Neutral Citation Number: [2010] IEHC 475

**THE HIGH COURT**

**[2009 No. 3286 P]**

**IN THE MATTER OF THE ESTATE OF BRIAN RHATIGAN DECEASED, LATE OF "CHANTILLY", BALLYBRIDE ROAD, RATHMICHAEL IN THE COUNTY OF DUBLIN**

**BETWEEN**

**SHARON SCALLY**

**PLAINTIFF**

**AND**

**ODILLA RHATIGAN**

**DEFENDANT**

**Judgment of Miss Justice Laffoy delivered on 21st December, 2010**

**1. The proceedings**

1.1 The aspect of these proceedings with which the Court is concerned in this judgment is an application by the plaintiff to have a testamentary document dated the 19th May, 2005, (which, for the sake of brevity, I will refer to as "the Will") proved in solemn form of law as the last will and testament of Brian Rhatigan ("the deceased"). The deceased died on the 7th February, 2006. The plaintiff is the sole surviving executrix named in the Will and she brings these proceedings in that capacity. The defendant is the widow of the deceased. On the 20th November, 2008, a caveat was entered on behalf of the defendant and two of the children of the deceased, although an issue arose subsequently as to whether the children had given instructions that the caveat be lodged on their behalf. In any event, the caveat was warned on the 27th February, 2009 and an appearance was entered to the warning on behalf of the defendant alone on the 10th March, 2009. These proceedings were initiated by plenary summons which issued on the 8th April, 2009.

1.2 On the 15th September, 2009, the defendant delivered a defence and counterclaim to the plaintiff's statement of claim which had been delivered on the 3rd June, 2009. The counterclaim raises issues which go beyond the issues which would usually be raised in a probate action, for instance, whether the deceased was, at the date of his death, constituted a trustee as to half of his estate for the benefit of the defendant by reason of matters pleaded in the counterclaim. The plaintiff delivered a reply and defence to counterclaim on the 3rd March, 2010. That, in turn, raised additional issues, for instance, whether the defendant's claim that the deceased was a trustee for her benefit of half of his estate is statute barred by operation of s. 9 of the Civil Liability Act 1961. Issues are also raised on the pleadings as to the extent of the estate of the deceased and as to the appropriateness of the plaintiff acting as legal personal representative of the deceased.

1.3 By order of the Master made on the 5th May, 2010 by consent, the issues to be tried were listed. At the hearing it was agreed by the parties that only the first three issues would be determined by the Court at this juncture. They are:

> 1. whether the Will was executed in accordance with the formalities required by s. 78 of the Succession Act 1965 ("the Act of 1965");
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> 2. whether the deceased knew and approved of the contents of the Will; and
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> 3. whether, at the time of executing the Will, the deceased was of sound disposing mind and had capacity to make a valid will.

1.4 At the hearing it was acknowledged on behalf of the defendant that the Will was executed in accordance with s. 78 of the Act of 1965. On the basis of sight of the original will and the evidence of the two attesting witnesses, Sheila O'Neill, a solicitor in Amorys, the firm which acted for the deceased when he made the Will, and Elaine Cahill, a trainee solicitor in that firm at that time, I am satisfied that the Will was executed in accordance with the rules for a will to be valid as set out in s. 78 of the Act of 1975.

1.5 Accordingly, what remains to be decided is whether the deceased had testamentary capacity on the 19th May, 2005.

**2. The deceased**

2.1 The deceased was born in January, 1946 and had just turned 60 years of age at the date of his death. There were three children of the marriage of the deceased and the defendant: Odilla Gilson; David Rhatigan; and Brian Rhatigan Junior, who pre-deceased the deceased having died in April, 2003 at twenty years of age. The deceased was also survived by grandchildren. Details of his grandchildren were not given in evidence, although I note from the agreed book of correspondence given to the Court that there are four grandchildren, the children of Odilla Gilson.

2.2 The deceased and the defendant had matrimonial difficulties during the late 1990s and they were *de facto* separated from around 1998. Following the separation, each was represented in relation to the family law matters by a solicitor specialising in family law. I make that observation for the purpose of emphasising that the plaintiff did not act for the deceased in relation to family law matters. As I understand it from the evidence, and it is necessary to emphasise that the defendant did not give evidence at the hearing, there was a consensual arrangement between the deceased and the defendant in relation to financial matters during the life of the deceased, although the arrangement was not formalised as a separation agreement in writing.

2.3 After he separated from the defendant the deceased formed a new relationship with Rachel Kiely. They lived together from 1998 until the death of the deceased, first in a flat in Sandymount and subsequently in the dwelling house "Chantilly" at Rathmichael, County Dublin mentioned in the title hereof, which was purchased in the summer of 1999 and which they moved into in December, 1999. There were two children of the partnership (the infants): a daughter who was born in November, 2004; and another daughter who was born in December, 2005.

2.4 The position, accordingly, is that the deceased was survived by his widow (the defendant), his partner (Ms. Kiely), his two children by his marriage to the defendant (Odilla Gilson and David Rhatigan) and the two children from his relationship with Ms. Kiely (the infants) and four grandchildren. He was also survived by four siblings.

2.5 The only evidence the Court has in relation to the deceased's business and his assets at the date of his death is the evidence given by the plaintiff, who is the principal in the firm of Amorys and who acted for the deceased in relation to property investments, conveyancing matters and litigation from 1986 onwards. On the basis of the evidence, the deceased's business affairs were a very "tangled web", and I use that expression fully conscious of its provenance in Scott's "*Marmion*" and its implications in that context. It is not possible, and, in any event, it is unnecessary, to disentangle the labyrinthine network of offshore trusts, corporations, property developments and investments in which, *prima facie*, the deceased would appear to have had an involvement at this juncture. Suffice it to say that, on the evidence, I think it is reasonable to draw the inference that the assets which were represented to the plaintiff when the Will was being drafted as representing the only assets of the deceased were part only of the assets in which the deceased had a sufficient interest to give him a power of disposition thereover. By way of example, I think it is reasonable to draw the inference that the deceased had an interest, in the sense that he was in a position to determine the ultimate destination of its assets, in the trust known as the Golden Promise Trust, which had been set up in Cyprus in 1999, to which I will refer later. It would appear that he also had an interest in the assets of the trust known as the Dolphin Trust, which appears to have been set up in Guernsey in 1984. It has been established since his death that he was the beneficial owner of the assets of the trust known as the Doni Trust, which was set up in the Isle of Man in 2002.

2.6 The plaintiff's evidence was that before his death the deceased had been questioned by "the Ansbacher Tribunal", that a transcript of his evidence had been made available to the Revenue Commissioners and, that, as a result, the Revenue Commissioners had commenced an investigation. That investigation continued after the death of the deceased and is still ongoing. Although the Inland Revenue affidavit sworn by the plaintiff on 30th October, 2008 discloses a net Irish estate in the amount of €6,358,168.20, in arriving at that figure the indebtedness of the deceased to the Revenue Commissioners has not been factored in. As a consequence, the net value of the deceased's estate is unknown.

2.7 The tragedy underlying this case is that the deceased who, on the evidence, was clearly a robust, congenial, generous man, who played rugby until he was forty and continued to participate in sports such as skiing and motor rallying, started displaying symptoms around 2001 which ultimately led to a diagnosis of motor neurone disease.

**3. The Will**

3.1 The Will, which runs to twenty three pages, has the appearance of a complex document. In this outline of its terms, I propose to extrapolate its essential elements.

3.2 The deceased appointed Dan O'Donoghue and the plaintiff to be executors and trustees of the Will. Mr. O'Donohue survived the deceased, but died in April 2008, leaving the plaintiff as the sole executrix.

3.3 In clause 3, which must be read subject to the provisions of clause 4, the deceased devised and bequeathed all his estate to his executors upon trust for sale and he directed them, after payment and discharge of his funeral and testamentary expenses and debts, to "satisfy or provide for the satisfaction of the statutory right of my wife Odilla under the provisions of the Succession Act 1965" and to satisfy the legacies bequeathed by clauses 5 and 6 of the Will. Accordingly, the provision made for the defendant was her statutory right to one third of the estate as provided for in s. 111 of the Act of 1965.

3.4 In clause 4 the deceased made specific provision for his daughter, Odilla, and his son, David, in that he devised and bequeathed to them in equal shares –

> (a) his interest in certain units in Kildare Business Park (the Kildare Units) subject to any mortgage, charge or other encumbrance thereon at the date of his death;
>
> (b) any monies standing to his credit in two current accounts and a deposit account, which were identified by their numbers, with Allied Irish Banks Plc (AIB), and
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> (c) any surplus remaining of the monies payable on foot of a policy of insurance, identified by the policy number, on his life with Irish Life Assurance Company Limited then held by AIB as security for his personal overdraft with that bank.

He specifically provided that those assets should not be applied in payment or discharge of his funeral and testamentary expenses or debts or in satisfaction of the provision he made for his wife, the defendant, or in payment of legacies which he later bequeathed so long as there were other monies arising from his estate available for those purposes.

3.5 In clause 5 the deceased bequeathed the following legacies, which were expressed to be subject to satisfaction of the statutory entitlement of the defendant and to the provision made for his children, Odilla and David, in clause 4:

> (1) €200,000 to Ms. Kiely;
>
> (2) to all grandchildren who should be alive at the death of his death a sum equivalent to the then tax free threshold amount applying to gifts from grandparents to grandchildren, which I assume refers to the relevant inheritance tax threshold, which at the time was €47,815;
>
> (3) €13,000 to each of his brothers and sisters who should be alive at the death of his death;
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> (4) €65,000 to be applied towards the purchase of a house for one of his sisters.

There was express provision for rateable abatement of those legacies, except the legacy in favour of Ms. Kiely, in the event of there being insufficient assets to meet them.

3.6 In clause 6 it was declared that the executors, who were designated trustees, should stand possessed of the residue of his estate upon and subject to the trusts and discretions thereinafter declared and subject thereto with ultimate provision upon trust for "the Beneficiaries in equal shares *per stirpes*". The definition clause (clause 2) identified "the Beneficiaries" as Ms. Kiely, Odilla Gilson, David Rhatigan, and, in the events which happened, the infants.

3.7 The trust provisions were set out in clauses 7 to 16 inclusive running from page 6 to page 23 and were undoubtedly complex.

However, in the main, they gave the trustees the type of broad discretion and the type of broad powers one would expect to find in a discretionary trust to distribute the trust estate among "the Beneficiaries" and regulated the exercise of the discretions and powers. In my view, it is improbable that any testator without a legal qualification or expertise in the law of trusts making provision for the type of discretionary trusts and powers contained in those clauses would concern himself with the precise detail of such clauses. There is an unusual feature, however, in the trust provisions in that amongst the powers conferred on the trustees in clause 8 was power to pay €100,000 or a lesser sum as the trustees should in their absolute discretion think fit to the charity GOAL.

**4. The law**

4.1 Section 77(1) of the Act of 1965 provides that to be valid a will shall be made by a person who "is of sound disposing mind". The test for determining whether a person was "of sound disposing mind" when making or purporting to make a will which has been consistently applied in this jurisdiction (cf. the decision of Kelly J. in *O'Donnell v. O'Donnell*, the High Court, unreported, 24th March, 1999 and the decision of Feeney J. in *Flannery v. Flannery* [2009] IEHC 317) is that set out by Cockburn C.J. in *Banks v. Goodfellow* [1870] LR 5 QB 549 (at p. 656) where it was stated:

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

4.2 Counsel for the defendant raised the issue as to which of the parties bore the burden of proving that the deceased was of sound disposing mind on 19th May, 2005. The Court was referred to a passage from the judgment of Hamilton P., as he then was, in *In re Glynn,* deceased [1990] 2 I.R. 326 (at p. 330) in which it was stated:

> "Normally the legal presumption is in favour of the will of a deceased and in favour of the capacity of a testator to dispose of his property and to rebut this presumption, the clearest and most satisfactory evidence is necessary.
>
> However, in cases such as this when a person suffers a stroke which may affect his capacity, the onus shifts and lies on the party propounding the will. Having regard to the nature of the stroke suffered by the deceased and the disability resulting therefrom, there is a heavy onus on the defendant in this case to establish that on the 20th October, 1981, the deceased had the mental capacity to make a testamentary disposition of his property, that he had a sound disposing mind, that he was capable of comprehending the extent of his property, the nature of the claims of his sister, the plaintiff herein, and that he was disposing of his property."

4.3 On the issue of the burden of proof counsel for the defendant also referred the Court to a recent decision of the High Court of England and Wales, *In re Key, decd.* [2010] 1 WLR 2020 and, in particular, to the following passage in the judgment of Briggs J. (at para. 97):

> "The burden of proof in relation to testamentary capacity is subject to the following rules. (i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity. (ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity. (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless . . . ."

4.4 In this case, evidence was adduced by the plaintiff with a view to establishing that the deceased did have testamentary capacity on 19th May, 2005. Evidence was adduced by the defendant to cast doubt on whether the deceased was of sound disposing mind on that day. I am satisfied that I must decide, on the basis of the entirety of the evidence, whether, on the balance of probabilities, the deceased had testamentary capacity by reference to the *Banks v. Goodfellow* test on 19th May, 2005. As is pointed out in Williams, Mortimer and Sunnocks on *'Executors Administrators and Probate'* (18th Ed.) at para. 13-19, "when the whole evidence is before the court, the decision must be against the validity of the will, unless it is affirmatively established that the deceased was of sound mind when he executed it".

4.5 By reference to the judgment of Briggs J. *In re Key, decd.,* counsel for the defendant submitted that the Court should have regard to what was referred to as the "Golden Rule" in that case. In his judgment (at para. 7), Briggs J. stated:

> "The substance of the Golden Rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings …."

However, Briggs J. went on to say (at para 8):

> "Compliance with the Golden Rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope."

4.6 Those observations, in my view, reflect the law in this jurisdiction. Irrespective of whether the "Golden Rule" or best practice was followed in a particular case, it is a question of fact, which is to be determined having regard to all of the evidence and by applying the evidential standard of the balance of probabilities, whether a testator was of sound disposing mind when the testamentary document which is being propounded was executed.

**5. Overview of the evidence**

5.1 In broad terms, the evidence adduced at the hearing falls into four categories; namely:

(a) Evidence of family members of the deceased.

His partner, Ms. Kiely, and his sister, Margaret Graby, who were called by the plaintiff, testified.

(b) Evidence of the circumstances in which the Will was made.

This evidence was primarily the evidence of the plaintiff, although Sheila O'Neill, one of the witnesses to the Will, and Liz Scanlon, the

deceased's secretary, had a peripheral involvement. Ms. Kiely testified that she knew nothing about the deceased's business affairs.

(c) Medical evidence as to the deceased's physical and mental condition in 2004 and 2005.

The principal witness called by the plaintiff was Professor Timothy Lynch, who is a Consultant Neurologist at the Dublin Neurology Institute at the Mater Misercordiae University Hospital and at Beaumont Hospital, and who is also Professor of Neurology at University College Dublin. The deceased was referred to Professor Lynch in September 2004. Dr. Yvonne Rafter, the general practitioner whom the deceased regularly attended from April 2004 until his death, was also called on behalf of the plaintiff. Ms. Eileen Carpenter, who was assigned by Home Instead, which provides palliative care for persons in need of it, testified as to her experience as a carer and companion to the deceased in the period from September 2005 until his death, also gave evidence. The only medical witness called by the defendant was Professor Robert Howard, who is Professor of Old Age Psychiatry at the Institute of Psychiatry and Consultant Old Age Psychiatrist at Maudsley Hospital in London. Professor Howard received instructions from the defendant's solicitors in April 2010, to furnish a report on the deceased's capacity as of 19th May, 2005. He did so, the report being dated 28th May, 2010, on the basis of the deceased's medical records, which had been furnished to him.

(d) Evidence of appropriate practice on the part of a solicitor in addressing the issue of capacity of a person to make a will.

That evidence was called by the defendant and was given by Ms. Paula Fallon, a practicing solicitor, who works exclusively in the area of wills, administration of estates and trusts.

5.2 While I have had regard to all of the evidence in reaching the conclusion which I will set out later, the main focus of this judgment will be on the evidence referred to at (b) and the evidence of Professor Lynch and Professor Howard referred to at (c) in para. 5.1

5.3 Before considering that evidence in detail, I consider it appropriate to advert to an issue of concern which I raised during the hearing. The deceased had made an earlier will in the 1980s, apparently on 21st November, 1989, which, as I understand the evidence, had been retained by Amorys. In 2005, in the context of the execution of the Will, the earlier will was destroyed on the basis that it was revoked by the deceased. As one would expect, the testamentary document executed on 19th May, 2005, that is to say, the Will, at its commencement was expressed to revoke all wills and testamentary dispositions previously made by the deceased. There is no copy of the earlier will available. Obviously, if it were the case that the deceased was not of sound disposing mind on 19th May, 2005, the earlier will would not have been revoked. In that event, the apparent absence of any copy of his earlier will or any evidence of its contents would create a problem.

**6. The making of the Will**

6.1 Apart from the plaintiff, two other persons played a part in obtaining instructions from the deceased and in formulating the terms which ultimately ended up in the Will. The most important of those was Mr. Charles Haccius. The plaintiff referred to Mr. Haccius, a barrister, as having had a long-standing business relationship in an advisory capacity with the deceased and as being a friend of the deceased. The other was Mr. Paddy O'Sullivan, who was a work colleague of the deceased and was also present at some of the meetings at which the terms of the deceased's will were discussed with the plaintiff. On the evidence, it would appear that the deceased carried on his business to some extent through the medium of a company known as York Securities Limited. Mr. O'Sullivan was an employee of that company, his position being "Financial Controller". Ms. Scanlon was also an employee of that company. The position of the deceased with that company was described as "Project Manager".

6.2 The thrust of the evidence was that York Securities Limited provided project management services for various companies and developments in which the deceased had an involvement. York Securities Limited is part of the "tangled web". The evidence indicates that the business of the deceased, through York Securities Limited or otherwise, was carried on from offices at Lower Baggot Street in Dublin until December 2003. Thereafter, the business moved to the mews premises at the deceased's home, "Chantilly", which had been converted into an office. Mr. O'Sullivan and Ms. Scanlon and the deceased worked there from January 2004 because of the deterioration in the health of the deceased.

6.3 The plaintiff's evidence was that the issue of the deceased making a will in 2005 first arose in February 2005. Ms. Scanlon telephoned the plaintiff to say that the deceased wanted to come to see her to talk about making a will. Subsequently, on 15th February, 2005 both the deceased and Mr. O'Sullivan attended at the plaintiff's office where there was a discussion about the deceased making a will. At the time, the deceased had lost his power of speech and he was using an appliance called DynaWrite to communicate. The plaintiff's evidence was that she remembered telling the deceased that, if he wished to make a will, they needed to discuss his assets, at which stage the deceased pointed to his watch. The plaintiff explained that this was a reflection of a long standing joke between the plaintiff and the deceased that, as the plaintiff subsequently put it in a letter of 21st August, 2006 to the defendant, the deceased always told her that he "never owned any asset either legally or beneficially apart from a small number of personal items including a gold Audemars Piquet watch and a set of golf clubs". In any event, by February 2005 the plaintiff knew that the deceased had acquired the Kildare Units. She was told by Mr. O'Sullivan at the meeting that there were a number of life policies and that Miss Scanlon had a list of them in the office. The plaintiff was told by Mr. O'Sullivan that the estate was not going to be a very large one and the deceased nodded in agreement. The plaintiff was also aware that a certain amount of cash would be coming to the deceased as a result of the administration of the estate of his son, Brian.

6.4 The plaintiff's evidence was that she told the deceased that she anticipated problems if his will only dealt with a small estate, because he had been involved in large property developments and the expectation of the defendant and, possibly, other members of the family would be that there was going to be a very substantial amount of money. In response, the deceased communicated to the plaintiff that there should be a meeting with Mr. Haccius. The plaintiff's evidence was that she was aware at that stage of the existence of the Golden Promise Trust and that the deceased "had a connection with it". She also had become aware that Mr. Haccius had been involved in setting up the trust, but she never had anything to do with its setting up or administration.

6.5 The plaintiff's recollection was that a lot of other business matters had been discussed at the meeting on the 15th February, 2005 with the deceased and Mr. O'Sullivan, including property transactions which were pending at the time.

6.6 The meeting with Mr. Haccius was arranged for 6th April, 2005 and took place at "Chantilly". Present were the plaintiff, the deceased, Mr. Haccius and Mr. O'Sullivan. The meeting went on for several hours. The plaintiff's evidence was that the first issue which was addressed was the size of the estate which would be covered by the deceased's Will and the potential disappointment on the part of family members if it was small. The plaintiff's evidence was that she had been previously often told by the deceased that he did not have "any connection" with the Golden Promise Trust "on the face of it". On this occasion, Mr. Haccius was emphatic that the deceased had nothing to do with the Golden Promise Trust, that he was neither a beneficiary nor a settlor and that the assets of the Golden Promise Trust would be entirely outside the estate of the deceased. Mr. Haccius also stated that any proceedings in

relation to the Golden Promise Trust would have to be initiated in Cyprus and that it would be very unlikely that anyone would be able to "overturn" it because of Cypriot law in relation to "these matters". The plaintiff's evidence was that the deceased nodded in agreement.

6.7 The plaintiff then went on to describe the process of taking instructions from the deceased. She said it was very difficult as he was very ill, but she was happy that he was "in control of his faculties and knew what he was talking about". The deceased was communicating by using the DynaWrite which she considered he found difficult. In terms of eliciting information, there was a lot of prompting. The process was very slow and difficult.

6.8 The matters which were discussed at the meeting thereafter were the assets of the estate, which would compromise the Kildare Units, the life policies, a schedule of which was furnished to the plaintiff, and the money coming from the estate of his son, Brian. The plaintiff's evidence was that at that stage they were working off assets valued at between €3m and €3.5m. In relation to the distribution of the assets, the deceased indicated that the defendant was to get one third. The plaintiff's evidence was that the deceased would have been aware that the defendant would have an entitlement to a legal right share of one third of his estate under the Act of 1965 even if it was not provided for in his will, but he communicated to her that he wanted it put in the Will. The deceased then communicated that the Kildare Units were to go to his children, Odilla and David. The plaintiff was aware that there was a first charge over that property in favour of AIB. The plaintiff's evidence was that the other matters eventually dealt with in clause 4 of the Will, the monies in AIB and the life policy held by AIB as security, were then explored and the wishes of the deceased ascertained, to some extent with the assistance of Mr. O'Sullivan, who was familiar with the deceased's dealings with the bank. The next issue which was addressed was the provision which was to be made for Ms. Kiely and the figure ultimately indicated was €200,000. The legacies in favour of the siblings of the deceased were then addressed and the evidence indicates that the plaintiff was given instructions which reflect what eventually was provided for in the Will. Provision for the grandchildren of the deceased was then addressed and, again, the evidence is that the instructions given by the deceased reflect what was ultimately provided for in the Will.

6.9 The issue of Ms. Kiely's daughter and the fact that she was expecting a second child then came up and the plaintiff's evidence was that at that stage the deceased communicated via the DynaWrite that Ms. Kiely was to stay in "Chantilly". The plaintiff reminded him that "Chantilly" was owned by a company, Unit 33 Nominees Ltd., which the evidence established was a company incorporated in the Isle of Man and was owned by Golden Promise Trust. The plaintiff's understanding was that the deceased was a tenant of "Chantilly". The plaintiff's evidence was that at that stage Mr. Haccius indicated that he would have to look into the matter. The plaintiff queried with the deceased whether she was to draft his will on the basis that "Chantilly" was not to be addressed in it and that she did not have to concern herself about the possibility of the infants not being catered for under his will. The deceased communicated that such was the case.

6.10 Another matter which was considered was a legacy for the charity GOAL. The plaintiff's evidence was that the defendant was thinking of a figure of something over €100,000 but the plaintiff suggested that it was rather large in the context of the size of the estate. Mr. Haccius suggested that the better way of dealing with that legacy would be to give the trustees power, if "the estate swelled", to give GOAL a lump sum. The deceased also wanted a provision in the sum of €30,000 to be made for another charity, which was named.

6.11 Finally, the residuary clause in the Will was discussed and the deceased indicated that the residue of his estate was to be divided between Ms. Kiely and his four children, although the quantum of the residue was uncertain.

6.12 As regards who was to act as executor, the deceased indicated, by pointing at her, that the plaintiff was to be an executor of the Will. She advised him that it would be prudent to have a second executor and the deceased indicated that Mr. O'Donoghue should also be appointed executor.

6.13 The plaintiff's evidence was that other matters were then discussed at the meeting on 6th April, 2005, including companies, property transactions and investments in which the Golden Promise Trust was involved. As the meeting broke up, it was agreed that the plaintiff would prepare a draft will on the lines discussed and would send it to the deceased and to Mr. Haccius.

6.14 After that meeting the plaintiff prepared a draft will on the lines discussed. However, instead of sending a copy of the draft to Mr. Haccius, the plaintiff arranged to have a meeting with the deceased on his own at her office on 13th April, 2005. The plaintiff's evidence was that at that meeting she went through the draft will with the deceased. He seemed to be happy with it and he asked her to send the draft to Mr. Haccius, which she did.

6.15 There was then a gap of some weeks, probably because the deceased was on holidays in France. Eventually, Ms. Scanlon asked the plaintiff to arrange a meeting with Mr. Haccius to discuss the deceased's will, because the deceased wanted to get on with executing it. A meeting was arranged for 13th May, 2005. It took place in the plaintiff's office. Present were the plaintiff, the deceased, Mr. Haccius and Mr. O'Sullivan. It was a long meeting. It lasted about six hours with a break for lunch. As I understand it, Mr. Haccius had drafted clauses intended to be incorporated in and to effect two major changes to the plaintiff's draft will. One related to giving the trustees of the draft will power to make a claim to an entitlement to a beneficial interest in the deceased's former family home, which was then vested in the sole name of the defendant. The plaintiff's evidence was that, communicating via the DynaWrite, the deceased made it clear that those premises belonged to the defendant. It was understood by the parties present that the deceased required Mr. Haccius's amendment in relation to the defendant's home to be struck out of the draft. The other major alteration proposed by Mr. Haccius was the inclusion of the clauses setting up the discretionary trusts and powers in relation to the residuary estate. The plaintiff's evidence was that there was general discussion in relation to why the trusts might arise and the contribution of Mr. Haccius was that he felt it was a good idea to have more lengthy provisions in case there was "a windfall" in the estate.

6.16 The plaintiff testified that at the meeting everything was read out carefully and explained to the deceased, paraphrased and discussed. As they went through the Will they stopped and asked the deceased if he wished to make any changes or wished to comment on any provision and he communicated with them by gestures. At the end of that meeting, a combination of the plaintiff's draft and the change introduced by Mr. Haccius in relation to the residuary estate, including, apparently, a variation in relation to the bequest to GOAL, was agreed as the final draft by the deceased.

6.17 At the meeting of 13th May, 2005 the plaintiff suggested to the deceased that it would be wise, if at all possible, for him to be seen by Professor Lynch, obviously to confirm that he had testamentary capacity notwithstanding his serious illness. Indeed, she suggested the possibility of Professor Lynch being a witness to the Will. The deceased was agreeable to that and the matter was left on the basis that Mr. O'Sullivan would ask Miss Scanlon to make the necessary arrangements with Professor Lynch. On 18th May, 2005 Ms. Scanlon faxed a typed letter signed by the deceased to Professor Lynch. The letter, which was headed "My Will" stated:

> "I am about to sign my will and I shall be pleased if you will let me have a letter confirming that I am mentis compos (sic) so that I can file it with same."

6.18 On the following morning, 19th May, 2005, the plaintiff received by fax a report from Professor Lynch in relation to the deceased, which was dated 18th May, 2005, which recorded the dates of his assessments of the deceased as 22nd October, 2004, 19th January, 2005 and 20th April, 2005 and was addressed to "To whom it may concern". Having stated that the deceased was attending the Department of Neurology for management of his progressive neurodegenerative condition, the medical report stated:

> "This has resulted in balance difficulty, parkinsonism, progressive speech loss (he is mute at this time), swallowing difficulty, muscle wasting suggestive of motor neurone disease and furthermore some cognitive difficulties. The cognitive difficulties are characterised by frontal lobe executive dysfunction including slowness in thought process, some deficits in mental flexibility and sequential thinking. Mr. Rhatigan's condition is called progressive supranuclear palsy/corticobasal degeneration and motor neurone disease. This is a very rare disorder and is caused by degeneration of specific regions of brain and less so the spinal cord.
>
> In my opinion [the deceased] is capable of making a Will and Testament. His neurodegenerative condition predominantly affects his motor, speech and swallowing and less so his mental and cognitive abilities."

After she had received the medical report, the plaintiff received a telephone call from Ms. Scanlon that the deceased would be able to call to her office that afternoon.

6.19 The deceased attended at the plaintiff's office on 19th May, 2009 on his own for the purpose of signing his will. The plaintiff's evidence was that she read through the draft first and then she and her assistant, Ms. O'Neill, took it in turns to go through the final draft again with the deceased. The evidence was that at that stage the document was in the form in which it was subsequently executed save that there were a number of typographical errors in it which required to be, and were, corrected and the deceased wanted the legacy in favour of the charity other than GOAL to be taken out, which was done. The plaintiff's evidence was that the deceased was fully aware of what was going on, although he was a very ill man and there were difficulties in communication. At the end of that meeting, the Will in its final form having been read out loud to the deceased by the plaintiff and Ms. O'Neill, and the plaintiff having left the room, the Will was executed by the deceased in the presence of both Ms. O'Neill and Ms. Cahill who then subscribed their signatures as attesting witnesses.

6.20 Neither the various draft wills which were prepared between February and May 2005, nor copies of them, are available. There are two attendance dockets available in which the plaintiff records what happened at the meeting of 13th May, 2005 and at the meeting of 19th May, 2005. On reviewing the evidence, some inconsistencies are apparent in the plaintiff's testimony and between the plaintiff's testimony and the attendance dockets. However, most are of a minor nature. In general, I accept the plaintiff's evidence as an accurate account of how the Will came into being. However, it is patently clear from the evidence that much more was going on behind the scenes in relation to the deceased's assets than is reflected in the Will.

6.21 One example will suffice to illustrate why it is reasonable to come to that conclusion. As I have already recorded, at the meeting of 6th April, 2005 it was decided that Mr. Haccius would look into the matter of "Chantilly". The plaintiff's evidence was that she had no particular recollection of "Chantilly" being raised at the meeting of 13th May, 2005. Her understanding was that Mr. Haccius was going to look into doing something with "Chantilly". Shortly after that, she became aware that "a trust called the Chantilly trust" had been set up but she was not involved in setting it up. The plaintiff was, however, involved in the purchase of "Chantilly" and in its sale after the death of the deceased. What the evidence discloses is that it had been purchased in the name of Unit 33 Nominees Ltd. with the aid of a loan from Anglo Irish Bank Plc (Anglo). On 10th March, 2005, Golden Promise Holding Ltd., which is a Cypriot company and which apparently was the trustee of the Golden Promise Trust, applied to Doni Ltd., the trustee of the Doni Trust, for a loan of €2,757,000.30 and requested that €1,757,219.30, a portion thereof, would be lodged to an account of Golden Promise Holding Ltd. at Anglo. The letter of request stated:

> "It is a condition that in making this payment on our behalf in the sum of €1,757,219.30 to Anglo … that that Bank will release its mortgage/charge over the house and premises known as "Chantilly", Ballybride Road, Shankill, County Dublin which is owned by our subsidiary company, Unit 33 Nominees Ltd."

The request was granted, as evidenced by a minute of a meeting of the board of Doni Ltd. held in the Isle of Man on the 11th March, 2005. By the time "Chantilly" came to be sold after the death of the deceased, it was free of the mortgage in favour of Anglo. After discharge of capital gains tax, the proceeds of the sale of "Chantilly" which were available to be distributed were in the region of €3.3m. The plaintiff's evidence was that she paid the proceeds over to Unit 33 Nominees Ltd., which was part of the Golden Promise Trust. However, when it was put to her in cross-examination that Ms. Kiely was the ultimate beneficiary, her response was that she could not say that. Although this is not clear on the transcript, the distinct impression I got from Ms. Kiely's evidence during her cross-examination was that she is the beneficiary of the proceeds of the sale of "Chantilly".

6.22 The arrangement for the discharge of the mortgage on "Chantilly" was only one of a range of matters which the evidence discloses were being dealt with by the deceased or on his behalf by Mr. Haccius or Mr. O'Sullivan between February and May 2005. In cross-examination, the plaintiff reiterated that the reason the complicated trust provision in relation to the residue was included in the draft, which was considered in the meeting of 13th May, 2005 and which had been drafted by Mr. Haccius, was that Mr. Haccius had stated that there was no harm in putting it in because it could cater for a "windfall situation", but she had no evidence of what sort of "windfall" Mr. Haccius had in mind. Although it could hardly be properly characterised as a "windfall" to the estate of the deceased, the plaintiff discovered after the death of the deceased that the deceased was the beneficiary of the Doni Trust. The amount due to the Doni Trust by way of repayment of the loan of €2,750,000 by the Golden Promise Trust appears as an asset of the deceased in the Inland Revenue affidavit sworn by the plaintiff. It is that sum which explains the increase in the value of the estate of the deceased from €3m to €3.5m discussed at the meeting of 6th April, 2010 to in excess of €6.3m shown as the net value of the estate in the Inland Revenue affidavit. However, the plaintiff's evidence was that the loan may be irrecoverable from the Golden Promise Trust.

6.23 In response to a question put to her, the plaintiff stated that there was no letter of wishes in relation to the discretionary trusts created in the Will. However, the plaintiff testified that on the morning of 19th May, 2005 she had received a phone call from Mr. Haccius who said that he was going to fax through a "letter of wishes" which the deceased had indicated he wanted to sign. The draft was faxed through and the letter of wishes was typed up in the plaintiff's office. After the Will was signed, the plaintiff asked the deceased about the letter of wishes and the deceased indicated that he wanted to sign it. The plaintiff read it over to the deceased. He indicated that he did not want to make any changes and that he was satisfied with it. He signed it and asked the plaintiff to send it to his lawyer in Cyprus. The plaintiff did not retain any copy of the letter. Her recollection was that it was

addressed to "the directors" of the Golden Promise Trust. It expressed wishes that certain property owned by the Golden Promise Trust would be sold at the time of the deceased's death and that certain other property would be retained. As regards distribution of the assets of the trust, the plaintiff's recollection was that the deceased indicated that they be distributed amongst his children and his partner.

6.24 Whether the plaintiff's recollection in relation to the content of the letter of wishes is correct and whether Ms. Kiely came within the class of beneficiaries who could benefit under the Golden Promise Trust is immaterial. What is significant is that, as I have stated, a lot more was going on in relation to assets associated with the deceased at the time than the mere drafting and execution of the Will. Although Mr. Haccius and, to some extent, Mr. O'Sullivan, neither of whom, apparently, live within the jurisdiction now and neither of whom gave evidence, were assisting the deceased in relation to those other matters, having regard to the evidence given by the plaintiff, it is difficult to accept that the deceased was not the instigator of what was happening in relation to assets with which he was associated, but which, apparently, were not in his name and were not to be dealt with in his will in accordance with his instructions to the plaintiff.

**7. The medical evidence**

7.1 In the medical report of 18th May, 2005 which I have quoted earlier, Professor Lynch characterised the deceased's condition as being "a very rare disorder". In his testimony, Professor Lynch described the constellation of conditions from which the deceased was suffering as "exceptional circumstances, one in one million".

7.2 The deceased was referred to Professor Lynch was Dr. Raymond Murphy, Consultant Neurologist, in September 2004. At that stage, as Dr. Murphy graphically put it in the referral letter, the deceased had "done the rounds". He had been to several doctors in Dublin. He had been to a consultant in London and he had spent three weeks in the Mayo Clinic in the USA, where the diagnosis of motor neurone disease had been confirmed. He had also been to Shanghai to a clinic specialising in alternative medicine. Consistent with that history, Professor Lynch found the deceased to be very proactive about his condition, deeply interested in it, focused on it, busy searching the Internet for information about motor neurone disease and his other disorders, and looking for medications that might potentially slow it up. Professor Lynch gave a number of examples of this. At his first visit in October 2004, Professor Lynch had a long discussion with the deceased about the benefit of antioxidant medication. Professor Lynch testified that he had ongoing discussions with the deceased not only about medications and new treatments but also about gene therapy and stem cell therapy, which was a topic which came up on every visit. It is reasonable to infer from the evidence that the deceased had sufficient cognitive ability to explore all of the available options.

7.3 However, Professor Lynch's evidence was that during the deceased's first visit he noted that he had some cognitive problems, which predominantly affected his frontal cortex. He did what is called a Frontal Assessment Battery (FAB), which disclosed some abnormalities, which he characterised as being "mild to moderate in that he had some difficulty with changing task". When he was reporting back to Dr. Murphy, Professor Lynch referred to the fact that he had suggested to the deceased that he might benefit from formal neuropsychometric testing with Dr. Robert Coen and Professor Brian Lawlor in the Mercer's Institute for Research on Ageing in St. James Hospital, so as to quantify in a formal fashion his frontal executive dysfunction which had been noted on the FAB.

7.4 The deceased was examined by Dr. Coen on 18th November, 2004 and he issued a report on 25th November, 2004. As I understand the report of Professor Howard and his oral evidence, his conclusion that the deceased "most probably did not have adequate testamentary capacity to execute" the Will on 19th May, 2005, was primarily based on the results of the tests carried out by Dr. Coen and Dr. Coen's conclusions, although he did consider a variety of other material, including Dr. Murphy's referral letter, the reports of Ms. Una Cunningham, who carried out speech and language therapy assessments on the deceased in February and March 2005, and Professor Lynch's reports. Professor Howard recognised that Professor Lynch had a peculiar advantage over him, as he put it, in that he was familiar with the deceased and he recognised the obvious limitations in providing a post-mortem assessment, as he was doing.

7.5 The area of disagreement between Professor Lynch and Professor Howard which is most pertinent to the task the Court has to perform relates to the degree of the deceased's cognitive impairment which was manifested in Dr. Coen's report on the neuropsychological test findings. Dr. Coen did not give evidence. However, his report was put before the Court. Professor Howard pointed to the fact that he stated that on a range of formal objective tests to evaluate specific aspects of executive dysfunction there was clear evidence of significant impairment. Dr. Coen then commented on various tests. In his concluding remarks Dr. Coen stated:

> "In addition to psychomotor slowing, the test findings provide evidence of clear deficits in mental flexibility, planning, sequential thinking, and the higher order regulation of goal directed behaviour. The latter was particularly evident on tests that require regulation and self monitoring while switching from one task to another and adhering to rules … Memory per se was not a problem …"

In cross-examination, Professor Howard stated that he was basing his assessment of the deceased's testamentary capacity on what he knew of patients who have frontal lobe dementia by reference to the only specialist neuropsychological assessment which the deceased had undergone – that which was that carried out by Dr. Coen. When Professor Lynch was recalled, because the detail of Professor Howard's report had not been put to him in cross-examination, he stated that the deceased did not have frontal lobe dementia, but had frontal cognitive impairment and there was a subtle difference there, but an important one. In relation to Professor Howard's opinion that in all of the tests which Dr. Coen gave to the deceased that looked at the function of frontal lobes the deceased had done extremely badly on them and it would be wrong to say that it was a kind of a borderline or grey area, Professor Lynch disagreed. His opinion was that the deceased's cognitive impairment, although present, was at the milder end of the spectrum in comparison with hundreds of patients with progressive supranuclear palsy and corticobasal degeneration who were seen and managed by him.

7.6 It was Professor Lynch who referred the deceased to Dr. Coen and his evidence was that he discussed Dr. Coen's report with Dr. Coen at the time. Professor Lynch continued in the management of the deceased's condition after Dr. Coen reported and he saw him again on the 19th January, 2005 and on 20th April, 2005. Professor Lynch expressed the opinion that the deceased did have testamentary capacity on 19th May, 2005, notwithstanding that a formal assessment in accordance with the Banks v. Goodfellow model had not been carried out, which he acknowledged, with the benefit of hindsight, would have been preferable. He based that opinion on the assessments of the deceased which had been carried out from late 2004 onwards and his interaction with the deceased. I find that Professor Lynch's assessment is to be preferred to that of Professor Howard, who was severely handicapped, as he acknowledged, in forming an opinion on the deceased's cognitive ability on 19th May, 2005.

7.7 Before setting out my conclusions on the issues which the Court has to determine, I think it is useful to record the evidence of some events which occurred after the execution of the Will, which inform the conclusion I have reached.

**8. Post 19th May, 2005**
8.1 A matter to which I attach significance is that after the Will was executed on 19th May, 2005 the plaintiff asked the deceased if he had any requirements in relation to his burial arrangements. The deceased understandably became upset and told the plaintiff that he would deal with the matter at a later stage. Ms. Scanlon's evidence was that on the following day the deceased, through a process of gestures which it is not necessary to outline, communicated to Ms. Scanlon that he wished her to fax to the plaintiff documentation which showed that he owned two plots in Shanganagh Cemetery, in one of which his son, Brian, was buried. The plaintiff confirmed that she received the relevant documentation by fax that morning.

8.2 Another factor to which I attach weight is that, although he was initially against it, the deceased made a decision in May 2005 to have a PEG inserted because of his swallowing difficulty. Professor Lynch testified that he discussed the insertion of a PEG with the deceased both at the consultation in January 2005 and again at the consultation in April 2005, at which stage the deceased was losing weight. Professor Lynch testified that he explained to the deceased the benefit of somebody with motor neurone disease who is losing weight having a PEG insertion to maintain calorie intake and weight – that it leads not only to a longer life but a better quality of life, which was something the deceased was particularly interested in. The deceased was admitted to the Mater Private Hospital on 25th May, 2005, just four days after the Will was executed, under the care of Professor Lynch. He was subsequently discharged and re-admitted in late May 2005 for the PEG insertion which was carried out on 1st June, 2005. It was the deceased who gave consent to the surgical procedure being carried out. At the time there was no issue as to his cognitive ability to give a valid consent for surgical intervention.

8.3 In December 2003 the deceased had appointed the plaintiff and Mr. O'Sullivan as his attorneys in respect of his business and commercial affairs under an Enduring Power of Attorney. Following a request from the plaintiff for a medical report dealing with whether the deceased was, or was becoming, mentally incapable of managing his property and affairs so that the plaintiff could determine whether the Enduring Power of Attorney required to be activated, Professor Lynch furnished a report to the plaintiff on 19th December, 2005. At that stage he had assessed the deceased again on 12th October, 2005. His conclusion was that the deceased's progressive neurodegenerative disease had significantly affected his cognitive ability and his mental health and the deceased was "mentally incapable of managing his property and affairs". Professor Lynch testified that he considered that it would have been more accurate for him to have stated in that report that the deceased had predominant problems with physical disability, with mild to moderate cognitive disability. In any event, as I understand it, the Enduring Power of Attorney was not activated.

**9. Conclusions**
9.1 In applying the *Banks v. Goodfellow* test, the first question which the Court has to consider is whether the deceased understood the nature of the act of making a will and its effect. On the evidence I am satisfied that he did understand that, in executing the Will on 19th May, 2005, he was executing a document that would take effect on his death and would determine the manner in which assets which he owned which were in his name would be distributed on his death. In a summary of his opinion, Professor Howard expressed the view that, on the balance of probabilities, the deceased would have understood the nature of the act of making a simple will. However, in his view the Will in issue was not a simple will. He remarked that he found some parts very difficult to interpret and he gave an example of the definition of "the trust period" in clause 2, which limited it to the earlier of the attainment of the youngest of the beneficiaries of the age of twenty five years or "the death of the last survivor of the descendants living at the death of my death of His Late Majesty King George VI". In my view, it would be very rare indeed that a testator or a settlor, other than a person with a legal qualification well versed in the law of real property and trusts, would appreciate the significance of delimiting the duration of the trust in a manner which was designed to ensure that the common law rule against perpetuities was not contravened. That type of technicality aside, on the basis of the entirety of the evidence, I am of the view that the deceased would have understood as well as, and perhaps even better than, most testators could the general thrust of the provisions of clauses 6 to 17 of the Will.

9.2 It is impossible to form a view on the evidence as to what the deceased and his advisers and, in particular, Mr. Haccius, anticipated would be the value of assets passing under the residuary clause, which would be subject to the discretionary trusts set out in clauses 7 to 16. One is no wiser when one reads the Inland Revenue affidavit sworn by the plaintiff on 30th October, 2008, which was qualified by a letter of the same date to the Revenue Commissioners. However, the evidence strongly suggests that it was not anticipated that the residue would be substantial, unless there was a "windfall" and the objective was to ensure that a "windfall" would not occur. Having regard to the steps which were obviously being taken to ensure that assets, other than those of which the plaintiff was informed at the meetings prior to the execution of the Will, over which the deceased would appear to have had disposing power did not form part of the estate, I am satisfied that the deceased understood what assets were being disposed of by the Will and how they were being disposed of. He clearly did understand the effect of the specific dispositions. As regards the residuary clause and, in particular, the discretionary trusts provided for in clauses 7 to 16, I am satisfied that he understood that the persons who would benefit were Ms. Kiely and his four children and that wide discretions and powers were given to the trustees, although I think it is unlikely that it was envisaged by him that those discretions and powers would ever fall to be exercised.

9.3 The second question to be considered in accordance with the *Banks v. Goodfellow* test is whether the deceased understood the extent of the property of which he was disposing. On the evidence I am quite sure that he did and that his objective was to ensure that the property passing under the Will would be limited to the Kildare Units, the life policies, what was coming to him from the estate of his son and whatever monies were in bank accounts, whether current or deposit accounts, in his name.

9.4 The third question under the *Banks v. Goodfellow* test is whether the deceased comprehended and appreciated the claims to which he ought to give effect. He undoubtedly comprehended that his wife, the defendant, had a legal right to a one third share of his estate under the Act of 1965. It may be that, as was implicit in the cross-examination of the plaintiff by counsel for the defendant, the deceased was deliberately limiting the assets which would pass on his death under the Will so as to exclude the defendant as well as, perhaps, the Revenue Commissioners from recourse to other assets in respect of which he had power of disposition. However, in determining whether he had testamentary capacity, the issue is whether he was aware that the defendant had a legal entitlement to his estate irrespective of whether he provided for her in his will or not and the extent of that entitlement. I am satisfied that he did. The deceased also clearly recognised that he had a duty to make provision for Ms. Kiely, the mother of the infants, and the infants. It would appear that the deceased decided that such a provision would be made primarily out of assets other than the assets which were in his name and would pass under the Will on his death. The deceased also clearly considered that it was proper to make provision for his adult children and he did so in a manner which was designed to ensure that they would get the Kildare Units with financial assistance to eliminate or reduce the security of AIB thereover. When account is taken of the disposition of assets which the deceased was putting in train with the assistance of Mr. Haccius outside the terms of the Will, the only conclusion which can be reached is that the deceased, when he was making the Will, fully appreciated the legal and moral entitlements which the defendant, his partner and each of his children had against him and his estate and his corresponding duty to them. I am satisfied that he endeavoured to fulfil his legal and moral duties and to meet those entitlements by either making provision in the Will or outside the Will out of other assets in a manner which he considered proper.

9.5 The fact that the deceased was enmeshed in the "tangled web" undoubtedly affects how the provisions of the Will may be perceived by the defendant and his adult children and outsiders. However, taking an overview of what the evidence discloses in relation to the provision he made within and outside the terms of the Will for those to whom he owed a legal or moral duty, in my view, there is no evidence, to use the terminology used by Cockburn C.J., of any insane delusion that influenced the Will in disposing of his property and brought about a disposal of it which, if his mind had been sound, would not have been made. Nor is there any evidence of a disorder of the mind that poisoned his affections, perverted his sense of right, or prevented the exercise of his natural faculties. On the contrary, even though the evidence raises questions as to the propriety of what the deceased was doing in relation to offshore assets, the evidence strongly indicates that the deceased had adequate comprehension and appreciation of what he was doing to support the conclusion that he had testamentary capacity on 19th May, 2005.

9.6 Whatever the motivation of the deceased was in pursuing the objective of divesting himself of assets in such a way that he retained the means to control their ultimate destination, even if, *ex facie*, that depended on the exercise of discretions and powers by trustees in whom the assets were vested, I am satisfied on the evidence that in the first half of 2005 the deceased had a sufficient cognitive ability to seek advice from Mr. Haccius and to direct the putting in place of the structures and the taking of the steps to continue the pursuit of that objective. Various motives were canvassed in the cross-examination and suggested in the replies of the witnesses, in particular, of the plaintiff: that the motivation was to obviate personal liability in the event of a business collapse, or to reduce the quantum of his estate for the purposes of Part IX of the Act of 1965 and the defendant's entitlement to it, or to avoid or evade liability for tax in this jurisdiction. It may be that the deceased was motivated by improper considerations. However, for present purposes what is significant is that it is possible to find on the evidence, on the balance of probabilities, that the deceased understood the effect of the provision he was making for the disposal of assets under the Will and that he also understood the effect of the dealings with assets through the medium of offshore corporate vehicles and trusts which, apparently was being facilitated by offshore legal and other advisers.

9.7 Accordingly, I am satisfied that, despite his severe physical disability and the cognitive limitations which Dr. Coen's assessment revealed, the deceased did have testamentary capacity on 19th May, 2005.

**10. Order**

10.1 There will be an order determining the issues raised in the Master's Order of 5th May, 2010 as follows:

(1) the Will was executed in accordance with the formalities required by s. 78 of the Act of 1965;

(2) the deceased knew and approved of the contents of the Will; and

(3) at the time of the execution of the Will, the deceased was of sound disposing mind and had the capacity to make a valid will.

10. I will hear further submissions from the parties as to how the other issues outlined in the Master's Order are to be addressed.