THE HIGH COURT

[2009 No. 3286P]

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 Ms. Justice Laffoy delivered on 1st day of October, 2012.

The subject of the judgment

1. This judgment is concerned with the costs of the two modules of these proceedings, which have been decided by the Court, namely:

> (a) the first module, in which judgment was given on 21st December, 2010 (Neutral Citation [2010] IEHC 475), which is now reported at [2011] 1 I.R. 639; and
>
> (b) the second module, in which judgment was delivered on 28th March, 2012 (Neutral Citation [2012] IEHC 140).

2. The parties have agreed that all claims arising out of the defendant's counterclaim which were not addressed in those judgments should be struck out. The Court was informed that the plaintiff had tendered her resignation as trustee of the will in issue in the proceedings.

Costs of the first module

3. The will of Brian Rhatigan (the Testator) in issue in these proceedings was made on 9th May, 2005. The Testator died on 7th February, 2006. When the proceedings were initiated the plaintiff was the sole surviving executrix of the will, the other executor nominated by the Testator having died in April 2008.

4. The immediate background to these proceedings was that the defendant's solicitors entered a caveat in the Probate Office on 20th November, 2008. The plaintiff, as the surviving executrix, warned the caveat in the Probate Office on 27th February, 2009. On 10th March, 2009 the defendant's solicitors entered an appearance to the warning. In consequence, it became necessary for the plaintiff to prove the will in solemn form of law. These proceedings were initiated by plenary summons which issued on 8th April, 2009 to achieve that end.

5. The issues which it was agreed between the parties required to be determined by the Court in the first module were:

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

In reality, the question of the testamentary capacity of the Testator at the date on which the will was made was the issue which the Court had to determine in the first module. In the judgment given at the conclusion of the first module, despite the evidence adduced by, and the submissions made on behalf of, the defendant, the Court concluded that the Testator did have testamentary capacity when he made the will and, accordingly, admitted the will to probate in solemn form. In other words, the plaintiff was successful in the proceedings. Although unsuccessful, the defendant claims that she is entitled to her costs of the first module out of the estate of the Testator.

6. The entitlement of a party to a probate action who has unsuccessfully challenged the admission of a will to probate was considered by the Supreme Court in *In bonis Morelli; Vella v. Morelli* [1968] I.R. 11 and more recently by the Supreme Court in *Elliott v. Stamp* [2008] 3 I.R. 387. As was pointed out by Kearns J. in delivering judgment in Elliott v. Stamp, in numerous cases referred to by Budd J. in the course of his judgment in *In bonis Morelli*, the position which had been adopted by the Irish courts was that two questions were to be considered with reference to an application for costs of the unsuccessful party to a probate action, namely:

> (a) Was there reasonable ground for litigation? and
>
> (b) Was it conducted *bona fide*?

If the answer to both questions was in the affirmative, then a litigant, even if unsuccessful, could recover his legal costs from the estate. As Kearns J. pointed out, that practice was continued in the Probate Court towards the end of the nineteenth century and continued throughout the twentieth century. The underlying rationale for the "old Irish practice" was explained and the relevant

principle was formulated by Budd J. in *In bonis Morelli* (at p. 34) in the following terms:

> "In our country the results arising from the testamentary disposition of property are of fundamental importance to most members of the community and it is vital that the circumstances surrounding the execution of testamentary documents should be open to scrutiny and be above suspicion. Accordingly, it would seem right and proper to me that persons, having real and genuine grounds for believing, or even having genuine suspicions, that a purported will is not valid, should be able to have the circumstances surrounding the execution of that will investigated by the court without being completely deterred from taking that course by reason of a fear that, however genuine their case may be, they will have to bear the burden of what may be heavy costs. It would seem to me that the old Irish practice was a very fair and reasonable one and was such that, if adhered to, would allay the reasonable fears of persons faced with making a decision upon whether a will should be litigated or not. If there be any doubt about its application in modern times, these doubts should be dispelled and the practice should now be reiterated and laid down as a general guiding principle bearing in mind that, as a general rule, before the practice can be operated in any particular case the two questions posed must be answered in the affirmative."

7. In *Elliott v. Stamp*, Kearns J. stated (at p. 395) that a "special jurisprudence in relation to costs was developed in this jurisdiction for the reasons so eloquently expressed by Budd J." and, if there is to be a departure from that jurisprudence, it requires a "reasoned basis" in a will suit. I see no basis from departing from the special jurisprudence in this case because I am satisfied that both questions which the Court has to consider must be answered in the affirmative in this case when considered from the perspective of the defendant's application for costs of the first module out of the estate.

8. First, I am absolutely satisfied that, having regard to all of the evidence adduced at the hearing of the first module and, in particular, to the fact that the Testator was suffering from motor neuron disease when he made the will and that the disease had advanced to a stage where he was unable to communicate verbally, there were reasonable grounds for the litigation and, in particular, for putting the plaintiff on proof that the Testator had testamentary capacity when he made the will, notwithstanding that the plaintiff had furnished a copy of the report of Professor Timothy Lynch dated 18th May, 2005 (referred to at para. 47 of the judgment on the first module) with her letter dated 21st August, 2006 (referred to in para. 3.4 of the judgment in the second module) to the defendant. Secondly, the only issue on which there was contention between the parties in the first module was the issue of the testamentary capacity of the Testator. I am satisfied that the defendant conducted the defence of the first module and, in particular, of that issue in a bona fide manner.

9. Accordingly, I am satisfied that the defendant is entitled to the costs of the first module out of the estate of the Testator.

10. Insofar as it is relevant, in my view, the defendant's contention that the plaintiff did not conduct the pleading process in, and the hearing of, the first module in a *bona fide* manner is not sustainable. Accordingly, I reject the defendant's submission that the plaintiff is not entitled to her costs of the first module out of the estate of the Testator.

The costs of the second module

11. As I recorded in the judgment on the second module, the principal issue which arose in the course of that module and which had to be addressed by the Court in the judgment was whether one of the reliefs sought by the defendant in her counterclaim, namely, a declaration that the plaintiff was not an appropriate person to act as an executor of the Testator's estate should result in the plaintiff, as the surviving executrix, being refused a grant of probate of the will of the Testator. The conclusion I came to was that the plaintiff's previous professional involvement, as solicitor for the Testator before his death, and also as solicitor for the multiplicity of corporate vehicles in which there were vested assets, which the evidence indicated were settled by him during his lifetime, both before and after the Testator's death, gave rise to a professional conflict which precluded her from acting as executor of the will of the Testator, because, as I stated in the judgment (para. 7.3), it would be impossible for her to steer a non-conflicted passage between the interest of the beneficiaries of assets which formed part of the estate of the Testator and the conflicting interest of the beneficiaries of non-estate assets the destination of which after his death, as the evidence indicated, the Testator had been the ultimate arbiter. However, I also found that, if a grant of probate of the will issued to the plaintiff, she would not only be conflicted as to her professional duties as solicitor, but she would have a conflict of interest by virtue of the fiduciary capacity in which she would hold the assets of the Testator by virtue of s. 10(3) of the Act of 1965. Accordingly, the net effect of the outcome of the second module was that the defendant was successful in pursuing her opposition to the plaintiff acting as executrix of the will of the Testator and the plaintiff was unsuccessful in endeavouring to obtain a grant of probate of the will in that capacity.

12. The outcome of the second module did give rise to the ancillary issue as to who should extract a grant of letters of administration with the will of the Testator annexed. On 18th April, 2012 I made an order pursuant to s. 27(4) of the Act of 1965 that Tom Kavanagh, Accountant, should be entitled to extract the grant. Therefore, the Court did not accede to the application of the defendant in her counterclaim that she be given liberty to apply for and extract the grant, on the ground that she also had a conflict of interest.

13. As regards the costs of the second module, the position of the defendant is that, as she was successful in contesting the plaintiff's entitlement to act as executrix of the will of the Testator, the costs of the second module should be awarded to her, but they should be awarded against the plaintiff personally rather than out of the estate of the Testator. The position of the plaintiff is that she is entitled to the costs of the second module out of the estate subject to an exception. The exception is that, as regards her defence of the defendant's counterclaim, insofar as it related to allegations of wrongdoing made in the counterclaim against the plaintiff which were not pursued at the hearing, the plaintiff should be entitled to those costs against the defendant personally. It is understandable that the plaintiff may feel aggrieved by the specific allegations of misconduct against her, for example, an allegation that she had been "guilty of gross inordinate and inexcusable delay" in respect of the administration of the estate of the Testator, but which were not pursued at the hearing of the second module. However, taking an overview of the matter, in my view, to the extent that those allegations required to be addressed by the plaintiff in preparation for and at the hearing of the second module, doing so did not have an impact on the costs of the second module to a degree that the Court would be justified in distinguishing them from the overall costs of addressing the aspect of the counterclaim actually dealt with at the hearing of the second module. In short, in my view, the proper exercise of the overriding discretion which the Court has by virtue of Order 99 of the Rules of the Superior Courts 1986 (the Rules) is to refuse to treat the costs which the plaintiff has sought to have treated as an exception differently from the overall costs of the second module.

14. Before outlining the legal position, on the basis of the submissions made on behalf of the parties, which helpfully included comprehensive written submissions from each side, I find it useful to identify in summary form what I consider to be the remaining issues which arise in relation to the costs of the second module. They are:

> (a) as regards the costs of the defendant, who succeeded in her claim on the counterclaim that the grant of probate of

> the Testator's will should not issue to the plaintiff, which was the core issue in the second module, and who is clearly entitled to her costs of the second module, whether the costs awarded to her should be paid out of the estate of the Testator or awarded against the plaintiff personally; and
>
> (b) as regards the costs of the plaintiff, who unsuccessfully defended that claim, whether she should be awarded her costs from the estate or, alternatively, whether there should be no order for costs made in her favour, so that she has to bear the costs she incurred personally.

Both issues raise very difficult questions against the background of very unusual and complicated facts.

15. In the light of some of the submissions made on behalf of the plaintiff, I think it is important to emphasise that the Court is only concerned in this judgment with the costs of the proceedings, not any costs which the plaintiff may have incurred in relation to her involvement in the administration of the estate of the Testator to date. Moreover, the Court cannot express any view on the suggestion made on behalf of the plaintiff that the probability is that the estate of the Testator is insolvent. That is a bridge that will have to be crossed if one comes to it, but it is not a matter to be addressed in this judgment.

16. The crucial consideration which underlies the issues which the Court has to decide in relation to the costs of the second module is identifying the fundamental nature of the issue for determination by the Court. The second module was not about the type of issue identified by Budd J. in *In bonis Morelli* – "the circumstances surrounding the execution of testamentary documents" – which had arisen and had been disposed of in the first module. Although not framed in this way, what the issue was about was whether the Court should exercise the jurisdiction conferred on it by s. 27(4) of the Act of 1965 and appoint somebody other than the plaintiff, the executrix chosen by the Testator, to apply for a grant of administration with the will of the Testator annexed. In other words, it concerned whether the Court should confer the status of personal representative of the Testator on a person other than the survivor of the two executors nominated by the Testator in his will, and, specifically whether the Court should refuse to confer that status on the plaintiff. The reason that question required to be addressed was because of the assertions made by the defendant in the counterclaim that, because of her professional position and by her conduct, the plaintiff was not an appropriate person to act as executor of the Testator's estate, which, of course, were denied by the plaintiff. As reflected in the Master's order of 5th May, 2010 which set out, by consent of the parties, the issues which were to be tried, the relevant issue was formulated as follows:

> "Whether, by reason of any of the matters listed at paragraphs 6 – 9 inclusive hereof, the Plaintiff is not an appropriate person to act as legal personal representative of the deceased."

The matters alleged in paragraphs 6 – 9 raised a number of questions: whether the plaintiff had failed to carry out proper inquiries and to take reasonable or sufficient steps to recover the assets of the estate of the Testator; whether she had been guilty of gross, inordinate and inexcusable delay in respect of the administration of his estate, being the example adverted to in paragraph 13 above; and whether, in acting as legal personal representative of the deceased, she "is conflicted in her interests".

17. As I have made clear in the judgment on the second module, at the hearing of the second module, the primary focus was on the assertion that the plaintiff, as personal representative of the Testator, would have a conflict of interest. It was submitted on behalf of the plaintiff that, in addressing the costs of the second module, the Court should have regard to the fact that the defendant made allegations against the plaintiff which amounted to an attack on her reputation, and that, so long as those allegations were levelled against her, she was entitled to oppose the counterclaim. Those allegations were never formally withdrawn, it was asserted. That, in my view, is a factor to be taken into account but it is peripheral.

18. The important factor is that the defendant, as the beneficiary of the Testator's will for whom the single largest provision had been made, asserted that, because of her past history in acting for the Testator and the various corporate vehicles in which he had vested non-estate assets, the plaintiff would have a conflict of interest in protecting the interest of the beneficiaries of his will. In the findings made by the Court, which are summarised in paragraph 7 of the judgment on the second module, it was found that the plaintiff would be "inevitably" embroiled in a professional conflict, if the status of personal representative of the Testator were to be conferred on her, to the extent that the welfare of the beneficiaries of the Testator's will could not be protected. Additionally, the Court found that, if the status of personal representative were conferred on her, the plaintiff would be actually conflicted.

19. Counsel for the defendant relied on two authorities from the Channel Islands in support of the defendant's position as regards the costs of the second module: *In the matter of E. L. O. & R. Trusts* [2008] JRC 150; and *In the matter of Y Trust* [2011] JRC 155A.

20. In the earlier authority, the Jersey Court was concerned with the costs of proceedings in which the issue was whether Verite Trust Company Limited (Verite) should retire or be removed as trustee of certain trusts on the ground of an alleged conflict of interest between its role as trustee of the family trusts in question and its role as trustee of related family trusts. Shortly before the matter was due to be heard, Verite had agreed to retire as trustee. The case made on behalf of the beneficiaries of the family trusts who had sought its removal was that Verite had acted unreasonably in not retiring earlier and that, accordingly, its remuneration and legal costs incurred in connection with the matter should not be payable out of trust funds, and that, further, Verite should be ordered to pay the costs of the other parties on an indemnity basis.

21. In outlining the relevant law, the Court referred first to the judgment of Millett L.J. in *Bristol & West Building Society v. Mothew* [1996] 4 All ER 698, to highlight the nature of a fiduciary duty and quoted, *inter alia*, the passage quoted in the judgment on the second module (para. 2.13). On the question of the removal of a trustee under the court's inherent jurisdiction, the Court referred to passages from *Lewin on Trusts*, 18th Edition, at paras. 13 – 49 and 13 – 50, which set out the principles on which the courts in the United Kingdom act. One could not take issue with the content of either passage, which reflect the law in this jurisdiction as outlined in Delany on *Equity and the Law of Trusts in Ireland* (5th Ed.) at p. 434 et seq. The Court then went on to state (at para. 28):

> "The Court may of course remove a trustee where he has failed to recognise a conflict of interest. *See Hunter v. Hunter* [1938] NZLR 520. Clearly, when faced with a request to retire, a trustee should bear in mind the principles applied by the Court in connection with its jurisdiction to remove trustees."

Again, one could not take issue with that proposition, and, indeed, the decision in the second module is in line with it. However, in the next paragraph, the Court dealt with the issue of trustee costs and stated:

"A trustee may only be denied an indemnity for its costs if it has acted unreasonably, which is a high hurdle. In *Hunter* the Court also made it clear that a trustee who defends proceedings which are brought to secure his removal and in which his defence fails, may not only be deprived of his costs, but may be ordered to pay the plaintiff's costs."

22. In applying the law to the facts before it, the Jersey Court held that, while Verite had acted in good faith, its position was "an elementary case of a plain and obvious conflict of interest". Verite should have retired without seeking directions from the Court. Its decision not to do so was wrong to the extent that it could properly be characterised as "unreasonable". While both the facts and the legal process in that case were complicated, in broad terms, the outcome was that, because Verite had acted unreasonably, the Court deprived Verite of costs incurred by it and awarded the opposing parties their costs against Verite, to some extent on an indemnity basis and to some extent on what would be referred to in this jurisdiction as on a party and party basis. It would seem that the Court in Jersey was particularly influenced by the decision of the New Zealand Court in *Hunter v. Hunter*. Unfortunately, the only information this Court has in relation to that authority is to be found in the two paragraphs from the decision of the Jersey Court quoted above.

23. In the later authority, the trustee of a trust, N, had applied to the Court to sanction a particular decision which had been made. It is disclosed in the judgment that the application to the Jersey Court was an "administrative application brought by N for the sanction of the decision made in December 2009". It would appear that the decision had varying implications for different beneficiaries. It was stated in the judgment that it is recognised that normally costs of all parties to such an application would be paid out of the trust fund, citing *Lewin on Trusts*, 18th Edition, para. 21 – 85. It was further stated that it had not been suggested by any of the parties that N had acted improperly in invoking the jurisdiction of the Court. The Court then referred to the fact that it had been found in the earlier authority that "a trustee can be denied indemnity for costs if it is found to have acted unreasonably", but it was stated that "this was a high hurdle". The Court then quoted two passages from Lewin.

24. The first quotation (being part of para. 21 – 64) is to the following effect:

> "A trustee may be deprived of costs, or ordered to pay costs, not only by reason of his conduct which occasioned the proceedings, but also by reason of his unreasonable conduct in bringing unnecessary trust proceedings, or his conduct in the proceedings themselves, for example by taking procedural steps which needlessly increase costs, by acting in a partisan manner to some beneficiaries against others, by adopting an excessive role in trust proceedings by contesting claims which ought to be contested by others, not the trustees, or which ought not to be contested at all. If the Court, upon the question of costs being drawn to its attention, makes an order that the judge does not think fit to make any order as to costs, that is an order depriving the trustee of costs and disentitling him from indemnity, and so preventing him from claiming a right of indemnity under the general law."

25. What the editors of *Lewin* were dealing with in that passage was one aspect of the costs of trust proceedings, that is to say, proceedings which relate to the construction, administration or execution of express trusts, the parties to which do not include strangers to the trust, or trustees or beneficiaries claiming otherwise in their capacity as such. The passage quoted by the Jersey Court is at the end of the paragraph in *Lewin* which is headed: "Trustee deprived of costs or ordered to pay costs by court order on grounds of breach of trust or misconduct". The beginning of that paragraph is in the following terms:

> "The right of a trustee to indemnity in respect of costs extends only to costs properly incurred in execution of the trust. By this is meant costs which have been both honestly and reasonably incurred. A doubt is to be resolved in favour of the trustee, and so the right is sometimes expressed in terms of a double negative, that is the trustee is entitled to costs not improperly incurred. The right of indemnity can be lost or curtailed by such inequitable conduct on the part of the trustee as amounts to a violation or culpable neglect of his duty as trustee. Thus if breach of trust causing loss to the trust fund or misconduct is established against the trustee, the trustee may be deprived of his right of indemnity and further ordered to pay costs of other parties. The word 'misconduct' is a strong one, yet it is clear that conduct that might be characterised by milder terms such as caprice and obstinacy, or neglect, negligence or carelessness, suffice to deprive a trustee of the right of indemnity, or justify an order for costs against him. While the mere fact that the trustee has made a mistake is not enough, it is equally clear that dishonesty is not requisite. Consequently either 'misconduct' should be widely construed so as to cover unreasonable conduct or in the alternative the 'inequitable conduct' on the part of a trustee which causes his right of indemnity to be lost or curtailed includes both misconduct in the sense of dishonesty and unreasonable conduct. We will here use 'misconduct' in the wider sense."
>
> (Emphasis added)
>
> In relation to that passage, I would make two observations. First, I consider that the first two sentences represent the law in this jurisdiction, which is set out in Delany (*op. cit*.) at p. 447 by reference to the decision in *Re Beddoe* [1892] 1 Ch 547 and subsequent authorities. Secondly, it is to be noted that the words to which I have added emphasis in the above quotation are not supported by any authority identified by the editors of *Lewin*.

26. The second passage quoted from Lewin (at para. 21 – 85) was designed to show that a beneficiary "convened" to an administrative application could be at risk as to costs by reason of his conduct, which has no relevance for present purposes.

27. The outcome of the judgment on costs in the Y Trust case was that the applicant, N, was found to have acted unreasonably and it was found that the unreasonable conduct had a direct effect on the level of costs incurred. Therefore, N was deprived of a material part of its costs, which was determined at one half of its costs on a "broad brush" basis.

28. Neither of the Channel Island authorities is of direct relevance in determining where the costs for the second module should lie. That is because they were concerned with the costs of trust proceedings. What the Court is concerned with here is the defendant's contention that the plaintiff should not have defended the counterclaim in a probate action that the plaintiff was not an appropriate person to be conferred with the status of personal representative of the Testator, because of the conflict of interest to which such conferral would inevitably give rise. However, there is an analogy here to the trust proceedings costs issues, in that the defendant's position is that the plaintiff, in a fiduciary capacity, acted unreasonably in contesting the issue in the second module. It is interesting to review the circumstances, as recorded at p. 446 et seq. in *Miller's Irish Probate Practice* (Maxwell: 1900 Ed.), which publication was the subject of much consideration by Budd J. in *In bonis Morelli* but which neither party cited, in which an executor who was unsuccessful in a probate action was condemned in costs. Of course, here the contention that the plaintiff acted unreasonably was made by only one of the beneficiaries of the Testator's will, albeit the beneficiary who was entitled to one third of the estate assets. As counsel for the plaintiff submitted, the plaintiff's fiduciary obligations were owed to all of the beneficiaries of the Testator.

29. The real problem in this case for the plaintiff is that, as the Court has found, the professional and actual conflict identified in the judgment and summarised at para. 11 above precluded her from acting as personal representative of the Testator. The plaintiff should have recognised her conflicted position because, to take just one example, there was a clear conflict even among the beneficiaries for whom provision was made in the will, in the sense that in at least the case of one beneficiary, namely, Ms. Kiely, provision had been made for her outside the will in a manner which may have depleted assets which would otherwise have passed under the will of

the Testator for the benefit of all the beneficiaries. The plaintiff, who had an involvement in the making of that provision for Ms. Kiely both before and after the Testator's death, was facing a claim under s. 120 of the Act of 1965, in her capacity as executrix, under the defendant's counterclaim, as outlined in the judgment on the second module (paras. 4.5 and 4.6).

30. As I have already found, the plaintiff acted properly in initiating the proceedings to prove the will of the Testator in solemn form and in prosecuting the first module thereof, which ensured that the Testator's wishes were given effect to. Thereafter, while the plaintiff was unquestionably placed in the difficult position in which she found herself by the Testator, nonetheless, as a solicitor, she should have recognised the seriousness of the conflict of interest to which conferral of the role of personal representative of the Testator on her was inevitably going to give rise. Accordingly, following the conclusion of the first module, she should have acknowledged that, because of the conflict of interest, she would not seek to be granted probate of the will of the Testator or the status of his personal representative, so as to obviate the hearing of the second module and the costs associated with such hearing. In consequence, I have come to the conclusion that the plaintiff should not be entitled to the costs of the second module out of the estate of the Testator.

31. On the other hand, I think it would be going too far to award the defendant her costs against the plaintiff personally for a number of reasons. First, as is to be inferred from my observations in para. 25 above, there is no authority cited in Lewin which identifies the legal principles by virtue of which, in a trust proceedings costs issue, it is determined that a trustee, who should be deprived of his indemnity in respect of costs, should also be ordered to pay the costs of opposing parties. Secondly, it is probable that, as regards conflict of interest, in many cases the position of an executor fiduciary before the will is admitted to probate is less clear cut than the position of a trustee under an express trust. While the conflicted position of the plaintiff was clearly established at the hearing of the second module, the relevant facts emerged over a number of years, albeit to some extent through the endeavours of the defendant's solicitors. Therefore, it is probable that the finding of a clear conflict on the part of the plaintiff was informed by an element of hindsight. While I am satisfied that the plaintiff's conduct in defending the second module constituted unreasonable conduct, in the sense of the meaning given to that expression in *Lewin*, I do not think that it would be fair to fix the plaintiff personally with the defendant's costs of the second module. Thirdly, there is the peripheral matter, namely, the allegations of wrongdoing made by the defendant against the plaintiff in the counterclaim, which, while ultimately not pursued at the hearing, hung in the air throughout the hearing of the second module. It is wholly understandable that the plaintiff should wish to protect her reputation against such allegations, as she did by defending the second module.

32. Accordingly, as regards the second module, I consider that the appropriate determination in relation to the defendant's costs is to award them to the defendant out of the estate of the Testator and to make no order in relation to the costs of the plaintiff.

Summary of conclusions

33. Both the plaintiff and the defendant are entitled to their costs of the first module out of the estate of the Testator, such costs to be taxed in default of agreement.

34. As regards the second module, there will be no order for costs in favour of the plaintiff. The defendant will be entitled to her costs out of the estate of the Testator, such costs to be taxed in default of agreement.