THE HIGH COURT

[2024] IEHC 668

Record No. H.SP.2023/311

IN THE MATTER OF THE ESTATE OF MICHAEL HOARE DECEASED
IN THE MATTER OF AN APPLICATION PURSUANT TO ORDER 3(6) OF THE RULES OF THE SUPERIOR COURTS

BETWEEN:

MYLES GILVARRY

PLAINTIFF

-AND-

WILLIAM NAYLOR

DEFENDANT

JUDGMENT of Mr Justice Oisín Quinn delivered on the 21st day of November, 2024

I. Introduction

1. This judgment concerns a question as to the priority of legal costs in probate litigation as between the executor/administrator of an estate and a beneficiary (who were both awarded their costs as "costs in the administration of the Estate" after a long running trial in the High Court and then, the Court of Appeal) in circumstances now, where as a result of the amount of legal costs incurred, the estate is insolvent.

2. The plaintiff, who is a solicitor and is now the administrator of the estate, contends that his costs should be paid in priority to those of the defendant ("Mr. Naylor") a son of the Deceased, who substantially succeeded in the probate action, and who was also awarded his costs as "costs in the administration of the Estate". The estate does not have enough money to pay both, and, it appears barely has enough assets to pay all of the costs of the executor/administrator.

3. The plaintiff estimates that the total assets available to the estate should come to approximately €450,000. The plaintiff estimates that legal costs incurred on behalf of the executor/administrator in respect of the main proceedings and the proceedings to remove Ms.

Maher come to approximately €967,000 and the costs paid already by Mr. Naylor (largely to his original solicitors in the main proceedings) amount to €193,000 with a further €350,000 claimed to be due to counsel for the main proceedings. There are additional unspecified costs in ongoing circuit court proceedings between the plaintiff and the former executrix. In other words, the claimed legal costs incurred by the estate and ordered as "costs in the administration of the estate" exceed €1.5m, in respect of an estate, estimated to have assets just below €0.5m.

II. Background

4. The background to this matter is also described in the related judgment delivered today by me in the context of an application by the former solicitors for Mr. Naylor in the main probate proceedings bearing record number 2008/11089p (the "main proceedings") wherein those solicitors sought orders under section 3 of the Legal Practitioners (Ireland) Act, 1876 in respect of unpaid fees.

5. The main proceedings concerned a claim by Mr. Naylor challenging the last will of his late father (the "Deceased") who died on 7 April 2007. The defendant to the main proceedings was Mr. Naylor's sister, Jean Maher who was, at that stage, the executrix of the Deceased's estate, until being removed in 2019 by the High Court.

6. The Deceased's estate included a farm of some 122 acres in Tipperary (the "Farm"). The last will of the Deceased made on 9 November 2006 left the Farm to Ms. Maher. A previous will made on 30 September 2005 had left the Farm to Mr. Naylor. Mr. Naylor claimed that he was entitled to the Farm on two grounds. Firstly, that he had been promised the Farm for many years and had worked on the Farm for decades for minimal pay and that, consequently, a proprietary estoppel arose. Secondly, he sought to have the last will struck down on the grounds that it was extracted by duress and undue influence.

7. The case ran in the High Court before Mr. Justice O'Keeffe for 21 days between 19 October 2011 and 3 February 2012. Judgment was delivered by O'Keeffe J. on 14 September 2012; see [2012] IEHC 408. A consideration of the judgment indicates the deep-rooted origins of some of the matters in dispute in the main proceedings.

8. Mr. Naylor succeeded on the proprietary estoppel ground and was found to be entitled to ownership of the 122 acre Farm and was entitled accordingly to be registered as full owner of the Farm, being the lands contained in Folios 21455 and 18131 of the Register of Freeholders, County Tipperary. Mr. Naylor was unsuccessful in his challenge to the last will. Both Mr. Naylor and Ms. Maher, as executrix, were granted orders for their "costs in the administration of the Estate" by Order of O'Keeffe J. make on 21 January 2013.

9. Ms. Maher appealed the proprietary estoppel finding and the appeal was ultimately heard by the Court of Appeal on 18 December 2017. By Order of 7 February 2018, the Court of Appeal dismissed the appeal and affirmed the order of the High Court, except that Mr. Naylor was required, as a condition of receiving the transfer of the entire Farm, to disclaim a bequest of €150,000 in the last will (the last will had not left the Farm to Mr. Naylor, but rather just provided for this bequest) and, in addition, the costs order made by the High Court was varied to provide that Mr. Naylor recover 75% of his costs in the High Court (on the grounds that the duress and undue influence argument had been unsuccessful). Mr. Naylor was awarded his full costs of the Court of Appeal, and both sets of his costs were made "costs in the administration of the Estate". In addition, Ms. Maher's costs as executrix incurred in the Court of Appeal were also made "costs in the administration of the Estate".

10. Unfortunately, there has been further litigation in relation to the estate. Mr. Gilvarry, the Plaintiff herein, was the solicitor who had acted for the executrix in the main proceedings, and he brought proceedings in 2018 to have her removed as executrix. Those proceedings were successful and accordingly, by Order of the High Court made on 5 March 2019 Ms. Maher was removed as executrix and Mr. Gilvarry, was appointed as administrator in her place. Subsequently, Circuit Court proceedings commenced between the administrator and Ms. Maher concerning another property in the estate. This led to further costs being incurred in the administration of the estate.

11. As a result of all of the foregoing, the position now is that the estate has become insolvent and cannot discharge all of the costs that have been incurred. Indeed, according to Mr. Gilvarry, the funds in, and likely to be realised by, the estate are estimated to be insufficient to meet even the costs of the executrix and latterly the administrator, much less the costs of Mr. Naylor, which have also been ordered by the court as "costs in the administration of the Estate".

12. Consequently, Mr. Gilvarry, as Administrator of the Deceased's estate, has brought these proceedings against Mr. Naylor seeking orders as to the priority to be applied in respect of the costs that have arisen.

13. It is not disputed that the estate is insolvent. As Mr. Naylor's legal costs of the main proceedings were awarded as "costs in the administration of the Estate" the question arises as to whether those costs should be paid *after* the legal costs of the administrator/executrix are discharged or, in the alternative, should the limited funds in the estate be deployed to discharge both Mr. Naylor's and administrator/executrix's costs on *pari-passu* basis. In practical terms, if the former is the correct legal position, then the reality appears to be that there will barely be

sufficient funds in the estate to discharge the administrator/executrix's costs and there will be no funds available to make any contribution to Mr. Naylor's legal costs. This has an important bearing, potentially, on the position of Mr. Naylor's former legal team as Mr. Naylor claims that he had an arrangement in place whereby, having made an initial contribution to his counsel's fees, and having reached an arrangement with his original solicitors, that any further fees would only be discharged from fees recovered from the estate. Hence the application in the related special summons proceedings (described above) whereby his former solicitors sought a charging order in respect of outstanding fees against the Farm. That application is addressed in the judgment delivered by me today in those proceedings and the application for an order charging the Farm has been refused and the relief in relation to section 3 has been limited to the order for costs made in Mr. Naylor's favour in the main proceedings.

III. Relevant Legal Principles

14. As the estate is insolvent, the rules as to priority of the payment of debts is governed by the provisions of the First Schedule, Part I of the Succession Act, 1965, per section 46(1). Part I of the First Schedule of the 1965 Act provides as follows:-

> *"1. The funeral, testamentary and administration expenses have priority.*
>
> *2. Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities, respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.*
>
> *3. In the application of the said rules the date of death shall be substituted for the date of adjudication in bankruptcy." (underlined for emphasis).*

15. Both sides agree that, by virtue of the orders for costs made in the main proceedings, each sides legal costs constitute "administration expenses" for the purposes of the statutory provision.

16. In the First Schedule, Part II of the 1965 Act, dealing with the order of application of assets where an estate is *solvent*, paragraphs 6 and 7 thereof provide as follows:-

> *"6. Property specifically devised or bequeathed, rateably according to value.*
>
> *7. Property appointed by will under a general power, rateably according to value."*

17. In general terms, an estate is solvent if the total value of the assets exceeds the value of the liabilities, even though the estate may have insufficient funds to discharge, for example, all of the specific legacies or bequests; see for example the decision in *Sampson v Devereux & Another* [1998] WJSC-HC 12034 where Murphy J. states:-

> "*In principle and on precedent it seems to me that the estate of the deceased was and is clearly solvent. The assets exceeded the liabilities by over £190,000. The difficulty is that the costs incurred now make it impossible to discharge in full the legacies and bequests made by the testator. I do not see any basis on which this could be interpreted as an insolvency and my views in that regard conforms with the decision of the Court of Appeal in England in In Re Lang. Tarn and Emmerson, 1985 1 Ch. D. 652.*"

18. Consequently, in that scenario where for example the estate is solvent but there may not be enough money to discharge all the bequests, there is express provision for the bequests to be discharged "rateably according to value"; see First Schedule, Part II, para 6 above of the 1965 Act.

19. In addition, by way of further contrast, section 81(2) of the Bankruptcy Act, 1988 provides that, in relation to priority, the debts specified in subsection (1) "shall rank equally between themselves and be paid in full unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves." (underlined for emphasis).

20. On the other hand, the express provisions of paragraph 1 of the First Schedule Part I of the 1965 Act (dealing with an insolvent estate) do not contain any words to indicate either firstly the order of priority as between funeral, testamentary and administration expenses if there is insufficient funds to pay all of them, or secondly how to deal with a scenario where there is insufficient funds to pay all the administration expenses, where some of those administration expenses are the legal costs of a litigant in a probate action whose costs have been awarded by the court as "costs in the administration of the estate".

21. Hence, the question in this suit arises: does the statutory scheme mean that the executor's administration expenses should get paid in priority to a litigant's, or should each set of costs be discharged from the limited funds on a *pro-rata* basis allowing each set of costs as administration expenses to rank equally.

22. The starting point is therefore one of statutory interpretation concerning the correct approach to interpreting the relevant provisions in the Succession Act, 1965.

23. The approach to a question of statutory interpretation is very comprehensively described in a number of recent Supreme Court authorities: see in particular in *Dunnes Stores v. The Revenue Commissioners* [2019] IESC 50 at paras. 63 to 72; *Bookfinders Ltd v. The Revenue Commissioner* [2020] IESC 60 and *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43.

24. These authorities make clear that the words of the statute are given primacy (as the best objective guide to what the Oireachtas intended) and the Court should look at those words in the context of the statute as a whole and taking account of the pre-existing context into which the legislation is introduced; see Murray J. in *Heather Hill* at para.s 115 and 116 in particular.

25. The statutory provision in paragraph 1 of the First Schedule, Part I of the 1965 Act provides that in relation to an insolvent estate the "funeral, testamentary and administration expenses have priority". These words do not indicate what is to happen if the funds are insufficient pay all the "administration expenses", especially if there are two competing sets of "administration expenses". To that extent there is an apparent ambiguity as to what the words mean in a specific scenario such as the one that arise here.

26. Accordingly, it is appropriate to look at the pre-existing context. Not surprisingly, the 1965 Act was not introduced into a probate law vacuum.

27. Firstly, the Irish provision exactly replicates the then equivalent provisions in both England & Wales and in Northern Ireland; see section 34 and the First Schedule Part I, para 1 of the Administration of Estates Act, 1925 and section 30(1) of the Administration of Estates Act (Northern Ireland) 1955 respectively. The 1925 Act provisions in that respect have since been replaced by the Administration of Insolvent Estates of Deceased Persons Order 1986. However, this 1986 Order, in Article 4(2) also provides for an equivalent provision, stating:-

> *"The reasonable funeral, testamentary and administration expenses have priority over the preferential debts listed in Schedule 6 to the Act [the Insolvency Act 1986]."*

28. One of the leading probate textbooks for England & Wales is *Williams, Mortimer & Sunnucks* on *Executors, Administrators and Probate,* (being the 22nd Edition of *Williams on Executors* and the 10th Edition of *Mortimer on Probate*), 2023. At para 46-64 to 46-65 the authors discuss this equivalent provision which provides that in an insolvent estate "funeral, testamentary and administration expenses have priority". They state inter alia:-

> "*Although there is no express statutory provision, it has always been the rule that the reasonable funeral expenses should be paid before any other testamentary or administration expense.*"

…

"*While, in an administration action properly instituted, the costs of the plaintiff and all necessary parties are administration expenses and are a first charge thereon, if the estate is insufficient to pay all such costs, the representatives are entitled to have their costs paid first. Further, a defendant executor's costs of an administration action have priority over a charging order obtained by the plaintiff's solicitors, and over the costs of the litigation instituted, after an administration order made by the Chancery Division notwithstanding the order of the probate judge that such costs be paid out of the estate and 'have priority over all other claims on the estate'." (underlined for emphasis).*

29. Various old cases are cited in support of the above commentary by the authors. Interestingly, they all (bar one of the cases dealing with the question of the priority for funeral expenses) pre-date the equivalent provision in England & Wales in the 1925 statute and its subsequent replacement by a provision in the same terms in the 1986 Order.

30. In other words, in describing the order of priority under the equivalent provision to that in Ireland, the English authors of *Williams Mortimer and Sunnucks* identify a practice by reference to caselaw from the 19th and early 20th centuries and there appears to be no suggestion, in England & Wales at least, that this practice was altered by the equivalent statutory provision in that jurisdiction in either 1925 or by the re-enactment of the same provision in the Administration of Insolvent Estates of Deceased Persons Order 1986.

31. By way of further background, it seems there is a general practise in Ireland, that if a probate case is a proper one to have been litigated and if the litigation is properly conducted then the costs will usually be ordered to be borne by the estate; see for example *O'Connor v Markey* [2007] 2 IR 194.

32. Before setting out some of the detail of the legal context prior to the 1965 Act it is worth describing the principled basis by which same can be looked at in the context of a consideration of a question of statutory interpretation.

33. In *Bederev v Ireland* [2016] 3 IR 1, the Supreme Court was considering a challenge to legislation on the grounds that it infringed Article 15.2.1 of the Constitution. As part of that exercise, the Court had to consider what the legislation in question meant. The judgments make clear that the exercise of statutory interpretation can involve considering the "historical frame of reference" in which the legislates operates; per MacMenamin J at para 21. More particularly, Charleton J. says in that context at para 40 *et seq.* as follows:-

"There is a presumption against an accidental alteration of the law. The following passage from Maxwell on the Interpretation of Statutes (11th ed., Sweet & Maxwell, London, 1962) at pp. 78 and 79 puts the matter as a presumption against any radical implicit alteration of law:-

> *"One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intentions with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended."*

The general system of law, described by Maxwell, consists of the corpus of legislation and requires the 1977 Act to be considered in its proper context: as a legislative measure targeted at particular ends and within an existing corpus of law. The reasoning of the Court of Appeal suggests that this legislation has the capacity to allow for the widest possible amendments to the law in a manner contrary to the democratic purpose which underlies Article 15.2.1° and which requires radical alterations to the law to be passed by the Oireachtas. It is to be stressed that radical and far-reaching changes to the law cannot occur through ambiguous language; O'Connell v. Bank of Ireland[1998] 2 I.R. 596. In the consideration of a particular section or subsection of an enactment, context is information; context both within the enactment and within where the enactment fits in the legislative body. In analysing the mischief which legislation is designed to address, how an enactment is bookended by other statutes informs its scope; see Bennion, Statutory Interpretation (6th ed., Butterworths, London, 2013) where it is suggested at p. 540 that:-

> *"The interpreter should treat the express words of an enactment as illumined by consideration of its context or setting. The words are not deployed in a vacuum ... Courts accordingly may have regard to the legislative history, the statutory*

context furnished by legislation in pari materia [on the same subject], and the common law context."(underlined for emphasis).

34. Added to the foregoing, is the dicta of Charleton J. in *Gearty v DPP* [2024] IESC 45, where he states at para. 46:-

> *"The law against uncertainty in statutory interpretation is reviewed by Murray J in Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General [2022] IESC 43. Uncertainty or ambiguity arises when on its face the text "clearly susceptible to more than one meaning, but it may also be contextual, so that seemingly clear words can, when placed in situation, bear a construction not always evident from the language alone"; The People (DPP) v Brown [2018] IESC 67, [2019] 2 IR 1. This involves two stages of inquiry that form part of a single continuum (1) words in context and (if there remained ambiguity), (2) purpose. For the reasons already outlined above, it is simply not possible to legislate without leaving some degree of uncertainty."*

35. In terms of the old cases that appear to contain the common law approach to this probate issue, the first case referred to was *Gaunt v Taylor* (1843) 2 Hare 413. This case decided that even where a court ordered the costs of several parties to litigation to be paid out of the funds of an estate, that such an order will not generally disturb what is described as the "well-established and undisputed rule of practice". According to the headnote of the reported judgment "the fund proving insufficient to pay all the costs – the Court ordered the costs of the executors to be paid in the first place".

36. In *Dodds v Tuke* [1884] LR 25 Ch D 617 the Court in a short judgment dealing with a similar problem, this time involving a trust, determined that the trustees were entitled to a direction for payment of their costs in priority to the costs of the other parties.

37. In *Re Griffith* [1904] 1 Ch 807 a similar problem arose in that a fund in court concerning an estate had insufficient funds to pay all the costs of all the parties. Farwell J noted that "It is well-settled rule of the Court that administrators have priority for payment of their costs out of their intestate's estate." Farwell J. considered the existing orders for costs did not decide the order of priority. Farwell J. followed the approach in *Gaunt v Taylor* and also describes the approach whereby the administrator gets paid in priority as a "well-established and undisputed rule of practice".

38. In *Re Turner* [1907] CA 126 the Court of Appeal adopted a similar approach. The Court of Appeal affirmed the High Court decision that, as noted in the headnote "having regard to the long-established practice of the Chancery Division indemnifying the trustees for all expenditure properly incurred in relation to their trust estate, and also to the express terms of the compromise, the defendant trustees were entitled to payment of all their costs, charges, and expenses in priority to the charging order obtained by the plaintiff's solicitors." In that regard, some flavour of the depth to which it was perceived that this practice was established emerges from the following portion of the judgment of Kekewich J. in the High Court which was upheld and affirmed by the Court of Appeal:

> *"The main ground for urging that I ought not to exercise the discretion in favour of the solicitors is one deserving a grave consideration. I shall put aside all others; they are small, and I doubt whether they are entitled to any weight at all. But there is one of great importance. It is said that if I give the solicitors this charging order, then they will not only oust the trustees, as they undoubtedly will, and leave them out in the cold altogether, but that they will oust them from a right which is recognized in this Court as established, not by any rule in books of practice, but by a rule which is part of the system of the Court itself, and has been repeated in the strongest terms for generations, if not for centuries. That is the rule to which I referred at the commencement of my remarks, that a trustee besides his right against his cestui que trust, which is one of the largest character, and has been laid down in very plain terms by the recent judgment of the Privy Council in Hardoon v. Belilios, has a right against the trust property. He can charge nothing for himself; he can make no profits; but he is entitled to be paid every penny which he incurs on behalf of the trust estate, and he is entitled to go against the trust estate and have every penny raised out of the trust estate, so that he will be fully indemnified. It is of the utmost importance that that privilege should be upheld. The Court of Chancery has always regarded it as of the utmost importance to the State that persons should be found who will, on gratuitous terms, undertake trusts and discharge duties to families and friends, of a very troublesome and responsible character, and it is impossible to expect the gentleman will be found to do that unless they have an indemnity against, I will not use the word "costs," but against every penny incurred by them in discharge of their duties. There is a rule in bankruptcy mentioned in the passage from In Re Humphreys to which I am about to refer providing for the priority of costs, and in that case importance was attached to it. To my mind the rule concerning trustees to which I have referred, and which is the established doctrine of*

the Court of Chancery, is far higher than that. It has a greater sanction than any rule, and is to my mind a far greater importance. If I decide in favour of the solicitors in this case, I shall tell the trustees that they will go without payment of the costs out of this fund. They must be left to look for those costs to their cestuis que trust, who ex concessis cannot pay them. I ought not to do that without grave consideration."(underlined for emphasis).

39. In addition, there are various provisions of the Trustee Act, 1893 and other provisions of the Succession Act, 1965 that give additional legal context to the statutory provision under consideration herein.

40. Firstly, section 24 of the Trustee Act, 1893 provides that a trustee "… may reimburse himself … out of the trust premises, all expenses incurred in or about the execution of his trusts or powers".

41. Section 50 of the 1893 Act provides that the expression "trust" includes the duties "incident to the office of personal representative of a deceased person".

42. Next, section 12 of the Succession Act, 1965 provides that:-

"12.—(1) All enactments (including this Act) and rules of law relating to—

(a) the effect of representation as respects personal estate,

(b) the dealing with personal estate before representation,

(c) the powers, rights, duties, and liabilities of personal representatives in respect of personal estate,

(d) the payment of costs of administration, and

(e) all other matters with respect to the administration of personal estate,

shall, so far as applicable, apply to real estate as if it were personal estate; and subsequent provisions of this section shall not prejudice the generality of this subsection." (underlined for emphasis).

43. In addition, *Halsbury, the Laws of England*, Vol. 16 states at para. 892 dealing with the costs of executors and administrators as follows:-

"Under the general practice of the Chancery Division a personal representative who has acted properly is allowed his full costs of the administration proceedings as a matter of course and in priority to the costs of all other parties… His prior right to

costs is not affected by the fact that the order on further consideration directs the costs of all parties to be paid out of the funds in court and the funds proved to be insufficient to meet all the costs."

44. A similar view is contained in the textbook, *Ingpen, a Concise Treatise on the Law relating to Executors and Administrators*, 1908 where the author states at page 313:-

"In an action for the administration of an estate, where the estate proves to be insufficient to pay all the costs, the legal personal representatives are entitled in priority to other parties to be paid their costs, and the costs of the plaintiff, not being the legal personal representative, are the next charge on the estate; and an order in the action that the costs of all parties are to be paid out of a fund does not affect this rule as to priority and amount to a direction that the costs are to be paid equally."

IV. Submissions

45. Both parties prepared detailed written submissions, made very helpful oral submissions and provided the Court with helpful caselaw and extracts from textbooks.

46. On behalf of the plaintiff it was submitted that the caselaw and textbooks described a settled and well-established practice that in a scenario like this, the executor's costs should be paid in priority to those of a litigant, even where both had been ordered as "costs in the administration of the estate".

47. It was submitted that the wording in Part I of the First Schedule to the 1965 Act, reflected the wording used in the equivalent UK legal provisions and that was not intended to and clearly had not, according to the textbooks, changed the aforementioned well-established practice.

48. On behalf of the defendant, it was submitted that his costs along with those of the executrix/administrator were ordered as "costs in the administration of the Estate" by both the High Court and the Court of Appeal. He had substantially succeeded in the main proceedings. It would be unjust if he did not now recover costs on at least the same *pro rata* basis as the executrix/administrator and that accordingly, each party should bear the shortfall equally.

49. Attention was drawn to the Supreme Court decision in *Re Morelli Deceased; Vella v Morelli* [1968] IR 11. In this case the Supreme Court sets out the approach that should be followed in relation to awarding costs as costs in the administration of an estate. Essentially there are two requirements. Firstly, that there should have been reasonable grounds for the litigation and secondly, the litigation should have been conducted *bona fide*; see Budd J. on

page 34 of the report, who sets out the rationale for this approach. On behalf of Mr. Naylor it is submitted that his approach to the main proceedings met these requirements and that it would, accordingly, undermine the said rationale endorsed by the Supreme Court in *Morelli* if Mr. Naylor was now to end up without his costs, or a pro rata portion thereof, being paid out of the estate due to the executrix/administrator getting priority for their costs.

V. Decision

50. In the main proceedings, Mr. Naylor substantially succeeded in obtaining relief whereby he was awarded the Farm. Although his challenge to the last will of the Deceased was unsuccessful, he was nonetheless awarded 75% of his High Court costs and all of his Court of Appeal costs as "costs in the administration of the Estate". If the estate was solvent, then both the executrix (now the administrator) and Mr. Naylor would be paid their legal costs from the estate.

51. The estate's assets are estimated at just below €0.5m. The costs claimed appear likely to exceed €1.5m. As a result of the main proceedings and the other litigation (described above) the assets of the estate are likely to be insufficient to even pay the costs of the executrix/administrator; the Farm of course is no longer part of the estate.

52. The problem that arises here hardly seems unique or unlikely to arise on an occasional basis. The court in a probate action in Ireland does not have the procedural rules to direct a costs management hearing or to direct parties to submit to an early independent evaluation of the case. For example, there are no equivalent procedural rules in Ireland whereby a court can direct an Early Neutral Evaluation (an "ENE") of a probate dispute; see for example *Lomax v Lomax* [2019] EWCA Civ 1467 whereby the Court of Appeal confirmed that under the English Civil Procedure Rules it could order an ENE even when one party objected. A party proceeding with a probate challenge in the teeth of an ENE could certainly be at more risk of an adverse costs order, as opposed to having their costs ordered as "costs in the administration of the estate". As described above however, it is general practice for the courts in Ireland to award all the litigants their costs as "costs in the administration of the estate" if the issues raised are seen as reasonably raised and the litigation is conducted properly; see *O'Connor v Markey* above. As the judgment of O'Keeffe J. in the main proceedings indicates, a probate action can involve deep rooted and highly contentious issues stretching back for a generation, if not longer, and consequently, in the absence of early costs and case management procedures (such as exist in England and Wales and as are described more fully in *Tristam and Coote's Probate Practice*, 32nd Edition, 2020 in Chapter 37) a long running case can ensue and, depending on

the value of the estate, the solvency of the estate itself can be put at risk due to the legal costs, as has occurred here.

53. Turning now specifically to the issue herein, firstly, the order made by the High Court and then the Court of Appeal for costs in the main proceedings did not determine any priority as between them. Both Mr. Naylor and the executrix were awarded costs as "costs in the administration of the Estate".

54. The estate is insolvent and cannot discharge both the administrator's costs and Mr. Naylor's costs. As set out above, the figures supplied indicate that the estate almost certainly has insufficient assets to discharge all of the administrator's costs.

55. Given that the estate is insolvent, section 46(1) of the Succession Act, 1965 provides that the assets should be administered in accordance with the rules as to priority contained in Part I of the First Schedule of the 1965 Act.

56. The first rule contained therein is that "[t]he funeral, testamentary and administration expenses have priority".

57. Both sides agree that Mr. Naylor's costs and the costs of the executrix/administration are properly to be considered "administration expenses".

58. Unlike other statutory provisions such as para.s 6 and 7 of Part II of the First Schedule of the 1965 Act and section 81(2) of the Bankruptcy Act, 1988, there is nothing in Rule 1 of Part I of the First Schedule to indicate what should be done if the administration expenses themselves exceed the assets available and in particular, if the administration expenses are due to the administrator and a separate litigant who has been awarded costs in the administration of the estate (for example pursuant to the general practice described above in probate cases such as *O'Connor v Markey* and *In re Morelli*).

59. I am satisfied accordingly, that the provision in question contains an ambiguity. Either scenario could plausibly fit within the express words used in the statutory provision.

60. The caselaw on statutory interpretation (set out above) indicates that in this scenario it is appropriate to look at the context in which the legislation is introduced, and this context includes the pre-existing law, including the common law; see *Gearty* and *Bederev* and Murray J. in *Heather Hill* at para.s 115 and 116 in particular.

61. The caselaw from the late 19th and early 20th century indicates clearly that in this scenario the well-established and undisputed rule of practice was that the costs of the executor would be paid in priority to the costs of another litigant, even where that litigant's costs were

awarded as costs in the administration of the estate; see the cases of *Gaunt*, *Dodds*, *Re Griffith* and *Re Turner* (all discussed above).

62. The textbooks indicate that this is the understanding of the authors in relation to this practise both at the time of those cases (see *Ingpen* 1908) and currently (see *Williams, Mortimer and Sunnucks* 2023 and *Halsbury*).

63. The view of the learned authors as to the current legal position on this precise question in England and Wales is instructive as it also relates to a legislative rule (the 1986 Order and prior to that, section 34 of the Administration of Estates Act, 1925) that is in precisely the same terms as the statutory provision in Ireland.

64. According to these textbooks, in a scenario such as this, the costs of the executor/administrator get priority.

65. This outcome also accords with the related provisions in the Trustee Act, 1893; see section 24 in particular.

66. In those circumstances I am satisfied that, applying the principles discussed above as outlined by Charleton J. in *Bederev*, had the legislature intended to change the well-established legal regime that pertained at the time in relation to insolvent estates (that the costs of an executor are to be paid in priority to the costs of a litigant awarded as costs in the administration of the estate) that clear language would have been required. The fact that the legislature chose to use the same words as used in the UK in the 1925 and 1955 Acts (and which rules had not - according to case law or academic texts - changed the practice there) reinforces this conclusion that the legislature in Ireland did not intend to change the long established practice on this matter.

67. Accordingly, I am satisfied that the correct interpretation of Rule 1 of Part I of the First Schedule of the Succession Act, 1965 is that in a case where both a litigant and an executor are awarded costs as "costs in the administration of the Estate" and where that estate is insolvent then the statutory provision in issue should be interpretated as meaning that the costs of the executor should be discharged in priority to the costs of the litigant.

VI. Form of Order

68. Accordingly, I propose to grant a Declaration to this effect in accordance with the form of the Order sought in paragraph 6 of the Special Summons.