of the caveat, but it had obviously been apprehended – correctly as it turned out – that it might take some time to have that issue disposed of. It was against that eventuality that the respondents sought a limited grant so that the proposed sale to the supermarket could progress. The appellant was well aware of the proposed sale to the supermarket chain and it seems to me that the caveat was calculated – in every sense of the word – to prevent the progress of the sale as well as the probate of the will. The High Court

judge was clear that the respondents were entitled to have applied for the limited grant but disallowed the costs associated with it because, she said – and she said so because that is what she had been told – the order giving liberty to apply for the limited grant had not been acted upon.

90. In point of fact, what the High Court judge was told about the limited grant was not correct. If the public counter of the probate office was closed by reason of COVID-19 restrictions, that would not have explained why the papers could not have been lodged and if in fact the order giving leave to apply for the limited grant had not been acted on, I think that the judge would have been entitled to disallow the costs associated with that element of the court application. However, possibly because the respondents' solicitor was not physically in attendance before the court, and possibly because the solicitor in virtual attendance was not the solicitor who had dealt with the file, counsel was uncertain as to what precisely had happened and the judge was left with the impression that the order had not been acted on. It is now clear that the order of 20th December, 2021 was acted on and that the application for the *ad colligenda* grant was in fact lodged but that the application had not been processed before the caveat was set aside. The setting aside of the caveat cleared the path for an application for a full grant in the district probate registry, and that was what was done.

91. As to the costs of the hearing on 13th December, 2021 the respondents would make much of the *obiter* observations of the judge that if she had to decide whether the registered envelope had been delivered on 8th December, 2021, she would probably have decided that it was. I prefer the submission that the return date for the motion was not confined to so much of the motion as sought a limited grant. In truth, even if there had been no dispute in relation to service, the appellant would surely have sought – and would have been granted – an adjournment to allow her to file a replying affidavit.

92. As to the costs of the hearing on 20th December, 2021, Butler J. then granted the respondents leave to apply for the limited grant, and there was no appeal against that order. There was no evidence as to the progress of the proposed sale to the supermarket chain or as to the registration of the deceased's title to the land proposed to be sold. But it seems to me that the justification for the application for the limited grant was not to be assessed with the benefit of hindsight.

93. With some misgivings, I would allow the cross appeal against the restriction of the costs.

Summary

94. I would dismiss the appeal but vary the High Court order to substitute 13th October, 2021 for 28th May, 2021 as the date from which the respondents are to have the costs of the High Court motion. I would allow the cross appeal so as to delete the exclusion from the respondents' costs the costs of the appearances before the High Court on 13th and 20th December, 2021.

95. Provisionally, it seems to me that the respondents are entitled to an order for their costs of the appeal from the estate and from the appellant. I do not see the minor modification to the date from which the High Court costs are to be recoverable as justifying a departure from the ordinary rule that costs should follow the event.

96. I take a different view of the costs of the cross appeal. The restriction imposed by the High Court judge was based on the erroneous impression created by counsel that the order giving liberty to apply for the limited grant had not been acted on. I do not immediately see that the cross appeal could have materially added to the costs of the appeal but in any event, I would make no order as to the costs of the cross appeal.

97. In case either party might wish to contend for any other costs order, I would give liberty to both parties to file and serve a short written submission – no more than 1,000 words

– within fourteen days of the electronic delivery of this judgment; in which event the other will be at liberty within fourteen days to file and serve a response, similarly so limited.

98. As this judgment is being delivered electronically, Costello and Pilkington JJ. have authorised me to say that they agree with it.