



THE HIGH COURT

[2024] IEHC 403

[Record No. 2022/78SP]

IN THE MATTER OF THE ESTATE OF MARY CONWAY LATE OF
GLASCORN, BALLINEA, MULLINGAR, COUNTY WESTMEATH

AND

IN THE MATTER OF THE SUCCESSION ACT

BETWEEN

DAVID CONWAY AND CIARAN CONWAY

APPLICANTS

AND

FINTAN CONWAY

RESPONDENT

JUDGMENT of Mr Justice Kennedy delivered on the 31st day of July 2024.

Introduction

1. The testator is survived by her five sons, including the three parties to these proceedings. The applicants and the respondent are siblings. The applicants seek the respondent's removal as the executor of their mother's estate. They blame him for delays in its administration and for failing to discharge his duties lawfully. The Respondent and the other two brothers, Frank and Kevin Conway ("the Other Brothers"), oppose the application.

2. The family have been farming near Mullingar for decades, acquiring more land over the years. Following the death of her husband (the parties' father) in 1999, the testator, a former

midwife, passed virtually all her land to her children and farmed at a much-reduced level until her death on 4 June 2013, with the second applicant managing her farming interests. There is no issue with the will, which divided 90% of the estate evenly between three sons (the first applicant and the Other Brothers). The second applicant and the respondent were each to receive 5% - the testator had given them farms in 2006 and 2009 respectively.

3. The second applicant (whose full-time occupation is a senior and responsible position in an agricultural nutrition company) has managed the family's farming interests since the 1990's on behalf of the testator, and also, in more recent years, his siblings, and he traditionally enjoyed a free hand on behalf of both the Testator and the family. The testator initially retained a few acres after transferring the two main farms to the second applicant and the respondent. Even when she transferred these last remaining acres, she retained some livestock and her own herd number. The second applicant managed her residual interests while also managing his own land and a farming partnership for himself and several brothers, with a separate herd number in his brother, Kevin's, name. There were different family partnerships with different compositions over the years, but nothing turns on that here. Accordingly, I will refer to the final partnership ("the Partnership"), in which all brothers (apart from Frank) participate. The following table compares the five siblings' interests in the estate and the Partnership:

	First Applicant	Second Applicant	Respondent	Kevin	Frank
Interest in estate	30%	5%	5%	30%	30%
Partnership interest	23.83%	36.88%	31.11%	8.18%	N/A

The Applicants' combined interest represents more than 60% of the Partnership but only 35% of the estate. The second applicant has a larger interest in the partnership than in the estate.

4. Since long before the testator's death in 2013, the second applicant managed what remained of her farming interests, along with the Partnership's farming activities. The combined enterprise was substantial, with an annual turnover in excess of €1 million. The two

herds were run together, and the businesses largely operated on a day to day basis together, a single enterprise for practical purposes (with exceptions such as the Partnership's contracts to fatten livestock for third parties, an income stream which did not involve the testator or her estate). While this may not have been an issue on a day-to-day basis, in legal and economic terms, ownership of assets and liabilities and the entitlement to profits and liabilities were shared between the Testator (and, subsequently, her estate) on the one hand and the Partnership on the other. However, the approach seems to have been fluid.

5. Both before and after the testator's death the second applicant invested time and energy in managing the family farming interests. His responsibilities as farm manager included keeping track of income and expenditure on behalf of the Testator and the Partnership. Periodically, he prepared schedules listing income and expenditure for his mother and the Partnership respectively. He says he furnished such schedules (which became more sophisticated over time) to Pat Corcoran and his team at Kinnear & Co., the family's accountants ("Kinnear"). The latter compiled accounts and income tax and VAT returns based on his schedules for the testator, the Partnership and the individual partners. Kinnear's work seems to have been largely a compilation exercise rather than a process of auditing or verifying the information; although they would presumably query discrepancies which they identified.

6. Both sides served notices of cross examination, requiring a three-day hearing which focused on the appropriateness of, and motivation for, actions of the second applicant and the respondent respectively. The controversy did not turn on direct conflicts of evidence so much as on how certain matters should be characterised and as to who was responsible for the difficulties and delay. Many points are largely common ground, and the numerous affidavits contain considerable repetition. Furthermore, the position on some issues crystallised during the exchange of affidavits or cross examination. Accordingly, I will summarise the issues and

my limited references to individual testimony and affidavits will concentrate on live points of disagreement and credibility and key issues.

Basis for the Application

7. In summary, the second applicant alleged that the respondent: (a) was guilty of gross delay in the administration of the estate; (b) was acting arbitrarily, unlawfully and without the benefit of legal advice, having discharged his solicitors after the grant of probate; (c) acted improperly in seeking to pursue an unjustified claim for €569,000 against the second applicant while refusing to explain that figure; (d) was seeking to frustrate the testator's intentions by undermining dispositions freely made by her during her lifetime; (e) made an application for probate on the basis of incorrect filings; (f) wrongfully paid his own legal fees from the estate; (g) wrongfully sought to make an interim dividend on an inappropriate basis; (h) wrongfully admitted substantial debts claimed by his younger brothers; (i) wrongfully disposed of partnership assets (BPS entitlements) without allowing the beneficiaries the chance to acquire the same; and (j) was failing to administer the estate in accordance with law and with the testator's wishes.

The Correspondence

8. Many issues are framed by the correspondence between the parties. According to the respondent, having fruitlessly tried various channels over an extended period to obtain from the second applicant the information required to apply for probate (including a request from Kinnear to the second applicant on 16 September 2014), the respondent ultimately found it necessary to instruct the family solicitor (who was assisting with the application for probate) to write to the second applicant on 1 September 2017 in respect of the application, requesting confirmation of the position in relation to the filing of accounts for the testator:

“from the date of her death to date in respect of any trading done for stock, single farm payment etc.”

9. However, the delays continued, for reasons which have not been satisfactorily explained, until the second applicant finally supplied to Kinnear the information and documents which they needed in order to prepare accounts and tax returns in support of the probate application. Accordingly, on 18 February 2021, Kinnear confirmed by email that they were finishing off the testator's accounts to the date of her death, noting that they also needed:

“to deal with the period of farming effectively conducted by the estate until all of [the testator's] stock washed out of the herd”.

10. The information furnished by the second applicant was largely only forthcoming between October 2020 and March 2021. Although that information remained incomplete, the information provided by that point finally enabled Kinnear to provide sufficiently detailed accounts to enable the respondent to proceed to apply for probate. On 29 November 2021, the respondent wrote to his siblings confirming that the grant of probate had issued and enclosing a copy of the grant itself and of the application form (the document initially circulated by the respondent was incomplete due to a copying issue, but nothing turns on that despite the time spent on the issue in the correspondence and affidavits). The respondent's letter noted that:

“I am writing to all debtors requesting payments of all amounts due in respect of Ma's estate/account/herd number etc. This will involve me writing to each of you as per the figures in the attached Form SA2.

I will be writing to Ciaran in respect of both Conway Partnership and Conway Bros.

There are still outstanding liabilities. These will have to be addressed and Ma's tax affairs finalised before the estate can be wound up. Unfortunately, this may take some time and I appreciate that this is frustrating for each of us.

However, I ask that each of you provide the necessary information and assistance requested thus allowing me to proceed with the process as quickly as possible”.

11. The respondent's 2 December 2021 letter to the second applicant stated:

“... From the information made available to me, you owe the sum of EURO 569,130 to the Estate. Can you please arrange to make payment of that amount to me, as executor? If you do not agree with this claim, please let me know why you disagree that this amount

is not the correct amount due and let me have the correct figure, or if you dispute the fact of the debt, please explain why.

Please also let me know of any dealings you had with any assets or liabilities of the estate since 4 June 2013, and details of all accounts you had in joint names with our mother before her death so I also may take account of these in bringing the estate to a close..."

The respondent sent corresponding letters to other potential debtors and creditors, including a simultaneous letter to the second applicant as the Partnership's representative, asking him to arrange for the Partnership to pay €68,343, which it appeared to owe the estate.

12. The second applicant stated that he received two further letters from the respondent on 4 December 2021, claiming that he and the Partnership owed the estate further sums of €38,701 and €9,960, respectively. However, he accepted on cross examination that, in fact, those letters were to the opposite effect. They suggested that the estate might owe such sums *to* him or to the Partnership, rather than the other way around, and sought confirmation so that the respondent could arrange for payment.

13. The second applicant did not respond immediately or directly to the respondent's 2 December 2021 letter. Accordingly, a further letter from the respondent, on 17 December 2021, requested a response, along with details:

"of any dealings that CP had with any assets or liabilities of the Estate since 4 June 2013, and details of all accounts that CP had in joint names with our mother before her death so I also may take account of these in bringing the Estate to a close".

The respondent sent a similar letter in respect of the partnership's debt to the estate.

14. On 13 January 2022, the second applicant's solicitor responded to the respondent's 4 December 2021 letter [*sic*], expressing concern that a debt of €569,130 was being asserted and requesting a breakdown. The respondent's response - the following day - stated:

"... I'm glad to see that Ciaran appears to be eventually engaging with the process which he has avoided doing so for the last 8 years despite several attempts by a solicitor and various family members to get him to engage.

The SA2 form was compiled and lodged by solicitors Kelly Caulfield Shaw on behalf of the Estate...

[The second applicant] still retains all the financial data and supporting documents belonging to the Estate... In addition, he belatedly provided data to Kinnear's in late 2020 / early 2021 to enable the compilation of draft farm accounts for the Estate of Mary Conway (8 years after her passing). This formed the basis for the compilation of the SA2 form by Kelly Caulfield Shaw. To date, the assets of the Estate ... as mentioned above, which would allow for verification and approval of the draft accounts, have not been passed onto the Executor. Please confirm that all these documents will be made available to me by close of business next Friday, 21 January 2022”.

15. The 14 January 2022 letter also made clear to the second applicant’s solicitors that their client and the Partnership were not authorised to use or retain monies or assets belonging to the estate and called on the second applicant to ensure that the Partnership paid the monies owing to the estate (which he put at €135,098), noting that:

“estate funds should not be co-mingled with partnership or personal funds and MUST NOT be used for the repayment by CP of CP family or CP family member loans. ...”

16. The respondent’s letter noted his expectation that the solicitors would:

“a. Instruct Ciaran to hand over all assets of Estate ... by close of business on Friday, 21 January 2022 to allow for the Estate to be wound up...

d. Ask him to provide the information requested regarding joint bank accounts, otherwise I shall assume there are no agreements etc with regards to these accounts

e. Advise Ciaran as to his potential criminal law liability.

Please ensure that Ciaran pays Moynihan Solicitors from his personal resources and not from partnership funds or funds taken from the Estate's funds...”

17. The second applicant’s solicitor responded on 18 January 2022, “vehemently” denying the allegations of retention of financial data and misuse of funds, reiterating the request for documentation and suggesting that both parties approach Mr Corcoran to prepare a vouched reconciliation of accounts. The respondent’s reply, the following day, stated that:

“despite Ciaran’s assertion to the contrary he is still refusing to:

a. To hand over all financial data along with all the supporting documents that he holds belonging to the Estate to the Executor.

b. Repay monies illegally held by Conway Partnership to the estate.

I trust that you will duly remind Ciaran that he is legally obliged to hand over all such items which are the property of the Estate.

For your information the draft accounts cannot be signed off until all such material is duly handed over as this is fundamental to allowing for the verification and approval of the accounts and the financial affairs of the Estate. It will also inform as to whether amendments are needed to the SA2. Can you explain why is Ciaran still refusing to handover this information, after nearly nine years?

In light of the above I will have no choice but to hand over the matter to An Garda Siochana [sic] unless all items pertaining to the Estate including the monies owing by Conway Partnership are handed over in an orderly and complete form to me by close of business Friday, 21 January 2022..."

18. A letter from the second applicant's solicitor dated 21 January 2022 threatened proceedings unless the respondent agreed to jointly instruct Kinnear to resolve the issue. The respondent replied, on 23 January 2022, that:

"... legal privilege does not protect you from any conspiracy to commit or to assist in continuing illegal activities of [his brother]."

19. A further letter from the applicants' solicitors dated 19 April 2022 - by this stage they also represented the first applicant - threatened proceedings to remove the respondent as executor on the following grounds:

"a breakdown in communication and the relationship of mutual trust between the beneficiaries and there is a serious concern that the estate is not being properly administered. There was a large unexplained delay between the date of death and the application for the grant, there has been no reconciliation of the administration accounts undertaken, no vouchers have been provided concerning the alleged debts owing to the Estate, no estate account is held and maintained by a solicitor acting on or on behalf of the Estate, no distribution of the Estate can be progressed, and that, following a valid reconciliation, it is likely that an amended SA2 return will be required to be filed with the Revenue Commissioners".

The letter invited the respondent to agree to the change of executor. Such agreement was not forthcoming, and the proceedings were issued on 17 May 2022.

The respondent's letter dated 22 September 2022

20. The respondent wrote to his brothers on 22 September 2022. He was continuing with the administration, notwithstanding the litigation, proposing an interim distribution to beneficiaries “*in good standing*”, and he aimed to wind up the estate as soon as possible. The delay was in respect of collecting sums due from family members and the Partnership. He noted the information and documentation which were still required by the respondent and outstanding issues, including discrepancies between Kinnear’s draft accounts and the available information, adding that the accounts had revealed:

“transactions/method of accounting which requires certain things to be clarified and verified. Unfortunately, the amounts involved are substantial so they cannot simply be ignored. Depending on how well the matters are clarified and verified will determine whether or not further work and/or investigations will be required by me as executor or experts or authorities. Put bluntly, it would appear that Ciaran through a small number of ways took money from Mammy during her lifetime. The amount of same is equal to the amount I have asked Ciaran to pay to the Estate. Ciaran has also taken money from the Estate. Of course, if all the beneficiaries can reach a unanimous agreement this would speed up the process to wind up the Estate subject to complying with tax and certain other rules.”

The letter also referenced provisions for a claim against the estate by one of the siblings, and for other liabilities in determining the figure available for interim distribution. The applicants vigorously objected to the proposed interim distribution, securing an undertaking that there would be no such distribution pending the determination of this application.

The Applicants' Evidence

21. The applicants have no confidence in the respondent’s administration of the estate. The first applicant’s short affidavit essentially verified the special summons, noting, without

elaborating, “*serious concerns*” about the way the respondent had been administering the estate and his wish that an independent solicitor should administer it. His oral evidence supported the second applicant without advancing matters. Being based in Switzerland, he seemed to have little involvement or familiarity with key issues. He had not been consulted about controversial issues (such as the banking of cheques made out to their mother) and he did not defend the second applicant’s approach to such issues.

22. The second applicant’s affidavits summarised the correspondence, emphasising, *inter alia*, the respondent’s alleged failure to: (i) explain the figure (€569,130) which the second applicant was alleged to owe the estate; (ii) agree that Kinnear should settle the figures or that an independent solicitor should administer the estate; (iii) act on professional legal and accounting advice in the administration of the estate; (iv) ensure that the form filed in support of the application for probate was correct; and (v) complete the administration of the estate and to reconcile the estate’s accounts without delay. He criticised the tone and content of the respondent’s correspondence, rejecting the latter’s explanations that, *inter alia*, (a) the probate was based on professional advice; and (b) the information and vouching documents were in the second applicant’s own hands, and it was his own failure to provide information and documents which was delaying the administration. The second applicant did not deny that he owed monies to the estate, but he did not reveal the figure which, in his view, was due. Instead, he simply noted that some “*settling of accounts*” might be required in respect of the family partnerships and stated that:

“demanding €569,130 as a debt without providing particulars of how same was calculated, then upon seeking vouching documentation, responding that I must have the information and further alleging that myself and my solicitor are in a criminal conspiracy, does not give me confidence that the estate will be administered correctly [sic]”.

23. The second applicant also accused the respondent of having:

“wrongfully [taken] €56,000 from bank accounts controlled by the partnership which created a serious cashflow issue whereby suppliers could not be paid.”

He said that:

“accounts had to be closed/mandates changed to ensure that the Respondent could not once again unilaterally withdraw partnership funds.”

24. In response to issues raised by the respondent, the second applicant: (a) denied forging his mother’s signature; (b) claimed that he and the respondent had agreed that he should run down their late mother’s farm business and that was what he was doing; and (c) sought to justify his attempt to transfer the testator’s herd number into his own name.

25. After various exchanges concerning the figure which, the respondent alleged, the second applicant owed to the estate, the latter noted that the sums claimed appeared to concern the Testator’s expenditure on his land, repayment of a joint loan in 2008 and 2009, loan payments to 2013, and the value of her car, a 2006 Peugeot. He denied liability to repay any of those sums on the basis that payments made by the Testator during her lifetime were her decision, and that any claim for repayment would be statute barred. He accused the respondent of seeking to reopen transfers by the testator during her lifetime. He also denied the suggestion that he owed a substantial debt to the estate and had an interest in delaying or undermining its administration. His original affidavit emphasised that he had:

“acted as farm manager without payment, undertaken the day to day manual labour and management of the farmlands and this work was undertaken irrespective of who or what entity the profits were payable to.”

He denied any responsibility for the delay, asserting that the respondent always had sufficient information to apply for probate but inexplicably failed to do so. He stated that he was continuing to work with Mr Corcoran to try to resolve the discrepancies in reconciling the proceeds of livestock numbers and that they believed that they had now largely accounted for most of the livestock owned by the testator at the date of her death.

26. In his oral testimony, the second applicant sought to justify his actions, including his banking (to his wife's account) of cheques payable to the testator on the basis that the respondent had agreed that the second applicant would continue to manage the estate's remaining livestock. He also argued that, because herd numbers had been used interchangeably, cheques were made payable to the Testator in respect of livestock actually belonging to the Partnership, because the factories buying livestock wrongly assumed from the register that the testator owned such livestock (although the register is not proof of title). He contended that the Partnership was entitled to the payment in such cases.

27. The second applicant also exhibited correspondence with his brother Kevin, who had originally been named as a joint executor along with the respondent and who had been a principal in the London office of a respected international law firm, including a detailed letter outlining the latter's views on the dispute, warning of the cost of the litigation due to the failure to allow common sense to prevail, and asking whether the applicants were motivated by resentment at not themselves being appointed as executors or at their inability to control the farming assets and money or whether the litigation was an attempt to bully the respondent or "*a throw back to childhood when you two would unite together against the whole world*".

28. The letter referred to a discussion with the testator when she wrote her will:

"I told her I did not want to be an executor and I recommended that Ciaran was the sensible choice. However, true to form Mammy knew her own mind and each of her sons better than we know ourselves".

29. The letter urged the second applicant to explain certain controversial financial transactions with the testator (being the issues also raised by the respondent), noting the lack of explanation as to why he should not account for:

"(i) moneys of or advanced to Mammy under various loan agreements and repaid by her in full or substantially in full which were spent mostly on the Glascorn farm, (ii) proceeds of the sale/slaughter of Mammy's herd were either lodged to her account but moved

immediately to the CP bank account or lodged directly to the CP bank account and not lodged to any of her bank accounts NOR recorded correctly in her accounts/records; and (iii) records indicating ownership of animal(s) by Mammy but the animal then disappears with no explanation nor sale/slaughter proceeds being recorded; (iv) substantial sums were transferred from Mammy's bank accounts but there is no record explaining why, to where and/or for what? (v) the sale proceeds collected and kept by you on the sale by you of Mammy's assets after her death; (vi) income arising from the 'investment' of any of the above”.

30. The letter noted that the respondent’s duty to collect their mother’s assets extended to investigating and understanding her finances and accounts and asking questions if necessary. It queried whether certain transactions would be treated as valid “*without sufficient explanation or consideration*” and warned the second applicant of the need to meet his legal obligations. It offered to discuss the issues on or off the record and noted the potential tax consequences of the second applicant’s position.

Mr Corcoran’s Evidence

31. Mr Corcoran is a chartered accountant and a partner in Kinnear who acted for: (i) the applicants; (ii) the family partnerships, including the individual partners; (iii) the testator until her death; and (iv) her estate thereafter. Kinnear’s letters of engagement were not exhibited and none of the exhibited draft accounts provided for the estate appeared to include the accountants’ reports, which presumably had not been finalised, but would presumably have been on similar lines to their report on, for example, the accounts which they prepared for the Partnership for the year ending 31 December 2020, which stipulated that Kinnear had compiled the financial statements “*from the accounting records and information and explanations supplied by you*”. Although the report was addressed to all the members of the partnership, in practice, the information and explanations were overwhelmingly supplied by the second applicant to Kinnear. The report made clear that Kinnear had not verified the accuracy or completeness of the accounting records or information or explanations on which the accounts

were based. Kinnear did not therefore, express any opinion on the financial statements. The report noted the partners' responsibility for providing all information and explanations necessary for the compilation and expressed no opinion as to the adequacy of their efforts in that regard.

32. Kinnear's reliance (without verification) on the information and documents supplied by the second applicant was confirmed by Mr Corcoran's oral testimony and by his letter dated 28 March 2022 to the respondent, which confirmed that Kinnear had "*examined*" the testator's books and records but had not carried out an audit. On the basis of that examination, the balance owed by the Partnership as of the Testator's death was €191,097, whereas the estate owed the Partnership €44,960 (for context, it should be noted that when Kinnear refer to their examination of the testator's books and records, they appear to be referring to the (apparently incomplete) books and records presented by the second applicant).

33. The 28 March 2022 letter also stated that:

"On the basis of the information and explanations available to us up to the 31st December 2020 the amounts outstanding were as follows;

- *Amount owed by Conway Partnership to the Estate €191,097.*
- *Amount owed by Estate to the Partnership of Conway Brothers €44,960.*

We attach herewith a schedule comprising a breakup of the balances compiled from the information and explanations available to us."

34. Following the issuing of the proceedings and the delivery of replying affidavits by the respondent, Mr Corcoran swore a short affidavit on behalf of the applicants. He also wrote a letter (exhibited in the affidavit of the applicants' solicitor) to the second applicant on 6 July 2022 (evidently in response to the respondent's affidavits), disavowing knowledge of the €569,130 debt which, according to the respondent, the second applicant owed the estate, and noting that the accounts which he and his firm had prepared had made no such provision. Mr Corcoran confirmed that he had never suggested that the second applicant owed

the estate that figure. On the basis of the books supplied by the second applicant, he confirmed in his affidavit that the second applicant and the Partnership did each have a liability to the estate of €7,662 and €90,137 respectively. His affidavit did not state that that was the full extent of those parties' liabilities to the estate, nor did it verify the contents of the 6 July 2022 letter or provide the Court with his current assessment of the position in the light of the information and documentation which had emerged in the course of the proceedings. Kinnear's letter did not address the delays caused in the preparation and the finalisation of the accounts. Nor did it comment on issues such as the issue with the cheques payable to the estate which, it was to emerge, had been banked by the second applicant to his wife's account (and it is not clear whether Kinnear were aware of that issue at the time of the letter).

35. The 6 July 2022 letter, *inter alia*, noted:

- a. the respondent's breakdown of the €569,130 debt allegedly owed by the second applicant, including €391,197 for expenditure by the testator on the second applicant's land;
- b. that Kinnear was only informed on 9 February 2021 (by the family solicitor who was assisting the respondent with the application for probate) that the testator owned no land at the time of her death in 2013, having transferred farms to the second applicant and the respondent in 2006 and 2009 respectively. Kinnear described arrangements whereby parents passed on land to the next generation but continued to farm it as "*not unusual*", but they did not examine the particular arrangements or their legal or accounting implications;
- c. that those land transfers should have been referenced in the testator's contemporaneous tax returns (which Kinnear described as "*technically*" incorrect in the absence of such disclosure) and that they could have given rise to a capital gains tax liability (for the testator). Kinnear did not examine any other tax consequences of such

transactions and tentatively expressing the view (without any supporting analysis to support that view) that they would be surprised if the testator would not have been entitled to retirement relief, in which event there would be no capital gains tax liability;

d. that Kinnear could not establish the basis for the respondent's figure of €391,197 (the largest element of the €569,130 figure), but noted that the testator's accounts for 2007 to 2011 included €387,258 in capital expenditure;

e. that the net cost to the testator of such capital expenditure was significantly reduced by VAT reclaims and grants and by the entitlement to capital allowances. The letter provided no analysis as to the validity of such reclaims, grants and capital allowances in circumstances in which the expenditure did not appear to relate to the testator's farming activities;

f. that they were:

“quiet [sic] taken aback that questions may be arising as to whether the accounts as prepared for your late Mother may be incorrect given that the accounts which included the above expenditure on farm buildings and infrastructure, were prepared from the records, information and explanations received and together with the tax computations prepared and based thereon were submitted to your late mother for her review, approval and signature.”

The letter says that the accounts “*were prepared from the records, information and explanations received*”, without identifying the source of such information, explanations and documents; the evidence confirms that it was primarily the second applicant, but the letter did not acknowledge that fact or its possible implications;

g. that all partners (including the respondent) received and approved annual accounts which included details of the Partnership's loans from the Testator or her estate; and

- h. that efforts were ongoing to reconcile livestock numbers to confirm the figure owed by the Partnership to the estate and making progress in that regard (without explaining the delay in resolving that issue, 9 years after her death).

The respondent's evidence

36. The respondent denied the applicants' allegations, arguing that the delay and issues were the second applicant's fault and that the proceedings were an attempt to obstruct the recovery of debts due to the estate. His affidavits:

a. claimed that, as a minor beneficiary, the second applicant had a vested interest in undermining its administration as he owed a substantial debt to the estate; the respondent had endeavoured to progress the administration, but it was delayed by the second applicant's obstructive behaviour;

b. noted that all information for the administration and the estimation of liabilities had been supplied by the second applicant as farm manager and that the vouching had been and was being obstructed because the second applicant had only recently made available some - but still not all - records. This was critical because:

"... [the second applicant] kept and maintained all the books, underlying invoices, kill sheets, herd records, animal numbers under the Department of Agriculture regulations and all other records relating to Deceased's farming business...[The second applicant] still holds this documentation and information";

c. observed that:

"for reasons never explained by Ciaran, the basic but necessary information which would have allowed Pat Corcoran to prepare accounts for the Deceased up to date of death was only delivered to Pat Corcoran between the end of October, 2020 and the middle of March 2021...it was only after that ... that your Deponent was then in a position to prepare the Form SA2 in relation to the Estate";

d. stated that the second applicant still retained the testator's farm records and investments which had enabled him to provide Mr Corcoran:

“with the basic accounting information, and transactions carried out in connection with the farm business of the Deceased which in turn allowed Pat Corcoran to prepare the Deceased's accounts and Tax Returns”;

e. welcomed the second applicant's disclosure - after the proceedings issued - of hundreds of pages of documents and information but stated that: (i) the documentation was still *“inexcusably and inexplicably late and incomplete”*; (ii) the delay in providing such documentation was the major cause of the delay in the administration; (iii) the belated disclosure on 26 May 2022 (following a hearing at which the Court made clear that all outstanding documents should be furnished without further ado) demonstrated the failure to co-operate with the application for administration before then; (iv) detailed documents and information were still missing (for example, no documents for the 2014 – 2020 period); (v) the second applicant had still withheld originals; and (vi):

“The information provided by Ciaran on 26 May 2022 has alerted me to an increased obligation to verify previous accounts, grant claims, transactions and returns based upon this documentation prior to the Estate being wound up. I would be delighted to complete the administration of the Estate but I can only do that when I am satisfied as to the correctness of the figures and some of the transactions in relation thereto”;

f. noted the second applicant had not explained his failure to account properly for the proceeds of sale of the deceased's livestock or to explain why the proceeds from 2014 to 2017 had not been kept separate, rather than being lodged to the Partnership's account, and that he did not handle the monies as a trustee should and disregarded his obligations and the rights of the estate and the beneficiaries;

g. noted that the second applicant transferred €401,119.36 from Partnership funds to his personal account (between 6 January 2022 to 4 April 2022), preventing the Partnership's payment of its undisputed debts owed to the estate;

h. stated that, despite the obstruction experienced, the respondent had identified:

“i) the assets of the Deceased with some reasonable degree of certainty ...

ii) the liabilities of the deceased, including liabilities which were kept hidden from [the first applicant, the Other Brothers and the respondent] ...

iii) four joint loan agreements made between the Deceased and Ciaran (as borrowers) and the Allied Irish Banks plc (as lender) the existence of which had been hidden from the family;

iv) that the sum of €569,130 had been spent on assets in purportedly the sole name of Ciaran but that the cost was borne solely by the Deceased for the most part and not disclosed to Pat Corcoran;

v) assets of the Deceased which were improperly dissipated, including an Ark Life investment policy taken as a saving should the Deceased have needed long term nursing care, was cashed and the proceeds were used to pay for farm investments and on the land by then owned by Ciaran.

vi) that the signature of the Deceased on two loan documents was copied/forged...

vii) that Ciaran failed to inform Pat Corcoran of the Deceased's inter vivos transfers or the alleged inter vivos transfers of the Deceased's landholdings on two different dates, and had lands incorrectly transferred into his own name, with the overall result that incorrect tax returns had been made by the Deceased and the accounts prepared for the Deceased were substantially incorrect”.

i. stated that, despite demands, no monies due to the estate from family members had been collected, save for €56,000 which the respondent had transferred as part payment of the Partnership's debt;

j. noted that the calculation of the second applicant's liability to the estate of €569,130 was based on accounts prepared by Kinnear, based on information supplied by the second applicant in his role as the testator's farm manager:

“The figure ... is based on amounts either expended by the Deceased directly benefitting Ciaran or amounts of the Deceased’s money used by Ciaran to discharge the joint liabilities of the Deceased and Ciaran to finance expenditure directly benefitting Ciaran...”

The affidavit provided details of such expenditure;

k. stated that, having reviewed accounts prepared by Kinnear in respect of the Testator, the following issues had to be addressed:

“a) why the Deceased's funds were invested in the sum of €569,130 in assets solely owned by Ciaran?

b) what were the joint loans taken out by the Deceased and Ciaran related to and

c) why these loans were discharged for the most part by the Deceased despite the monies raised being spent on land then purportedly owned by Ciaran?”;

l. continued as follows:

“Conduct of Ciaran after Deceased's Death

36) ... [The second applicant], without authority ...continued to operate the farm business of the Deceased after her death, including the sale of the livestock... failed, refused and/or neglected to produce or provide any or any reasonable account of same to me or to Pat Corcoran. As late as May and June 2021 both Applicants sought to instruct applications in respect of the Basic Payment Scheme and in respect of the Nitrates Derogation under the Deceased's herd number. Such applications would have then and now required that the Estate was actively farming the lands.

37) I say that on the 21st June 2022 ... an official with the Department of Agriculture, Food and Marine's Regional Veterinary Office... informed me that Ciaran (in the last month) sought to have the Deceased's herd number transferred into his own name. ...The Department denied his request as he is not the Executor for the Estate and has no authority to seek a transfer of same.

Failure to account

38) ... [The second applicant] has failed, refused and/or neglected to provide assistance and/or communicate directly with me, to respond to the requests for the provision/delivery of the property properly belonging to the Estate...”;

m. noted that his 2 December 2021 letter had invited discussion if the second applicant disagreed about the debt but that the latter had chosen not to engage and instead instructed Kinnear to talk with him and for his solicitors to write to him;

n. noted that Kinnear had accepted the need for verification of the information provided by the second applicant on which their accounts were based;

o. noted that the second applicant:

“...had raised joint loans with the Deceased and the documentation shows

a) One of the loans was largely paid off by the Deceased alone with the balance being paid off by means of a set off from the Estate's funds;

b) Other loans were paid off by new borrowings and the new borrowings were paid off by the Deceased;

c) A substantial amount was paid off before the death of the Deceased;

d) Interest was paid for by the Deceased out of her pension and small farm income;

e) The money raised in the joint debt was spent on land in the sole name of Ciaran...”; and

p. noted that:

“...it is part of my role to get in the assets of the Estate and ensure that the assets of the Estate are protected and collected for the benefit of the beneficiaries...the issuing of the proceedings herein is an abuse of the process of this Honourable Court to delay and/or undermine the administration of the Estate ... the Estate should not be burdened with the costs of these proceedings ...”

37. The respondent's second affidavit added further detail on the following issues:

a. Unusual features of transactions between the second applicant and the Testator, which were not dealt with in accordance with the latter's normal prudent practice. She typically discussed such matters with her solicitor son, Kevin, before deciding what course to take and then followed up with the family solicitor, to document any personal loans to family members. The family solicitor and other family members were unaware

of alleged joint loans involving the second applicant and herself (including where doubts arise as to her signature).

b. The fact that the second applicant's failure to disclose the land transfers to Pat Corcoran could create additional tax liabilities for the estate.

c. His contention that he had not failed to break down the €569,130 figure which the second applicant was alleged to owe the estate, which included expenditure paid for by the testator on the second applicant's behalf:

(i) Investments in farm infrastructure on the second applicant's land.	€391,197
(ii) Farm loan repayments on a joint loan account where the joint debt was repaid solely from the testator's monies.	€59,970
(iii) Farm loan repayments from the testator's funds up to 4 June 2013 in respect of joint debt and expenditure incurred solely for the second applicant's benefit.	€62,629
(iv) Outstanding farm loan as at the testator's death paid out of her monies.	€52,934
(v) The testator's vehicle retained by the second applicant.	€2,400

38. The affidavit provided detail as to unusual aspects of transactions which the Testator had supposedly entered into, to the second applicant's exclusive benefit, including loans where the repayment burden was overwhelmingly borne by the Testator.

39. The respondent's second affidavit noted that family members were invited to provide details of any arrangements with the Testator but that the second applicant did not do so:

“Rather than communicating with the Executor with a view to trying to establish an amount which he may feel is actually owing, Ciaran's strategy instead seems to be to take an offensive approach and play the man rather than the ball”.

40. The respondent's second affidavit, sworn 17 November 2022, noted that, as of that date, documents received from Kinnear remained incomplete (or illegible). He still awaited 288 invoices / supporting documents for the years 2009 to 2013 and no supporting documents had been supplied by the second applicant for the years from 2014 onwards. He said that Ciaran, despite his role as farm manager, had chosen not to carry out any financial management duties such as: (i) producing accurate financial information and reports and providing management and annual accounts; (ii) making tax returns on time; and/or (iii) budgeting, managing credit etc. He noted that the second applicant, as a company director, and the first applicant, as a former executor, were familiar with Revenue filing requirements and knew that the probate application could not be filed without the testator's farm accounts. However, while purporting to manage the testator's farm, the second applicant failed to submit accounts for 2012, the year prior to her death, which cost the estate €4,734 in late filing surcharges and that the respondent had repeatedly asked:

“Ciaran to furnish same as he held all the records. David was asked several times to ask Ciaran to complete the accounts and to assist him to do same. Likewise, Frank and Kevin. Frank made numerous attempts to arrange a day(s) so that he could assist Ciaran in compiling the accounts. Eventually, Ciaran agreed, only not to show up at the appointed time at his house on 2 specific dates, 28 June 2017 and 8 February 2019. Kevin also flew over from London to assist Ciaran in compiling the necessary data. However, each time he dismissed them after a number of hours saying he was too busy to finish the exercise”.

41. As noted above, the respondent retained the family's traditional solicitor to help with the estate and, on several occasions, he asked the latter to contact the second applicant about the accounts. Eventually it became necessary for the solicitor to do so in writing, on 1 September 2017. The respondent's second affidavit also noted the family solicitor's confirmation to him that the second applicant had previously been asked at a meeting, held on 27 July 2018, to furnish estate accounts to the respondent. The respondent noted that the second applicant had access to all the testator's bank statements to her death and to all joint loan

account statements to the date of the affidavit, but only started providing information to Kinnear in or about October 2020. He provided revised stock reconciliation figures to Kinnear on 24 February 2021, but some cattle were still unaccounted for, and it was only on 10 March 2021 that Kinnear provided sufficient information to allow the estate's solicitors to lodge the application for probate.

42. The respondent noted that the second applicant had provided varying figures as to the Partnership's debt to the estate, but the solicitor needed details of all assets and liabilities from Kinnear to compile the application for probate. Kinnear, in turn, needed the information from the second applicant. The affidavit detailed examples of inconsistencies between information in folders provided to the respondent on 26 May 2022 and information the second applicant previously provided to Kinnear to prepare draft accounts. The affidavit also explained the respondent's conclusion that the Partnership's debt to the estate as of 31 December 2020 was €191,097 rather than €183,418, the figure suggested by Mr Corcoran (while I have seen no reason to doubt that conclusion, I do not need to determine that issue).

43. The respondent rejected criticism of his distribution of BPS entitlements. He said he made clear to the beneficiaries in the course of a Zoom meeting regarding estate matters on 8 March 2021 that he would facilitate the distribution of the entitlements to siblings who wished to acquire them. However, the second applicant did not provide the information legally required to enable him to transfer the entitlements to them. He made other arrangements to preserve the value of the entitlements for the estate.

44. The respondent complained that the second applicant had instructed Kinnear to refuse to hand over original documents to him despite his entitlements as executor. No basis had been put forward to justify the suggested concern that originals might be tampered with. He also complained that the second applicant wrongfully interfered in the administration of the estate by seeking to transfer its herd number into his own name. In response to the second applicant's

query, the respondent explained the omission of Frank's claim against the estate from the SA2 - that issue had arisen after the lodging of the form.

45. His affidavit detailed inconsistencies in the testator's livestock reconciliations provided by Kinnear based on information from the second applicant, stating that Kinnear still concluded that there were animals unaccounted for and that, leaving them aside, the Partnership owed the estate €183,418. He noted that Kinnear had adjusted the Partnership Loan Schedule, increasing the debt owing to the estate to €191,097, but without allowing for the cattle which the second applicant's returns had still not accounted for, which explained the difference between his and Kinnear's calculations of the Partnership's debt. He also noted discrepancies between the Kinnear Partnership Loan Schedules based on the second applicant's position.

The Other Brothers' testimony

46. The Other Brothers' testimony was consistent with that of the respondent. Kevin Conway swore an affidavit, but did not provide oral testimony for health reasons, and there was no objection or response to his affidavit which stated that:

"...during the year 2018, and in response to [the second applicant's] request for assistance, I spent several hours over many days helping [the second applicant] work on the accounts of the Deceased. This work primarily involved assisting [the second applicant] with inputting base data on his computer regarding the farming business of the Deceased and in respect of a number of financial years. During this period I observed that [the second applicant] kept very good, detailed and accurate records. After spending several hours with [the second applicant] on this, he told me that he had to do work on the herd numbers, and this was very complicated and he needed to do it on his own as it was very slow and detailed. I am confident that he had and has all of the relevant information and supporting documentation to enable Fintan to administer the Deceased's Estate and complete his role of executor. However, and also based on what I have seen over the last year and on reading [the second applicant's] affidavit, I believe that [the second applicant] has gone and will go to any lengths to obstruct Fintan administering properly the Estate of the Deceased...."

47. Frank Conway swore an affidavit supporting the respondent's retention, questioning the second applicant's motivation, and testified along similar lines in support of the respondent, without any major issue arising in that regard.

Forensic Handwriting Analysis

48. A technical report by Mr Michael Moore BSc (Hons), MCSFS, CSFS Dip., Forensic Document Examiner, examined signatures attributed to the testator on an AIB facility declaration and an AIB direct debit instruction for loan repayments (associated with the controversial accounts), concluding that:

“the handwriting evidence strongly supports the proposition that [the testator's] signature is not a genuine signature that was written by [the testator] but is a forged signature that was written by someone else, who is familiar with [the testator's] general signature or who had a genuine signature of [the testator] to copy from”.

The Law

Legislation

49. The Succession Act 1965 provides as follows:

“26. —...

(2) The High Court shall have power to revoke, cancel or recall any grant of probate.

27.—...

(2) The High Court shall have power to revoke, cancel or recall any grant of administration.

...

(4) Where by reason of any special circumstances it appears ... to be necessary or expedient to do so, the Court may order that administration be granted to such person as it thinks fit.

...

50. — *(1) The personal representatives may sell the whole or any part of the estate of a deceased person for the purpose not only of paying debts, but also (whether there are or are not debts) of distributing the estate among the persons entitled thereto, and before*

selling for the purposes of distribution the personal representatives shall, so far as practicable, give effect to the wishes of the persons of full age entitled to the property proposed to be sold or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons so, however, that—

(a) a purchaser shall not be concerned to see that the personal representatives have complied with such wishes; and

(b) it shall not be necessary for any person so entitled to concur in any such sale.”

50. In *Spencer v Kinsella* [1996] 2 ILRM 401 (cited by Laffoy J. In *Scally v Rhatigan* [2012] 2 IR 286 (“*Scally*”)), the trustee’s conduct and impartiality were challenged. Barron J. noted that the need to determine whether retention or removal would be detrimental to the beneficiaries. Although no deliberate wrongdoing was established, the trustees were criticised for failing to execute certain agreements and for being too closely identified with some beneficiaries to be regarded as capable of being truly impartial. Barron J. concluded that:

“The welfare of the beneficiaries is being affected by the present situation. There is a conflict of interest which I have identified and it would be difficult to reorganise with such conflict on the part of some of the Trustees continuing to exist. It is accordingly appropriate that such persons should step down.”

51. Likewise, in the Supreme Court’s seminal decision, *Dunne v Heffernan* [1997] 3 IR 431 (“*Heffernan*”), Lynch J. held that the beneficiary’s unhappiness or frustration was not enough to justify replacing an executor:

“the Appellant has done nothing wrong in her capacity as executrix and the mistaken perception of the Respondent ... cannot alter the position”.

Serious misconduct and/or serious special circumstances were required to justify the drastic step of removing an executrix - serious grounds or weighty reasons were required to justify overruling the testator’s wishes.

52. Such grounds were established in *Flood v Flood* [1999] 2 IR 234 (“*Flood*”). The Court removed an executor who had controversially borrowed large sums from the testator. The dispute arose from the executor’s use (prior to the testator’s death) of monies transferred by

the testator to buy land in the executor's own name, giving rise to an issue as to its beneficial ownership. The executor was arguably conflicted due to the allegation that:

“the repayment of this loan is money now due to the estate, and that the Defendant has refused to acknowledge this. In the circumstances, it is said by the Plaintiffs that this stance of the Defendant is in conflict with his role as executor, because as such executor he is obliged to get in all the assets for the estate, being a trustee thereof for the beneficiaries”.

53. Macken J. concluded that the very serious step of removing the executor was necessary, as he claimed that the testator's payments had been a gift, not a loan, so there was no money recoverable by the estate and thus no conflict. Although Macken J. could not resolve that substantive issue on the affidavits, she concluded that:

“there a sufficient question mark over the transfer of the funds to justify considering the appointment of an alternative person as administrator of the estate”.

54. Macken J. also rejected an alternative submission that she should not accede to the request because any claim would be statute barred, noting that on one interpretation:

“the limitation period did not expire prior to the death of the late Mr. Flood...it is only where I hold that the monies were given as a gift in 1989, and remained as a gift, with no element of a beneficial interest remaining in Christopher Flood, that I could find the cause of action had expired.

Since I cannot do so with any degree of certainty, it seems to me that the Defendant's argument that the statute of limitation period expired, and no cause of action could exist, cannot stand”.

Macken J. concluded the executor should be removed due to the conflict of interest.

55. The defendant also relied on the Supreme Court judgments of Denham J. (as she then was) and Barron J. in *Carroll v Carroll* [1999] 4 IR 241 (“*Carroll*”), an application for probate in circumstances in which there was a possible need to set aside a gift apparently made by the testator during his lifetime (without independent legal advice) as an improvident transaction procured by undue influence. Matters were complicated by the role

played by the executor's law firm in the impugned transactions (prior to the testator's death). In the circumstances, the Court found that the defendant had not refuted the presumption of undue influence and upheld the setting aside of the transaction on the grounds of its improvidence.

56. In *Scally*, Laffoy J. considered the responsibilities of the testator's solicitor (at pp. 300 and 302) and distinguished between:

“(a) the beneficiaries of assets the distribution of which fails to be determined in accordance with the terms of the Will, to which I will refer as the "estate assets"; and (b) the beneficiaries of assets settled, in the sense that he was the arbiter of their ultimate destination, by the Testator, directly or indirectly, which do not fall within his estate, to which I will refer as "non-estate assets".

It is important to emphasise at the outset that the defendant, as one of the principal beneficiaries of the estate assets, is vehemently opposed to a grant of probate issuing to the plaintiff.

...

The reality of these proceedings is that they reflect a major contest between the defendant, as one of the principal beneficiaries of the very limited estate assets, on the one hand, and the beneficiaries of what appear to be very substantial non-estate assets, on the other hand. Such a contest is inevitably going to be played out in an acrimonious fashion. So it has been and so it continues in this case, in relation to the multiplicity of issues which have arisen between the defendant and the plaintiff in relation to assets over which the Testator may or may not have had ultimate control. The three issues which I have chosen from the issues which have arisen ... in assessing whether the plaintiff is professionally conflicted are issues which relate to matters in which the plaintiff has been professionally involved, through the medium of Amorys, since the death of the Testator. The firm Amorys have acted for the plaintiff in the prosecution of these proceedings.”

Laffoy J. concluded that the executrix's conflicted position constituted “*serious special circumstances*” and that the beneficiaries' welfare would not be protected if probate was granted to her. The court appointed an alternative administrator.

57. *Darragh v. Darragh* [2018] IEHC 427 (“*Darragh*”) likewise noted the “*very high bar*” to establish serious grounds before the Court would override the testator’s choice. The Courts have also noted that, since any such replacement could impose significant additional expense on the estate, it should be avoided unless strictly necessary.

58. In *Muckian v. Hoey* [2016] IEHC 688 (“*Muckian*”), Keane J. concluded that special circumstances were established which required a change of administrator. In addition to her delay, the executrix had failed in her primary duty to gather in the property of the estate and to account properly to the beneficiaries for the assets and liabilities. Having undertaken a detailed review of the authorities, he:

a. approved the summary of the obligations of an estate’s personal representative in Wiley’s *Irish Land Law* (5th ed., Bloomsbury, 2013, at para. 18.27):

“A personal representative is under a duty (a) to collect and get in the estate and administer it according to law; (b) when required by the court, to exhibit on oath in court a full inventory of the estate and, when so required, to render an account of administration to the court; (c) when required by the High Court, to deliver up the grant of probate or administration.”; and

b. noted that the special circumstances to justify such an order would generally be a want of honesty, of capacity or of reasonable fidelity, but the main criterion was the beneficiaries’ welfare. Keane J. concluded at para. 36 that:

“In short, while not every mistake or neglect of duty or inaccuracy of conduct will require the replacement of an administrator or administratrix, acts or omissions that endanger the estate property, or show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity, may do so. The overriding consideration is, therefore, whether the estate is being properly administered; the main guide must be the welfare of the beneficiaries”.

59. Keane J. concluded at para. 37 that:

“(a) A pronounced delay on the part of a personal representative in the administration of an estate could, alone or in combination with other factors, amount to a special circumstance warranting the removal and replacement of that person.

(b) A failure by a personal representative to discharge the fundamental duty to collect and get in the estate and administer it according to law can, depending on the gravity or extent of that failure, whether alone or in combination with other factors, amount to a special circumstance warranting the removal and replacement of that person.

(c) An administrator (or administratrix) may be replaced more readily in such circumstances than an executor”.

Keane J. was satisfied that there had been both delay and a failure to discharge the fundamental duty to collect and get in the estate and administer it according to law had been established, which warranted the removal and replacement of the administratrix.

60. In *Gunning v Gunning-Hameed* [2003] IEHC 123 (“*Gunning*”), Smyth J. concluded that serious misconduct and/or serious special circumstances had been established, justifying the removal of an executor who had improperly attempted to remove an asset belonging to the estate. This was contrary to his duty to administer the estate according to law and his obligation to hold the estate as trustees for the beneficiaries and to protect their interests – “*holding the scales impartially*” as Megarry V.C. put it in *Cowan v Scargill* (1985) Ch 270. The executor’s intention to have herself registered as owner of a lease vested in the estate conflicted with her role as executrix, making a change of executor “*the only way in which this matter can be dealt with properly and impartially.*”

Discussion

Partnership Issues

61. By way of a preliminary observation, the correspondence and affidavits raised issues on behalf of the estate while simultaneously agitating points in respect of the Partnership. There is necessarily some crossover, because the Partnership may owe money to the estate and vice versa, particularly in respect of the second applicant’s transfer of Partnership funds to prevent

the respondent paying monies believed to be due to the estate. Also, it is necessary to determine how assets and liabilities and income and expenditure should be allocated as between the estate and the Partnership. However, while the partners are perfectly entitled to agitate issues between themselves in respect of the management of the Partnership, and the respondent may seek a full account as partners, it would be preferable if the exchanges in respect of the administration of the estate and Partnership were kept separate as much as possible. This application is only concerned with the former. In the context of the formal litigation, at least, issues arising as between the members of the Partnership *qua* partners should be dealt with independently of the estate and the respondent's actions as executor.

Agreement with regard to the management of the Testator's livestock after her death

62. It was common ground that the respondent, sensibly, agreed that, rather than immediately selling the testator's remaining livestock, they should be sold in the normal way to maximise the return to the estate. Accordingly, the livestock would be progressively sold (but not replaced). However, there was no basis for the second applicant to conclude that he and/or the Partnership were indefinitely entitled to: (i) retain the proceeds of such sales; (ii) refuse to provide information or documents to the respondent; (iii) instruct Kinnear not to allow the respondent to access the original documentation; (iv) take possession of the testator's motor vehicle; or (v) change its registration.

The Respondent

63. The respondent struck me during his oral testimony as a careful individual faithfully endeavouring to discharge the responsibilities entrusted to him by the parties' mother. Unlike the second applicant, he has little to gain from the process. While both are minor beneficiaries, the second applicant has a far greater interest by virtue of the estate's potential claims against him. By contrast, an irony of the present application is that the respondent has arguably been acting against his own interest (as a partner) by diligently seeking to recover sums due to the

estate, including from the Partnership. However, I have seen no basis to conclude that the respondent has failed to discharge his duties impartially.

64. The applicants dismissed the respondent as a man who would “*drive into every pothole*”. This is unfair. The characteristic which may have provoked this comment is his determination to work out the correct financial position in respect of income and expenditure as between the estate, the Partnership and all parties, including the beneficiaries, coupled with his determination to ensure that everything is done right in terms of complying with regulations (whether income tax or Department of Agriculture requirements, including as regards grants or otherwise). Although the applicants might see it as pedantic, the respondent was right to adopt that approach. He impressed me with his concern to identify and comply with legal, regulatory, tax and accounting requirements, even if this might give rise to liabilities for the estate, the Partnership or the beneficiaries. His determination to go “by the book” may have frustrated the applicants. However, this may well be the very characteristic which led his mother to choose him and his solicitor brother as executors, as opposed to the applicants. I have no doubt that the respondent’s approach is sound in principle and more likely to avoid “potholes” than would be the case with a more casual approach to compliance.

65. I found the respondent’s oral evidence precise and balanced in all but one respect. He was reluctant to acknowledge the legal input he received for certain correspondence with the second applicant. The family’s traditional solicitor originally assisted him in seeking probate but indicated that he could not act in the emerging dispute with the second applicant. Before disengaging completely and being replaced by new solicitors, the family solicitor informally helped the respondent draft his correspondence with potential creditors and debtors, including the second applicant, but that correspondence was sent in the respondent’s name, rather than on the outgoing solicitor’s stationery. That issue has minimal significance in the context of the current application (and actually counters the applicants’ criticism that the respondent acted

without professional advice in sending the letters in question), but the respondent should have been more forthcoming on that point at the outset of his testimony.

66. It was suggested that the respondent was acting under his brother Kevin's influence and/or seeking to reverse or undermine dispositions made by the testator during her lifetime. I do not consider that either criticism is justified. The fact that the Other Brothers share the Respondent's concerns and support his actions tends to reinforce, rather than detract from, the appropriateness, independence or legitimacy of his enquiries. The 4 October 2022 letter from Kevin Conway, which the second applicant chose to exhibit, warned of the risks of the litigation, and wisely encouraged the parties to step back from the litigation. There is no basis to suggest that the respondent is his brother's puppet. It is to his credit that he and his wife have been caring for Kevin during his recent health and other issues. No evidence was adduced which suggests a basis to impugn the respondent's motivation or integrity.

The Second Applicant

67. Although the testator may have delegated to the second applicant the control over her farming interests, that changed on her passing. Her property, including all assets and income, such as her bank deposits and payments due to her, formed part of her estate, as did her car. Furthermore, the testator had designated the respondent and his brother Kevin as executors, entrusting them, rather than the applicants, with responsibility for and control over the estate. Kevin declined to act as executor. Accordingly, the respondent was legally obliged to identify all assets and take responsibility for their recovery and distribution as part of the estate. The second applicant, in his capacity as the testator's farm manager, was duty bound to cooperate to that end. His assistance was essential to progressing the administration of the estate.

68. It was evident from the second applicant's oral testimony that the respondent's appointment was unwelcome from his perspective. Whereas he may previously have been entrusted with a free hand with regard to the combined farming enterprise, he was now required

to act at the respondent's direction in respect of his mother's estate and to account for the farming activities he had been managing on her behalf. It was inevitable and appropriate that the respondent would subject the accounts to greater scrutiny than they may previously have attracted. Unfortunately, the second applicant appears to have had difficulty reconciling himself to the new order of things and in dealing promptly and appropriately with the respondent's entirely legitimate questions.

69. There were concerns with the second applicant's oral and affidavit evidence. For example:

a. His grounding affidavit objected to the four letters sent to him by the respondent as executor on 2 and 4 December 2021, all of which he interpreted as alleging that he or the Partnership owed various amounts to the estate. However, as he eventually acknowledged under cross examination, only two of those letters referenced sums allegedly due to the estate. The other letters were to the opposite effect - concerning sums potentially owed by the estate to either the second applicant or the Partnership. Accordingly, his complaints were partially based on a false premise. I doubt that the second applicant deliberately sought to mislead the Court on that point. However, it did show his lack of objectivity, in that his affidavit unfairly criticised his brother's actions without checking basic facts.

b. The second applicant answered the respondent's (legitimate) enquiries through his solicitors, but positions adopted in his name by his solicitors were factually wrong (as were positions averred to in his own affidavits) and the provision of such inaccurate explanations in correspondence and even on affidavit was never satisfactorily explained by the second applicant. Examples include:

- i. The unjustified criticism of the respondent for discharging his original solicitor - in fact, that the departing solicitor had informed the second applicant's solicitor that he withdrew to avoid a potential conflict.
- ii. The second applicant's denial of any responsibility for the delay in the administration or for retaining documents, a position at odds with the evidence, including the production of hundreds of pages of documents during the proceedings and at the behest of the Court, and also with the ongoing efforts to reconcile the proceeds of the sale of the livestock owned by the testator at the time of her death more than a decade ago. As farm manager, the second applicant must take responsibility for the extraordinary fact that these issues and processes remain incomplete.
- iii. The denial of misappropriation of funds notwithstanding, *inter alia*, his unauthorised practice of depositing cheques payable to the testator to his wife's account without the executor's knowledge or approval.
- iv. The unfair criticism of the respondent for paying Partnership monies owing to the estate and the second applicant's own actions in removing other Partnership monies to prevent the executor seeking to pay other such monies lawfully due to the estate.
- v. The second applicant's failure to explain either the joint loan accounts entered into prior to the testator's death, to her substantial detriment and to his substantial benefit, or the fact that those bank statements were sent solely to his address rather than her address, contrary to her normal practice. He also failed to explain the departure from the normal practice for documenting significant family transactions. He avoided these issues in his affidavits but also failed to address them satisfactorily in his oral testimony.

70. The second applicant sought to portray himself as a simple, hard-working, individual who selflessly spent time and energy in the combined family business over the years on behalf of both his mother and the Partnership. He presented his actions as directed towards the collective best interests. He may have persuaded himself that that was the case. While some of his actions may be more understandable, viewed from that perspective and in the relaxed context of the historic operations of the family farm, his commitment to the Partnership did not give him *carte blanche* to disregard the interests of either the testator or her estate, or the rights, responsibilities or instructions of his mother's chosen executor.

71. Although I do not need to (and will not) determine such issues for present purposes, many of the second applicant's actions appeared problematic, irrespective of their motivation. Leaving aside examples I have previously mentioned (such as the casual misappropriation of the testator's car or the wrongful interception of cheques by the second applicant), perhaps the gravest concerns arise from his failure to provide a meaningful explanation for the loan accounts which seem to have operated to his benefit and to the testator's detriment.

72. The second applicant was defensive in his testimony, and I was also surprised by his attitude to various legal and regulatory requirements, including the use of his mother's herd number to enable the Partnership to buy livestock when it was legally restricted from doing so. That and other aspects of his testimony might raise possible concerns with regard to compliance with various accounting, tax or Department of Agriculture requirements, which are beyond the scope of this application. In the absence of evidence and legal submissions, I will not express a view, save to note that all parties, including the Partnership and the estate, must comply with their legal and regulatory obligations. The second applicant asserts that the particular use of the herd numbers as a "*work around*" was approved by the Department at some level. However, the parties and their legal advisors would need to take care to ensure compliance with relevant regulations. For example, if reliance is placed on Departmental approval for an apparent

departure from applicable requirements, then it would be prudent to contemporaneously confirm and document any such approval to avoid any misunderstanding. Any such approval would need to be unambiguous and authorised at an appropriately senior level. While it is helpful that regulators should offer practical guidance as to practical compliance and operational issues with regard to regulatory requirements, the interpretation of any such requirements is ultimately a matter for the Courts. Even if an appropriately qualified Departmental representative did give some sort of informal approval for the practice with regard to herd numbers, any such approval might be meaningless unless the law permitted such flexibility or gave the officials discretion as to the implementation of such requirements.

73. The second applicant's conduct and demeanour in his oral testimony did not inspire confidence. While he ultimately acknowledged errors in his evidence and the inappropriateness of his conduct in respect of the cheques and the car, he sought to excuse such actions on the basis that he was a simple farmer, running the family business, implying that he could not be expected to have appreciated legal technicalities. Such justifications for questionable actions were utterly unconvincing from an evidently shrewd and sophisticated businessman/farmer with a third level degree, who occupies a senior corporate role in his professional life. He apparently commanded a substantial six-digit salary and had undertaken significant senior corporate roles and responsibilities for his corporate employer. In particular, he was serving as a director of a company of an agri-tech subsidiary partly owned by his employer, although, surprisingly, he claimed to have no memory of that (recent) appointment and even suggested that any such appointment was purely to help the "start-up" company with research, and that he had only signed documents and allowed his name to be used to facilitate its applications for grant funding. Such matters have no direct bearing on these proceedings save to make it implausible to suggest that the second applicant was an *ingenu* who failed to appreciate the nature of his obligations to the executor. They also make it hard to understand the lack of

precision in his testimony. I am not satisfied that naivety or misunderstandings as to his obligations explain the second applicant's acts and omissions. Nor do the demands on his time explain the failure to meet his obligations to the estate.

74. The second applicant sought to justify his position on the various issues by reference to Kinnear's work. However, Kinnear did not audit or verify the information he furnished. To the contrary, as may be common in a noncontentious family farm or a small business context where no need for segregation arises, Kinnear relied on information supplied by the client (i.e. by the second applicant) to compile accounts, income, VAT and other tax returns for the Partnership and the estate. All such accounts and returns were based on his instructions, documents, information and schedules. He, rather than Kinnear, determined which income and expenditure was attributed to the Partnership or the estate. Kinnear essentially undertook a compilation role. They were working to his instructions, and it was not suggested that they had independently audited or verified the accuracy and completeness of the information and documentation which he furnished to them for the purpose of the preparation of the accounts and returns. Indeed, the saga of the ongoing efforts to trace the proceeds of sale for the livestock owned by the testator at the time of her death demonstrates the absence of adequate reconciliations prior to that point, and the extent to which Kinnear depended on the second applicant's provision of accurate and complete information and documentation, which, unfortunately, was not always forthcoming.

75. In any event, individual clients must take ultimate responsibility for the contents of accounts or tax returns, and in this case the responsibility primarily rested with the second applicant as farm manager. Reliance on professional advisors is undermined if, as here, the latter are not being fully and fairly briefed with all relevant facts. However, the second applicant failed to brief Mr Corcoran on issues such as: (a) the transfer of the farms in 2006 and 2009; (b) the fact that his mother did not own the land on which extensive (and expensive) works were undertaken at her expense – while the net expense to the testator would have been

reduced as a result of the grant funding, a properly briefed advisor may have been concerned to confirm the eligibility for such funding, in circumstances in which the testator did not own the land to which the expenditure related (for completeness, I should note that, although the second applicant argued that the respondent also failed to alert Kinnear to the transfer to him in 2009, following on from the second applicant's own default in that regard in 2006, it was primarily the second applicant's responsibility to instruct and brief Kinnear. Furthermore, the obligation to maintain proper records and to scrupulously account for income and expenditure was greater for the second applicant, by virtue of his role as farm manager and his responsibilities to the testator (and subsequently her estate) and to his fellow partners – he was not dealing with his own money. If the latter was supplied with incomplete or inaccurate information, the primary responsibility rests with the second applicant; the person, to use his own words, who was responsible for the management of the testator's farming interests during her lifetime).

76. It was the respondent's legal responsibility to ensure that probate was granted, which required regularising tax filings and identifying assets and liabilities. He could not do so without information from the second applicant. By virtue of his role as the testator's farm manager, the second applicant was duty bound to cooperate with the respondent and to disclose all necessary information and documents and to provide reasonably required assistance. Unfortunately, for reasons which the second applicant has never satisfactorily explained, there was an extraordinary delay and lack of cooperation on his part, and material issues remain unresolved to this day. It was March 2021, nearly eight years after the testator's death, before the second applicant had provided sufficient basic information to Kinnear to enable them to start preparing the accounts and returns for the estate. Reasonably promptly thereafter, Kinnear provided draft accounts to the respondent, and the family solicitor was then in a position to

apply for probate on behalf of the respondent, which, once again, he did reasonably quickly. The delay was the second applicant's responsibility.

77. The second applicant's position – which did not appear to have been forcefully challenged by Kinnear, even when Mr Corcoran was eventually informed of the cheques - that such monies and other monies payable to the estate could simply be recognised in subsequent accounts as a debt due to the estate - was unsustainable. The eventual characterisation of monies due to the estate as loans or debts was even more unsatisfactory in view of the second applicant's and Kinnear's delay in producing accounts. The respondent had made his position clear in correspondence. The second applicant and his advisors had no basis for believing that he or the Partnership were legally entitled to retain or make use of any such monies. Nevertheless, the second applicant had unlawfully intercepted cheques made out to the testator which should have been immediately referred to the executor. While he claims to have been well-intentioned and that the partnership was entitled to some (but, significantly, not all, of those monies), he acted without recourse to the executor, without authority, and contrary to the respondent's lawful instructions. He had no lawful basis to do so. Kinnear, his elder brother and his solicitors would have been obliged to explain this to him if he had consulted them.

78. It was suggested to the second applicant during cross-examination that he was saying that the "*money was just resting in his account*", in circumstances in which he appeared to be defending the Partnership's unauthorised retention for an indefinite period (at his instigation) of monies due to the estate. Even if some of those monies were in fact due to the Partnership, the second applicant did not meet his obligation to promptly transfer the balance to the respondent in accordance with the executor's directions. To the contrary, he appeared to regard it as sufficient for the second applicant and the Partnership to retain funds due to the estate until accounts were prepared (a process which was largely controlled and delayed by the second applicant), at which point the precise balances due to the estate could be confirmed and dealt

with. However, he had no right to delay the payment of any monies which were due to the estate. His delay and disregard of the executor's directions were not legitimised by eventually producing accounts quantifying the monies due as if they were loans from the estate, loans unauthorised by the executor. On the second day of his testimony, the second applicant himself used the phrase that the "*money was just resting in his account*" to justify the failure to remit funds to the estate without delay, the language put to him the previous afternoon. Although the second applicant disavowed the expression when I asked him whether he was adopting it, there were times during his testimony when he certainly appeared to adopt such a "*Craggy Island*" defence, a defence which is not mandated in Irish law. Section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 defines theft as, in short, the dishonest appropriation of property without the owner's consent with the intention of depriving its owner of the property in question. I make no finding as to any possible criminal offence as there are many factual and legal issues which would need to be considered but would simply note that, as Section 4(5) makes clear, *if* all the other necessary ingredients of the section are satisfied, then the owner need not be *permanently* deprived of the property – the offence may be committed even where the deprivation is temporary.

Kinnear

79. Kinnear prepared accounts (and, presumably, tax filings) based on the second applicant's instructions. In the absence of an audit, let alone a full verification or certification process, minimal reliance can be placed on their output, since it was based on instructions which failed to accurately reflect (*inter alia*): (i) developments with regard to assets belonging to the testator, such as the transfer of the two farms; (ii) the circumstances surrounding the joint loans; (iii) the irregular approach to dealing with cheques payable to his mother after her death; (iv) concerns about the incompleteness or inaccuracy of the documents; and (v) lack of investigation of serious issues, such as the joint loans. I suspect that, if an independent

professional advisor had been properly briefed with the full facts in respect of such issues, it would have affected their approach to the preparation of the financial statements and the various tax returns for the Partnership and the estate and the individual partners, both before and after the testator's death, although the extent of any such impact cannot be determined without further evidence and independent analysis. In any event, the second applicant must take the responsibility for allowing Kinnear to proceed on false premises. Different conclusions may have been reached if he had furnished accurate and complete information, or if Kinnear had intensively interrogated the figures and the documentation with the impartial "attitude of professional scepticism" which would have been required, for example, in a statutory audit context.

80. Both the applicants and Kinnear appeared disconcerted by the issues raised in the context of the estate and relied on the lack of complaint prior to the testator's death. However, the testator and the siblings may (rightly or wrongly) trusted the second applicant to run their affairs during that period, leaving the second applicant unsupervised. I have seen no evidence that the testator or the siblings were conscious of the controversial financial transactions in which the second applicant had apparently engaged, including on foot of the joint bank accounts. In any event, it is not surprising that, following the respondent's appointment as executor, the demarcation between the Partnership and her estate came into sharper focus and required greater clarity as to the proper allocation of assets, liabilities, income and expenditure. The fact that accounts prepared by Kinnear on the second applicant's instructions may previously have received less scrutiny does not relieve the executor of the obligation to scrutinise them on behalf of the estate, nor does it relieve the other parties or their advisors of their duty to cooperate with such enquiries.

81. The applicants criticised the respondent for failing to agree that Kinnear should determine what was owing between all parties. In some circumstances, the use of an "honest

broker”, a trusted, independent, intermediary, to resolve issues on a non-contentious basis may be eminently sensible, avoiding unnecessary expense and aggravation. However, the respondent was not acting unreasonably in rejecting the proposal. Kinneare were not sufficiently independent to undertake that role. Their doing so would have been flawed in the absence of a satisfactory process to verify the accuracy and completeness of the information furnished by the second applicant, which was the basis for their work to date. Accordingly, the executor was entitled to reject the proposal that Kinneare should determine the parties’ liabilities. They would be conflicted in undertaking such a role. Mr Corcoran was in a difficult position, having largely acted on the second applicant’s instructions (since the second applicant was his main point of contact, both for the testator’s business and for the Partnership). He appeared deferential and reluctant to criticise the second applicant – for example, with regard to the cheques, he merely said that he would not have recommended the course adopted by the second applicant. This was an underreaction to a serious issue. There were other examples, such as his deferring to the second applicant’s instructions not to release originals to the respondent, who was clearly lawfully entitled to them. However, Mr Corcoran’s approbation often seemed to be a case of “*damning with faint praise*”. For example, when asked about the adequacy of information furnished by the second applicant, he said that it “*was not as bad as that furnished by some of his other clients*”, presumably the clients he had mentioned as furnishing shoeboxes full of stray receipts. This was scarcely a ringing endorsement, particularly since many such parties would presumably only require compilation services for their own personal purposes and issues of segregation would not necessarily have arisen to the same extent.

82. Kinneare would of course be aware of the added complexity and obligations when interests may diverge and of the need to appropriately segregate and apportion income and expenditure between different parties such as the estate and the Partnership, and to meet the

applicable legal obligations. It was not obvious to me how Kinnear's approach addressed those concerns in relation to the financial transactions between the estate and the Partnership.

83. It was not clear whether Mr Corcoran was presented as an expert or a witness of fact. It was not expressly submitted that he should be regarded as an expert. In any event, notwithstanding his qualifications, he could not be regarded as an independent expert here because of his prior roles. If his views were to be put forward as independent expert testimony, then I would need to be satisfied that he had been fully briefed with all relevant documents and information and that he understood the obligation to provide independent testimony to the Court. It was not obvious to me from his actions, correspondence or his testimony that Mr Corcoran met the high standard of impartiality which would be required in order to treat his evidence as independent expert testimony. In *Ryan v Dengrove* [2021] IECA 38, Murray J. dismissed such an unsubstantiated expert opinion (as to whether a sale by a receiver was likely to be at an undervalue):

“70. ... However, an abrupt statement of opinion by an expert (even if he were a witness) is not proof of anything. Before a court can act on opinion evidence, it must both understand the basis of the opinion, and be confident from the face of the expert's evidence that he has taken all relevant matters into account informing it. The legal position was explained by Stewart-Smith LJ in Loveday v. Renton [1989] 1 Med. LR 117 in a passage quoted with approval by Charleton J. in James Elliott Construction Ltd. v. Irish Asphalt Ltd. [2011] IEHC 269 at para. 12:

‘The mere expression of opinion or belief by a witness, however eminent ... does not suffice. The Court has to evaluate the soundness of his opinion. Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence.’

71. Mr. Lynch does not explain the basis for his opinion – beyond attributing this to his ‘experience’. He just gives it - and does so in a context which clearly required some explanation of the basis for his view...If the Court were to be expected to conclude that notwithstanding these considerations the price would be depressed if sold by a receiver it would have to be told why this was the case.

72. Yet, none of this is addressed in the evidence adduced by the appellants. They simply rely upon unexplained and uncorroborated assertion. Even then, the opinion that is offered is conspicuously vague: all Mr. Lynch can say is that he has ‘serious reservations’, that the receivership ‘may’ disadvantage the value and that it may be ‘more advantageous’ to proceed by way of a ‘straightforward consensual open market disposal of the property’. And perhaps more importantly again, it is not apparent whether Mr. Lynch was aware that Dengrove has committed to an open market sale. Certainly, he did not record that fact in expressing his opinion.

73. Expert opinion that is not referenced to the expert’s understanding of the relevant factual context in which their opinion is tendered is properly disregarded for that reason alone, not least of all because the Court does not know if the expert has complied with their obligation to make a full and proper assessment and disclosure of the information they have relating to the issues on which they are expressing an opinion. The position was explained by Charleton J. in *Condrón v. ACC Bank plc* [2012] IEHC 395, [2013] 1 ILRM 113 at para. 19:

‘Experts have a particular privilege before the courts. They are entitled to express an opinion. In doing so, their entitlement is predicated upon also informing the court of the factors which make up their opinion and supplying to the court the elements of knowledge which long study and experience has equipped them so that, armed with that analysis and the elements of arriving there, the court may be enabled to take a different view to their opinion.’

74. This statement, and the passage from *Loveday v. Renton* to which I have referred were made in the context of plenary actions rather than of interlocutory applications. However, while noting the different questions of proof and the facility for adducing hearsay evidence in an application of this kind, the same basic principles must apply. It is not open to the appellants to produce letters or affidavits from an expert witness stating that there might be an adverse impact on value simply because the property will be sold by a receiver and, without explaining the basis for that view or providing any detail of the factual assumptions on which it is based, to proclaim that they have provided evidence sufficient to ground this aspect of their proofs.”

In my view, the observations in the foregoing passage are equally applicable to Mr Corcoran’s correspondence and testimony. For the reasons identified by Murray J., I cannot accept his

evidence in respect of matters of professional opinion in this particular case, such as the hypothetical tax and other regulatory and accounting consequences (including eligibility for grants), that would have arisen if the second applicant had informed Kinnear that the testator had disposed of her land or that the huge capital expenditure was on his land.

84. In particular, I am not swayed by the Kinnear letter dated 6 July 2022, which was exhibited by the applicants' solicitor's affidavit, and which confirmed certain amounts owed to the estate by the Partnership and the second applicant. Kinnear's work was of limited value because their accounts were limited to information and documents supplied by the second applicant and they had not performed an audit or verified the accuracy and completeness of that information (nor, in fairness had they been instructed to). The fact that the information and documentation was manifestly incomplete was demonstrated by the emergence of substantial additional documentation after the proceedings were initiated (and at the behest of the Court) and by the ongoing efforts to trace the proceeds of the testator's livestock. Kinnear's 28 March 2022 letter does express a view as to the various balances "*On the basis of the information and explanations available to us up to 31st December 2020*", rather than to the date of their letter. Since information and documentation had come to light in the intervening period, it would have been rather more helpful if Kinnear had updated the figures (or at least explained their failure to do so). I also note that, by July 2022, Mr Corcoran was aware that he had not always been provided with all material information by the second applicant (notably in relation to the sale of the farms, the capital developments on the second applicant's farm which were charged to the testator, the fate of the testator's livestock or their proceeds). Unless Kinnear's opinion was based on the facts, it was necessarily flawed, but Kinnear do not appear to have probed this issue or sufficiently called attention to its implications. Furthermore, I do not know when Kinnear first learnt how the second applicant had dealt with cheques payable to the testator. In his oral testimony, Mr Corcoran acknowledged that Kinnear wouldn't have recommended the

approach adopted by the second applicant to the cheques if they had been aware of it at the time, an underwhelming response given the gravity of the matter. In the circumstances, I am not satisfied that Kinnear sufficiently addressed the ramifications of such issues.

The reasonableness of the respondent's claim that the second applicant and the Partnership owed the estate €569,130 and €68,343

85. There were different aspects to this criticism – firstly, that the respondent was asserting such debts without a reasonable basis; secondly that he was trying to undermine dispositions voluntarily entered into by the testator; thirdly, that he was doing so without professional advice (although I have already dealt with that point); fourthly, that he was acting unreasonably by refusing to properly explain the basis for the claim; and fifthly, that any such debt would be statute barred in any event. It is not my function to determine what, if any, debt the second applicant might owe to the estate. However, I am satisfied that the respondent acted reasonably and appropriately in raising the issue. He would be remiss if he had failed to do so (indeed, the executor was removed in *Flood* in order to ensure that there was a full investigate whether transactions entered into during the testator's lifetime (to the executor's benefit) had been procured by undue influence), claims the executor said were statute barred.

86. All parties should appreciate the respondent's obligations– they were summarised in Kevin Conway's letter to his siblings. Having heard the evidence, including the second applicant's reluctance or inability to explain the joint bank accounts and loans or the circumstances of those transactions, I am satisfied that the respondent must probe those issues. There is "*a sufficient question mark*", to borrow Macken J.'s phrase in *Flood*, and the applicants were wrong to portray him as arbitrarily seeking to unwind transactions freely and voluntarily entered into by the testator during her lifetime. Key points include: (a) the departure from the testator's normal practice with regard to family financial transactions; (b) the fact that the controversial bank statements were sent to the second applicant's address rather than the

testator's, unlike her other farm accounts; (c) the absence of any evident objective or commercial or reasonable explanation for the transactions; (d) the fact that the burden of the joint loans was almost entirely borne by the testator, whereas the benefit almost exclusively accrued to the second applicant; (e) the sheer size of the documentation; and (f) the issues with the documentation and the address used. These and other circumstances give rise to legitimate grounds for concern as to whether the transactions may have been entered into by and with the knowledge of the testator and as to possible undue influence. The respondent would be remiss if he failed to investigate the matter, nor can it be assumed that the claims were statute barred in circumstances in which section 71 of the Statute of Limitations, 1957 may apply. This case is analogous to *Flood* and *Carroll*, both in relation to the duty to investigate *inter vivos* transactions (and the possible application of s.71 also similarly arose in *Flood*). I cannot determine whether the monies paid by the testator under the joint loan or her expenditure on the second applicant's land should be repaid by the second applicant, but the issue certainly requires investigation. It is wrong to criticise the respondent for his efforts. In any event, even if the transactions were legitimate and I make no such finding, tax and other issues could need to be addressed.

87. Having heard his oral testimony, I am not convinced by the second applicant's claims that he needed a breakdown. Given his dominant role in the management of his mother's farming interests and those of the Partnership, and his direct knowledge of the impugned financial transactions and bank accounts, it is difficult to believe that he was under any genuine misapprehension as to the basis for the figures. If there had been any real confusion, a telephone call to the respondent on receipt of the 2 December 2021 letter would have swiftly clarified the matter. Instead, the second applicant only replied through his lawyers on 13 January 2022, a response which did not engage substantively with the issues. In his oral evidence, the second applicant seemed to consider that he had been cunning in refusing to engage. I disagree. The

respondent had raised legitimate questions, and the second applicant should have responded comprehensively, transparently and expeditiously.

88. The applicants particularly sought to rely on Kinnear to determine the unreasonableness of the respondent's claims as to the monies apparently due to the estate. However, having heard the parties' testimony and that of Mr Corcoran, and having read their affidavits and the correspondence from Kinnear, I am satisfied that the respondent was (and is) entitled (and indeed obliged) to continue to investigate the potentially substantial debts allegedly owed by the second applicant and the Partnership to the estate. As noted above, I place little weight on Kinnear's opinion that lower figures were due, not only because I do not regard them in a position as being to provide independent expert testimony, but also because their assessment appears to be premised on the assumption that they were provided with all necessary and accurate information, an assumption which does not appear to have been sufficiently tested and which has been undermined by subsequent events.

89. Even leaving aside the doubts as to its admissibility, although the Kinnear letter does not say so explicitly, it appears to assume that no sums are payable in respect of crucial heads identified by the respondent, such as the joint accounts, an unsubstantiated assumption. Any expert opinion would need to identify and justify all assumptions on which it was based.

90. The actual position can only be confirmed following full factual disclosure and on the basis of independent forensic analysis, if necessary. Kinnear's compilation role certainly does not provide a basis to allow definitive determinations to be drawn. They have confirmed that the second applicant and the Partnership owe particular sums to the estate – and there appears to be common ground to that extent, at least. However, Kinnear has not established that those figures represent the *totality* of the second applicant's or the Partnership's indebtedness to the estate. Kinnear could not form a meaningful view without, for example, forensically investigating the joint loans and the expenditure on the second applicant's farm which was paid

for by the testator in order to determine what, if any, sums needed to be repaid. Complex factual and legal issues would need to be considered before determining whether the second applicant was required to pay such sums and, if so, to quantify such an obligation. There is no suggestion that Kinnear has undertaken any such analysis or that the factual and legal position was sufficiently clear in order to enable them to do so. Indeed, key factual and legal premises in such an analysis could be beyond Kinnear's expertise in any event.

91. Although Kinnear's figures for the value of the expenditure on the second applicant's land differ somewhat from the respondent's estimate, I am satisfied by the respondent's explanation for his figure. Other issues suggested by Kinnear as affecting the net cost to the testator would require further and factual legal investigation and independent analysis before reaching any conclusion.

92. Accordingly, Kinnear's testimony does not greatly assist the applicants. The position will require further, more forensic, assessment, once all necessary information and documentation is available. Unless agreement can be reached, it would be a matter for the Court to determine, after a detailed factual and legal investigation, what sums might be repayable. At this stage, the respondent is seeking to investigate that matter. He is entitled to do so, and the second applicant is obliged to cooperate with him in that regard.

Amount of Partnership debt

93. Although the parties differ slightly as to the precise figure for the Partnership's debt, I am satisfied with the respondent's approach to that issue as well. He should probe the issues until outstanding factual, accounting, regulatory and legal issues can be resolved to the satisfaction of all parties, or, if necessary (and, hopefully it will not be), by the Court.

Transfer of Herd Number

94. The second applicant correctly notes that the registration of herd number does not denote legal title to the associated livestock and should reflect the details of the person

responsible for the management of the livestock on a day-to-day basis. Accordingly, it is arguable that the deceased's herd number should have been in the second applicant's name, even during the testator's lifetime (and the same would follow in respect of the Partnership herd number). However, his attempt to change the herd number into his own name was not simply a belated attempt to regularise the position in that regard. It is clear from the correspondence from the second applicant himself and from his agricultural consultant (which he exhibited) that his objective was to prevent the executor dealing with the estate's entitlements. It was wrong for the second applicant to seek to transfer the herd number at that time without the respondent's approval or to seek to obstruct the respondent's administration of the estate. The application to change the herd number was directed to securing the BPS entitlements or to prevent the executor from making arrangements in respect of those entitlements or was designed to ensure that forthcoming livestock payments were paid directly to him. Whatever the reason, it was inappropriate for the second applicant to seek to change the herd number from the testator's name into his own without first consulting the respondent and securing his approval. This was a further example of the second applicant's disregard for the executor's authority and his willingness to frustrate the administration of the estate.

Transfer of entitlements

95. The applicants took exception to the transfer of certain agricultural entitlements by the executor, maintaining that they should have been offered first refusal. The respondent dealt with this issue. He offered his brothers the opportunity to take over the entitlements. Although interest was expressed, none provided the respondent with the information required in order to transfer the entitlements to them. He took appropriate action to prevent further entitlements expiring, transferring them to third parties to prevent them lapsing. There is no suggestion that these were not arm's length transactions. The respondent acted reasonably with regard to the

entitlements. He would have facilitated the applicants if they had provided the necessary information. He took appropriate steps. There was no misconduct.

Refusal to agree to the appointment of Kinnear or to change executor

96. In some cases, it may be entirely appropriate and sensible for a neutral and trusted third party to act as an “*honest broker*” to try to determine issues in the best interests of all parties. I do not consider that it would be appropriate for Kinnear to undertake that role in this case. They cannot be regarded as sufficiently objective or independent given the roles they have undertaken and given the nature of their work to date. The respondent was right to reject that proposal. He could have been criticised if he had acceded to such a process in circumstances in which he could not be confident that Kinnear were possessed of all relevant and necessary information and documents relating to all issues and that they had independently and objectively analysed and probed such issues. Nor do I see any basis to criticise the respondent for rejecting the suggestion of nominating an independent solicitor to replace himself as executor. Such an action would simply increase the cost and time involved in the administration, as the applicants must surely appreciate. Nor would such a proposal have addressed the central issue, the second applicant’s failure to promptly provide all information and documents and to clarify the circumstances of the impugned transactions and accounts.

Obligation to ensure correct information is submitted on the application for probate

97. I am satisfied that the administrator proceeded on the basis of the best information to him. Any issues in this regard are primarily the responsibility of the second applicant.

Obligation to complete the administration without delay

98. I am satisfied that the respondent has been acting *bona fide*. The delays are primarily the responsibility of the second applicant. If anything, the respondent can be criticised for not taking a more robust line with the second applicant. However, I believe it would be unduly

harsh to criticise him, given the obstruction he has faced. I understand his reluctance to escalate matters. He has tried to undertake a difficult role as sensitively as possible.

Inappropriate and intemperate correspondence and communications

99. Some of the respondent's communications were intemperate and inappropriate. It is clear that he was understandably concerned and frustrated by the second applicant's lack of engagement and by the unfairness of his criticisms. While his frustration is understandable, more measured responses would have been appropriate. The respondent has acknowledged this and has apologised. I am satisfied with his overall approach and his commitment as to his future approach. The past incidents do not constitute serious misconduct or special circumstances sufficient to justify his removal.

Payment from Partnership funds by Respondent

100. The second applicant criticised the respondent for paying €56,000 from Partnership funds to the estate, supposedly jeopardising the Partnership's financial position. However, he does not appear to deny the fact that some or all of those monies were due to the estate at the time. Accordingly, the respondent was entitled to demand the payment and it was wrong for the second applicant to transfer other Partnership funds to prevent the payment of monies due to the estate. Although matters are confused by the parties' various roles, I am satisfied that the respondent acted appropriately in making the payment. I consider that the second applicant should not have transferred Partnership assets into his own personal control to prevent the payment of monies due to the estate.

Acting without professional advice

101. The contention that the respondent was failing to proceed in accordance with professional advice in the administration of the estate was not supported by the evidence. I am concerned by the second applicant's claim that the respondent had discharged the family solicitor when he was on notice that that was not the case. He claimed that he was not aware

of the position in that regard, but it would be surprising if his then solicitor had not confirmed the position to him. In any event, the second applicant could and should easily have checked the position before making an unwarranted allegation.

102. The second applicant's criticism of the respondent for acting contrary to professional advice appears ironic in the light of certain of his own actions (with regard to the cheques, the car, the Partnership accounts and the use of and transfer of the herd numbers) which are unlikely to have received professional sanction. For example, he would have been left in no doubt that his actions with regard to the cheques could not be justified if, as would have been prudent, he had sought independent professional legal and accounting advice on the basis of full disclosure to such advisers.

The Testator's car

103. I have previously noted that the second applicant eventually acknowledged that he was responsible for the unauthorised appropriation and re-registration of the testator's motorcar following her death. Although the value of the vehicle is modest, it is a further example of the second applicant's disregard of his responsibilities to the estate and of his duty to respect the rights of the respondent as executor.

Statute of Limitations

104. The second applicant alleges that the respondent is wrongfully pursuing claims which are statute barred, in any event. It is not necessary for me to determine that issue, save to note that, on the basis of the evidence before the Court, it appears that claims may not be statute barred (if s.71 of the Statute of Limitations applies). The position in this regard is directly analogous to *Flood*, where the executor was removed for misconduct in failing to investigate similar *inter vivos* transactions (which had been to the executor's benefit). Accordingly, executors have been removed because they declined to investigate controversial transactions (in which they were involved) precisely because of the possibility that s.71 would operate in

such circumstances. That is applicable here and mandates the Respondent's investigation of events which might otherwise be statute barred.

Reconciliation of livestock figures

105. One of the difficulties facing the estate was the need to account for the proceeds of the sale of all livestock owned by the testator at the time of her death. No satisfactory explanation was forthcoming from the second applicant for the difficulties or delays. Although the second applicant and Kinnear claim that they had, by the time of the hearing (more than a decade after the testator's death), made substantial progress and the numbers unaccounted for are much reduced, it does the second applicant and his advisors little credit that it should have taken so many years to reach that point. The delays, difficulties and documentation issues in respect of this issue alone undermines the second applicant's criticisms of the respondent and demonstrates that he must take primary responsibility for the difficulties experienced.

The second applicant's duty to account

106. It is not necessary for me to reach any conclusive determinations in respect of the second applicant's liabilities, but it is indisputable that, as a result of the duties which he undertook as farm manager, he owed duties to the testator, and, subsequently, to her estate, to account for all incoming expenditure associated with the testator and the estate. He would owe corresponding duties to the Partnership in respect of its affairs, but I am not concerned about those duties. It is also clear that he had an obligation to furnish all relevant documents to the executor without argument, including originals. He had no lawful basis for refusing to do so or for instructing Kinnear to withhold originals. As of the hearing of the application, documents were still outstanding. There can be no doubt about the second applicant's obligation to account to the respondent and to provide such documentation. It appears that progress has been made since the hearing. The Court expects this engagement to continue.

Alleged forgery

107. I am satisfied on the basis of the handwriting analysis there is a legitimate issue as to whether, even leaving aside any possible question of undue influence, the testator's signature on crucial bank documents were genuine and that that issue requires further investigation. It is neither necessary or appropriate that I should make any finding as to whether the signatures were actually forged or, if so, the party responsible or in respect of undue influence.

Conclusion

108. The applicants have failed to discharge the onus to show cause. In my view:

- a. the respondent was not guilty of gross delay. The evidence suggests that the second applicant was overwhelmingly responsible for the delay;
- b. although the respondent has rightly accepted that certain correspondence should have been more measured, the handful of intemperate communications do not constitute misconduct or special circumstances which could justify his removal;
- c. the respondent has sought to discharge his duties faithfully. I do not agree that he was acting arbitrarily or unlawfully. The suggestion that he was acting without legal advice is misconceived, with the change of solicitors being due to circumstances outside his control (and I am surprised that this point was taken in these proceedings, since the second applicant's then solicitor had been told the reason for the change);
- d. it is not necessary at present to quantify the second applicant's debt to the estate. However, the respondent is right to probe the controversial financial transactions which give rise to his figure. The breakdown demanded by the applicants has been provided but, in any event, the second applicant and his advisors were at all times intimately acquainted with the estate's financial position. I do not believe that the second applicant was ever in genuine doubt as to the basis for the figure;

- e. it is not correct to characterise the respondent as seeking to frustrate the testator's intentions, by undermining dispositions freely made by her during her lifetime. As noted in the letter from Kevin Conway exhibited by the second applicant, the respondent's duties as executor extend to checking the circumstances of material financial transactions before the testator's death, where there is reason to believe that such transactions may not have been legitimate transactions duly authorised by the testator and in her best interests. The respondent was doing his job. Indeed, executors have been removed in other cases where they appeared unlikely to probe the legitimacy of past transactions, including whether the testator had acted under undue influence;
- f. I am satisfied that the respondent applied for probate on the basis of best information then available. If there was any issue with accuracy and completeness of the information, then responsibility rests with the second applicant, for failing to discharge his duties to account to the estate without delay;
- g. I am not satisfied that the applicants have established serious misconduct in relation to the payment of legal fees;
- h. in circumstances in which the respondent has undertaken not to make an interim dividend pending the determination of these proceedings, I do not consider that his previous proposal is a sufficient basis for his removal;
- i. I am satisfied with the respondent's explanation in respect of the debts claimed by the Other Brothers - he has noted those claims against the estate but has not determined their validity;
- j. the respondent has not wrongfully disposed of partnership assets without offering the beneficiaries the opportunity to acquire the same; and

k. that the respondent has given his best endeavours to administer the estate in accordance with law and with the testator's wishes. It is the second applicant who has frustrated and delayed the process.

109. The application will be refused because, after three days of evidence and multiple lengthy affidavits, no serious misconduct or improper motivation on the part of the executor has been established, let alone anything which would justify interfering with the testator's instructions or removing him. The executor is not the party responsible for the delays and other issues which have beset the distribution of the estate. Furthermore, the relief sought would be prejudicial to the interests of the beneficiaries. (and the parties supporting the respondent's retention collectively represent 65% of the beneficiaries). It would: (a) reduce the prospects of recovering all assets due to the estate; (b) increase the costs of administration; (c) increase the delay; and (d) reduce the amount to be distributed.

110. The applicants' solicitor's letter before action also complained of "*a breakdown in communication and the relationship of mutual trust between the beneficiaries*". However, in my view, the second applicant is responsible for any such breakdown and for the concerns and delays, including in reconciling/vouching accounts.

111. It is incumbent on all parties, especially all those who owe duties to the estate (and their servants or agents), to work diligently and expeditiously and to cooperate constructively to ensure that all outstanding information and documents are furnished to the executor and to progress and resolve outstanding issues appropriately, avoiding further delay and expense as much as possible, thus allowing the estate to be distributed to the beneficiaries at last. I trust that the parties (and their agents) will progress matters without needing further judicial guidance. If, however, the Court is required to offer further directions to ensure that issues are appropriately resolved, then it will do so. Hopefully, that will not be necessary.

112. In the circumstances, having been successful in his defence of the proceedings, it seems that the Respondent is presumptively entitled to his costs (on a party and party basis). I will allow the parties leave to file written submissions (2000 words or less) on or before 9 September 2024, if they wish to contend for an alternative order as to costs in any respect.