THE COURT OF APPEAL

UNAPPROVED
REDACTED

Neutral Citation Number [2021] IECA 108
Court of Appeal Record No. 2020/129

Edwards J.
Whelan J.
Ní Raifeartaigh J.

IN THE MATTER OF THE POWERS OF ATTORNEY ACT 1996, AND IN THE MATTER OF AN INSTRUMENT CREATING AN ENDURING POWER OF ATTORNEY EXECUTED BY A DONOR ON THE 6TH DAY OF AUGUST 2008

BETWEEN:

E. AND F.

APPLICANTS / RESPONDENTS

- AND -

G. AND H.

RESPONDENTS / APPELLANTS

Judgment of Ms Justice Máire Whelan delivered on the 13th day of April 2021

Introduction

1. This is an appeal against an order made by the High Court (Humphreys J.) on 12 May 2020 directing the appellants to pay 6/7ths of the respondents' costs. The substantive part of the order registered an enduring power of attorney ("EPA") created by the mother of all the parties to the application (hereinafter "the donor"), pursuant to the Powers of Attorney Act 1996 ("the 1996 Act") and made directions pursuant to the 1996 Act in relation to the

performance of the attorneys' powers. No appeal has been brought against the substantive part of the order.

Background

2. On 6 August 2008 the donor executed an instrument creating an EPA and appointing two of her five children, the respondents E. and F., to act as her attorneys should she thereafter become mentally incapacitated. Her other three children, G., H. (the appellants) and D. were notice parties to the execution of the instrument.

3. In or around 2010 the donor began displaying signs of Alzheimer's dementia. She continued to live independently, in close proximity to her son, the first respondent, E., until she suffered a stroke in March 2012, following which she went to reside with E. and his wife. She has resided in a nursing home since May 2019.

Application to register enduring power of attorney

4. Following a deterioration in the donor's mental condition, on 17 May 2019 E. and F. issued a notice of intention to apply to register the EPA pursuant to the 1996 Act.

5. On 16 July 2019 G. issued a notice of objection to registration on the grounds that E. and F. were each unsuitable to be the donor's attorneys. Thereafter a similar notice of objection was issued by H. on 30 July 2019.

6. G., in an affidavit sworn on 17 July 2019, disputed the suitability of E. to act as attorney on the basis that he had deprived the donor of access to assets that "should at all times have been preserved and rendered available for her benefit and welfare". He outlined that in 2017 E. sold shares in Glanbia owned by the donor and applied the proceeds thereof to developing two apartments on a property beneficially owned by E. (hereinafter "the Farmhouse") over which the donor had a life interest. G. expressed his doubts as to the donor's capacity as of 2016/2017 to understand the nature and purpose of the transaction for investment in renovating the Farmhouse and he asserted that the donor was not independently advised in relation to the

matter. G. sought an order refusing the application to register and a further order to recover the benefit of the equivalent value of the shares that were encashed by E. for the donor.

7. G. objected to the suitability of the second respondent, his sister, F., to act as attorney on the basis that she was not resident within the State and may have been too distant from the 2016 share sale transaction to detect it and not aware of the surrounding events.

8. In an affidavit of 30 July 2019, H., supporting opposition to registration on grounds of unsuitability of both attorneys, deposed as to his surprise over lack of consultation with him about the donor's move to a nursing home in May 2019 in circumstances where he and his wife provided regular care to her and were willing to accommodate her in their home and become her primary carers. He asserted in para. 4 that the decision to sell her Glanbia shares and invest the proceeds in renovating the Farmhouse to provide respite accommodation for her was "a poor decision" in light of her subsequent move to a nursing home. He believed that E. should account to the donor for the share sale proceeds expended on the redevelopment in circumstances where same could provide for the donor's ongoing care. He asserted that the donor could not and did not authorise the sale of the shares.

9. By notice of motion dated 22 October 2019, the respondents applied to the High Court for, *inter alia*, an order pursuant to s. 10 of the 1996 Act registering the EPA. The application was grounded on the affidavits of the respondents, of 14 August 2019 and 15 August 2019, respectively, and their solicitor of 22 October 2019.

10. In his replying affidavit of 14 August 2019, E. responded to the appellants' criticisms of the sale of the Glanbia shares and investment of the proceeds in developing the Farmhouse. He explained in paras. 4 and 5 that he and the donor inherited the Farmhouse from his late father. In January 2000 the donor transferred her interest in the property to him, reserving to herself an exclusive right of residence in the house. He also deposed that he had refused a previous offer by the donor to transfer her Glanbia shares to him in 2000.

11. E. further deposed that prior to the sale he consulted with each of his siblings, save G. whom, he averred, had not shown much interest in the donor's care. He averred that he expended €50,000 of his own money in the development of the Farmhouse into two apartments; one of which was intended for use as a respite location for the donor, the other to be rented to provide a stream of revenue for her living and care expenses. He averred that all income from the property was used for the donor's expenses and same continued after she moved to the nursing home. He and his wife kept a clear record of the donor's financial interests.

12. In her affidavit of 15 August 2019, the second respondent, F., confirmed that she had supported E.'s decision at the time regarding the sale of their mother's Glanbia shares and the investment of the proceeds to provide a respite location for her.

Invitation to mediation

13. On 4 November 2019 the application came before the President of the High Court. He encouraged the parties to consider resolving the issues by way of mediation rather than proceeding to a full plenary hearing. Both the appellants and the respondents expressed a willingness to partake in mediation.

14. By letter dated 12 November 2019, solicitors for the respondents wrote to G. and H. seeking to progress mediation. G. introduced a precondition which rendered a mediation process substantially futile.

Open proposal to resolve

15. The appellants' solicitors in open correspondence dated 22 January 2020 advised that their clients were prepared to meet for discussions "to see if an acceptable solution can be found within the family". The minimum terms on which their clients would meet were as follows:

> "1. That [E.] withdraws as a nominee for appointment as his mother's Attorney to be replaced by either [H.] or [G.], with [F.] continuing as Joint Attorney.
>
> 2. That the value of Glanbia shares be recovered to your mother's Attorneys to be

retained and applied as required for her welfare and benefit during her lifetime…"

It was asserted that, in circumstances where their objection to the application was "justified", G. and H. may "well be entitled to their costs". It was asserted that, as notice parties to the EPA, they "hold responsibility to bring matters such as this to the attention of the Court. That is the purpose of their appointment."

"*Calderbank*" letter

16. By letter dated 5 February 2020, entitled "Without Prejudice as to Costs", solicitors for the respondents asserted that the appellants' proposals in the letter of 22 January 2020 were "unworkable in terms of the jurisdiction of the High Court in applications of this nature" and offered the following counter-proposals:-

> "1. The within proposal is made in the interests of resolving the within application concerning the welfare of the parties' mother, [the donor], in a manner that, having regard to the expressed wish to avoid [the donor] being admitted to wardship, is acceptable to all of those concerned and avoids the need for a continuation of adversarial legal proceedings between family members and to save costs.
>
> 2. …in the spirit of compromise, as articulated at paragraph 1 above, subject to your clients' agreement to all of the terms herein proposed, [E.] will disclaim his right to act as attorney and withdraw his application for registration of the Instrument concerned insofar as it appoints him as [the donor's] attorney.
>
> 3. The parties shall consent to the High Court making a qualified order registering the Instrument creating an Enduring Power of Attorney executed by [the donor] on 6 August 2008 appointing [F.] insofar as the Instrument shall be registered and take effect in respect of [F.] as sole Attorney thereunder appointed.
>
> …
>
> 4. The parties each bear their own legal costs arising from the Application."

The respondents' solicitors emphasised that in the event that the matter was not resolved prior to a determination by the court, the contents of same would be relied upon by the respondents in relation to the issue of costs.

17. In addition to the so-called "*Calderbank*" letter, solicitors for the respondents also sent an open letter dated 5 February 2020 in reply to the appellant's open letter of proposal dated 22 January 2020. It engaged with the proposals advanced, asserting that the High Court lacked jurisdiction in the context of an application for registration of the EPA to appoint either of the appellants as attorneys of the donor as to do so would supplant the wishes of the donor and fall outside the terms of the EPA executed by her.

18. Although not exhibited in any affidavit, the response from the appellants' solicitors dated 6 February 2020 was provided to the trial judge at the hearing of 12 May 2020. At lines 17 and 19, p. 7 of the transcript, the trial judge noted that the appellants' response was "essentially a rejection" and "the making of a counter proposal".

Affidavit of E. of 5 February 2020

19. In a further affidavit filed on 5 February 2020 E. corrected a statement in his earlier affidavit of 14 August 2019 that "[a]pproximately €59,000 worth of shares were encashed and used" for the purpose of renovating the Farmhouse and that he put "approximately €50,000" of his own money towards the cost of the renovation works. He averred that, after engaging an accountant to prepare a report detailing the transactions relevant to the Farmhouse, he realised that he had understated the value of the Glanbia shares. The correct value of the encashed shares was €84,672.07. The amount of his own money applied to the renovation works was €38,548.55. He averred that the errors in his first affidavit were inadvertent and came about as a result of forgetting about a "third cheque" received in respect of the sale of the shares and that "the family had always referred to €60,000 when discussing the matter".

High Court judgment of 6 May 2020

20. Though not the subject of any appeal, to properly contextualise the key issues in this appeal it is necessary to consider the substantive orders ultimately made and the reasons for same. At para. 4 of his judgment, the trial judge outlined the scope of the appellants' objection on grounds of unsuitability of the respondents to act as attorneys, noting that the objection to F. seemed:-

> "…to be focused on the point that she went along with [E.] …and did not make her own inquiries, so it is essentially a derivative objection."

He observed that the appellants' submission that both attorneys stand or fall together was "essentially the correct approach in the circumstances of this case".

21. He noted at para. 5 that an objection to F. on the basis that she resided outside the State was "only faintly pressed" and was not put to her in cross-examination. He considered that such an objection did not amount to a valid ground of unsuitability "especially in a globalised modern world." He noted that F. was living abroad when the power was executed.

22. At para. 6 the trial judge noted that the objection to E. was:-

> "…focused exclusively on the decision to sell shares of the donor to fund works in [the Farmhouse], in which the donor had a right to reside, and on the circumstances surrounding those steps. That decision seems to have been taken in late 2016 and carried into effect with the sale on 30th December, 2016 and to further tranches of sales into 2017. The notices of objection were lodged out of time, but it is not suggested that they are invalid on that basis."

23. The trial judge noted that the onus of proof of unsuitability of an attorney is on the objectors, citing the decisions of *In re S.C.R.* [2015] IEHC 308; *In re W. (Enduring Power of Attorney)* [2001] Ch. 609, para. 47 *per* Arden L.J. (as she then was); and, *In re E. (Enduring Power of Attorney)* [2001] Ch. 364, para. 32 wherein it was stated that "the court has to be

satisfied not as to the chosen attorney's suitability, but rather to his unsuitability." At para. 8 he observed:-

> "…in the present case the objectors may have laid the basis for directions to be given under s. 12(2) of the 1996 Act, but they have failed to overcome the distinctly higher onus of proof that rests on them to demonstrate the unsuitability of the attorneys."

He considered that there were "a number of independent but mutually reinforcing reasons" for the above conclusion.

24. Firstly, he found that the donor had decided to sell her Glanbia shares and renovate the Farmhouse and that it had not been established in evidence that she lacked capacity at the time:-

> "…In the absence of that lack of capacity being positively proved, it was therefore in law a decision not of the attorneys, but of the donor, and thus it cannot be said to render the attorneys unsuitable." (para. 9)

25. Secondly, having heard the parties in evidence, he broadly rejected the evidence of the appellants where it differed from that of the respondents and their witnesses. With regard to G., the trial judge observed that he came across "as a witness with something of an agenda" noting:-

> "…Some of his evidence was contradictory or evasive, and he resiled in evidence from some of the points made on affidavit. He conceded in the witness box that care of the donor by [E.] was excellent." (para. 11)

He observed that "one of the main purposes of the objection was to ventilate a great quantity of historical family issues" (para. 12).

26. He considered that H.'s evidence concerning conditions said to be attached to his agreement to the share sale and investment of the proceeds was contradictory and "distinctly unimpressive" (para. 14).

27. Thirdly, the trial judge held that family hostility would only render an attorney

unsuitable if it would impact adversely on the administration of the donor's estate and referred to *G.B. v. H.B.* [2016] IEHC 615, para. 89 *per* Barr J. and *In re W. (Enduring Power of Attorney)* [2000] Ch. 343 in this regard. On the evidence, the trial judge found that family hostility would not impact adversely, when factoring in the court's power to give directions.

28. Fourthly, the trial judge found that that any missteps on the part of the attorneys did not amount to unsuitability within the meaning of the 1996 Act. He noted that, although E.'s management of the personal care of the donor was excellent, it had been conceded that his management of the donor's financial affairs was "sub-optimal" (para. 17). However, he held that lack of competence, as such, is not a ground to hold an attorney to be unsuitable. He referred to *M.L. v. D.W.* [2016] IEHC 164 *per* Kelly P. at para. 33 onwards, relying on the judgment of Morris P. in *In re Hamilton* [1999] 3 I.R. 310 at p. 314:-

> "…lack of business skill is not a valid objection to the registration under section 10. It is perfectly normal for a donor to choose a member of his or her family or somebody sympathetic to him or her to act as an attorney. It would, in my view, be an improper exercise of the discretion vested in the court to refuse to register an instrument simply because the chosen attorney did not possess management and business skills in a high degree. …A criticism made of a proposed attorney, to constitute a ground for refusing to register an instrument, must far exceed the corresponding test applied by the courts in applications for the removal of a trustee."

The trial judge found at para. 18 that any errors or missteps by the attorneys constituted mismanagement but did not "far exceed" that threshold so as to amount to misconduct.

29. The trial judge reiterated that while missteps by the attorneys are not a ground to hold them unsuitable, such actions or omissions may be a basis for making directions under s. 12(2) of the 1996 Act. He relied on the decision of Baker J. in *A.A. v. F.F.* [2015] IEHC 142 as authority for the proposition that:-

> "…directions (at least generally) are envisaged as being on the application of an interested party rather than on the court's own motion, and that there is an onus on the person seeking directions under s. 12…" (para. 19)

30. Fifthly, he held that, even if his conclusions were incorrect, he would nonetheless dismiss the objections on the grounds of acquiescence, noting that the objections were centred on the sale of the donor's Glanbia shares. The trial judge found that H. agreed to the sale in 2016, did not make inquiries and did not attach any conditions to his agreement. The trial judge held that any objection to the transaction could not properly be launched years later. He rejected G.'s evidence that H. had waited years to inform him of the transaction concluding:-

> "…[G.] did know, in broad outline, within a matter of weeks, of the proposal to sell the donor's shares in late 2016, and he articulated no objection. It is wholly impermissible for either objector to launch such an objection years later in the context of registration of the enduring power." (para. 22)

31. Sixthly, the trial judge found that the appellants had given written consent to F. acting as attorney in an "open letter" dated 22 January 2020. He clarified that the appellants' suggestion that F. should act jointly with one of them was not a permissible procedure under the 1996 Act. The trial judge rejected G.'s attempt in his direct evidence to "shift the blame on to his solicitor" for the letter not being without prejudice.

32. Finally, the trial judge found that the medical evidence favoured the donor remaining in her present care arrangements. At para. 24 he stated:-

> "The last minute demand, after years of care by [E.] and his wife…, that [G.] and [H.] take over the care of the mother and be provided with tens of thousands of euros in order to enable them to do so, especially in the context of a peremptory unilateral announcement that the donor was going to be taken out of her nursing home (until scotched by an interlocutory direction I gave on the [respondents'] application), is

> deeply unimpressive. The medical evidence…is clear that on the balance of probabilities the donor is better off where she is, and I will give that direction under s. 12(2) of the 1996 Act, subject to hearing if the parties want to add anything to the previous requests by the [respondents] for an equivalent direction under s. 8 of the 1996 Act, which was sought prior to the registration of the power. Equally unimpressive is [G.'s] sudden assurance that he will personally fund all financial shortfalls if the mother's assets run out, given that so far he has contributed absolutely nothing financially. Confronted with the contradiction between this conversion to financial support and his previous position of not having paid a cent towards the donor's care, he would only grudgingly concede that he had contributed minimally."

33. He directed that the enduring power be registered under s. 10 of the 1996 Act, the statutory criteria having been met. The matter was adjourned for a short period to give the parties an opportunity to seek to agree whether directions under s. 12(2) of the 1996 Act were required and, if so, what the wording of those directions would be.

Postscript to judgment of 12 May 2020

34. Having heard the parties further, the trial judge made the following directions by consent under s. 12(2) of the 1996 Act:-

i. the donor to remain resident in her nursing home absent medical emergency;
ii. the attorneys to make all outstanding CGT returns within 28 days;
iii. all of the donor's income shall be paid into a bank account in her name, out of which all of her living and care expenses and future legal liabilities be paid;
iv. the attorneys shall sell the donor's FBD shares and pay the net proceeds thereof into her bank account after deduction of all CGT;
v. to record E.'s undertaking to pay any CGT tax, interest surcharge and penalties charged by and/or payable to the Revenue Commissioners in connection with the

disposal of the donor's Glanbia plc shares within 28 days;

vi. the attorneys shall not undertake any further dispersal of the donor's property save on day-to-day living and care expenses of the donor and gifts of a nominal value (not exceeding €50 in each case);

vii. to record E.'s undertaking to discharge:

a) all lawful nursing home fees, expenses and charges; and

b) the fees, expenses and costs for care provided to the donor by registered carers out of the gross rental income from the Farmhouse;

viii. the attorneys to provide their siblings with a written statement setting out lodgements and withdrawals from the donor's account on an annual basis;

ix. to record E.'s undertaking to provide on an annual basis a written statement to his siblings setting out:

a) the gross rent received from the Farmhouse;

b) the total amount paid by E. in relation to nursing home fees, expenses and charges for the period;

c) the total amount paid by E. to registered carers during the period; and

d) the balance remitted to the donor's bank account.

Costs

35. Turning to the issue of costs, the trial judge began by noting the general rule that costs follow the event and cited *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 I.R. 775, O. 99 of the Rules of the Superior Courts ("RSC") (recast) and s. 169 of the Legal Services Regulation Act 2015 (hereinafter "the LSRA 2015").

36. It was argued on behalf of the appellants that EPA proceedings were not "civil proceedings" within the meaning of s. 169 of the LSRA 2015 and that a separate rule as to costs should apply in an EPA context. Reference was made to the fact that the 1996 Act does

not set out rules as to costs of proceedings, and the fact that the Act provides for parties to be given notice of an intention to register a power and allows them to make objections. Reliance was placed on *Elliott v. Stamp* [2008] IESC 10, [2008] 3 I.R. 387 to suggest an analogy with the treatment of costs in will suits. In that case, Kearns J. (as he then was) referred at para. 30 to the view of Budd J. in *In bonis Morelli; Vella v. Morelli* [1968] I.R. 11 at p. 34 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."

In *Elliott v. Stamp* Kearns J. concluded that a special jurisprudence in relation to costs was developed in this jurisdiction for the reasons expressed by Budd J. and a departure from that jurisprudence requires a "reasoned basis" in a will suit.

37. The trial judge held that the expression "civil proceedings" in s. 169 should be given its ordinary meaning which in that context means non-criminal proceedings and so EPA proceedings are in principle civil proceedings. He held that placing the general rule of costs following the event on a statutory footing in s. 169 LSRA 2015 must be taken to mean that it has superseded previous special approaches in particular areas save environmental law, which is expressly provided for in that section. He posited that same does not mean that in will suits an unsuccessful objector cannot get their costs, but simply that they do not start with a presumption in their favour – an observation which is clearly *obiter*.

38. In the alternative, the trial judge observed that if a special rule on costs still exists in will suits such that there is a presumption in favour of costs coming out of the estate in the case of genuine allegations that the will is not validly executed, it should not be extended beyond

its existing narrow bounds having regard to s. 169. If in turn he was also wrong about that, he observed:-

> "…if special rules regarding will suit costs exist and were to be extended to cover certain EPA litigation, such an approach could not cover applications that do not relate to analogous questions of validity and undue influence, but relate rather as here to more general matters like suitability of the attorneys; and especially not in cases where, as here, I did not hold that the objection was reasonable and *bona fide*, but indeed much to the opposite sense that there had been acquiescence and where much of the [appellants'] evidence was rejected." (para. 33)

The trial judge concluded:-

> "So whatever way it is viewed, the general rule that costs follow the event must apply here, save to the extent that it can be said to have been shown that there are grounds to displace that default approach." (para. 34)

39. The trial judge further found that the general principle of costs following the event was significantly reinforced by the fact that the respondents had sent a *Calderbank* letter on 5 February 2020 which proposed registering F. alone as attorney and that the parties would bear their own costs. He noted that that offer was "significantly better" for the appellants than what was actually obtained from the court (para. 35). He noted that this offer was rejected and a counter-proposal was made seeking that E. would pay €85,000 by way of making good the sum from the Glanbia share sale. The trial judge was satisfied that even if the general rule was not that costs would follow the event in a case such as this, the *Calderbank* letter was a powerful basis for an order in favour of the respondents thereafter, subject to any consideration of discretionary circumstances.

40. He considered that while the submission that the court retained a discretion in regard to costs was correct, the court was not at large in that regard. In considering all the circumstances

of the case and in terms of the discretion that arose therefrom, the trial judge considered that the following issues arose:

i. the appellants were not in the position of reasonable and *bona fide* objectors since he had rejected much of their evidence, holding that they had acquiesced to matters to which they objected in the proceedings;

ii. even if he accepted that the proposed mediation failed due to the attitude of the appellants, that did not add much to the position that pertained post the *Calderbank* letter;

iii. he had regard to the fact that the case became more urgent "due to the high-handed action of the second named [appellant] threatening to peremptorily and unilaterally remove the donor from her nursing home" (para. 39);

iv. the trial judge noted the submission on behalf of the appellants that a great deal of specific information only came out at trial, *e.g.* the actual value of the donor's shares that were sold. He considered that same was true and fell under the heading of missteps by the attorneys but did not mean that "full-blown litigation of the type actually undertaken was necessary or appropriate or proportionate" (para. 40). He found it was in the appellants' favour that certain directions under s. 12(2) of the 1996 Act were agreed to by both sides in light of what were conceded to be missteps by the attorneys. However, he considered that, although the 1996 Act was not necessarily framed in the clearest way in this regard, it should be interpreted in a flexible and practical manner. He held that if such an approach had been taken, or even if a literal interpretation was applied, it would have been open to the appellants as interested parties to apply for directions under s. 8 pre-registration without making a formal objection as to suitability or under s. 12(2) post-registration.

41. He held that if the general rules on costs were to be departed from, the logical approach to take where a losing party achieves a modest benefit, but has failed on the substance, is to ask what the hearing would have looked like had that party taken the appropriate approach and limited themselves to the relevant and pertinent issues or those that they could be said to have made headway on. In the instant case, the contrast was between the hearing that actually took place and what would have happened if the appellants had limited themselves to seeking s. 12 directions. He referred by way of analogy to the approach taken as to costs in relation to the removal of a liquidator, where regard was to be had to the contrast between the hearing that actually took place and the time that would have been consumed had an inappropriate objection not been made; relying on *In re Star Elm Frames Ltd.* [2018] IECA 103 and *In re Star Elm Frames Ltd.* [2016] IEHC 666.

42. He noted at para. 43:-

> "…I should clarify postscriptually that there can be no pretence at any exact measurement of what the costs might have been, and the time expended will have to serve, in the absence of anything more definite, as a very rough and ready proxy for the level of additional costs that were generated by the way the case was actually approached. While this methodology is not in any sense mechanical, I should add that the result thereby arrived at seems to me an appropriate reflection in this case of the proportion of extra costs that were unnecessarily incurred and for which the [appellants] should be liable."

Having heard estimates given on behalf of the parties as to the time actually expended at the hearing and the time it would have taken had the appellants confined themselves to the issue of s. 12 directions, he ordered that the appellants pay 6/7ths of the respondents' costs.

Notice of appeal

43. By notice of appeal dated 5 June 2020, the appellants appealed against the order that the appellants were to pay 6/7ths of the respondents' costs, contending that the trial judge erred in fact and in law in:

i. determining that the costs of these proceedings should be approached on the basis of the general rule that costs follow the event;

ii. determining that, by virtue of s. 169 of the LSRA 2015, the courts' previous recognition that the general rule was not appropriate in certain types of cases had been superseded and courts should not recognise any new categories of action to which special rules in relation to costs should apply;

iii. determining that, as a matter of principle, special rules in relation to costs should not apply where an objection is raised in relation to the suitability of attorneys seeking registration of an EPA under the 1996 Act;

iv. determining that the objections raised by the appellants were not reasonable and *bona fide*;

v. concluding that the *Calderbank* letter militated in favour of an award of costs in favour of the respondents; and,

vi. determining that the appellants ought to have raised their concerns by way of an application for directions rather than by way of a challenge to the registration of the EPA and that the court could have disposed of any such application within one hour as opposed to the approximately seven hours which the hearing in fact took.

In particular, the appellants contended that the trial judge erred in failing to have any or adequate regard to:

i. the scheme and purpose of the 1996 Act and the role of notice parties thereunder, the fact that notice parties act on behalf of the donor rather than for their own benefit and the chilling effect which the general rule on costs could have on notice parties who have a reasonably held concern in connection with the registration of a power;

ii. the court's finding that there had been errors and missteps on the part of the respondents in the managements of the donor's financial affairs which, it was contended, would not have been highlighted had they not been raised by the appellants;

iii. the respondents' failure to provide information to the appellants in relation to the proceeds of the sale of shares and the precise use to which these monies were put;

iv. the inconsistency between the first respondent's two affidavits in relation to the amount of money derived from the sale of shares and the extent to which he invested his own money in the renovation of the Farmhouse;

v. the fact that the proceeds of the sale of shares were used to renovate the Farmhouse when the donor was approximately 90 years old and had not been capable of independent living for approximately 5 years;

vi. the fact that the renovation of the Farmhouse involved converting the existing dwelling into two apartments;

vii. the appellants' evidence that they were concerned about the donor's capacity to consent to the sale of shares in 2016 and 2017 following her stroke in 2012;

viii. the first respondent's acknowledgement under cross-examination that he did not arrange for an assessment of the donor's capacity to consent to the sale of shares in 2016 and 2017;

ix. the medical reports submitted by the respondents which referred to the fact that the donor suffered cognitive deficit progressing to severe dementia from 2012 and had been diagnosed as suffering from Alzheimer's dementia in or around 2015; and,

x. the fact that the court saw fit to impose nine specific directions pursuant to s. 12 of the 1996 Act.

44. The respondents opposed the appeal in its entirety.

Discussion

45. The Powers of Attorney Act 1996 was commenced on 1 August 1996. Part II of the Act is directed towards enduring powers of attorney. Prior to its introduction a person concerned that she might become incapable of managing her affairs was unable to make provision for that eventuality. Wardship pursuant to the Lunacy Regulation (Ireland) Act 1871 was the mechanism whereby a person who became incapable of managing her affairs was taken into the care of the High Court. The 1996 Act marked a significant milestone in the development of welfare-oriented protections and supported decision-making structures for older citizens that aimed to meet the requirements of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities.

46. The donor was born in 1926. She married in the 1950s and there were five children of the marriage, four of whom are parties to this litigation. Her husband died in the late 1990s. She was then aged about 72 years. In 2000 she decided to effect a transfer of her interest in certain lands and a dwelling house to her son E., reserving unto herself an exclusive right of residence in the dwelling house. By then she was 74 years old. In August 2008 when she was then aged about 82 years she instructed a solicitor in connection with the creation of an EPA which was duly executed on 6 August 2008. She selected two of her children, one of her sons (E.) and one of her daughters (F.), the respondents, to be her attorneys and the other three were

notice parties in respect of the creation of the EPA. The notice of execution of the instrument was signed by her on 6 August 2008 and thereafter served upon each of the three notice parties. No objection was expressed by the notice parties to the creation of the EPA at that time.

47. There has been no appeal against the finding of fact of the trial judge as to the knowledge of H. in 2016 and of G. (at the latest in early 2017) of the sale of the donor's Glanbia shares, her capacity to assent to same and the purposes for which the proceeds thereof were to be applied by E.

48. The donor's health deteriorated over the ensuing years and on 17 May 2019 the nominated attorneys, E. and F., issued a notice of intention to apply to register the EPA in accordance with s. 10 of the 1996 Act, as amended. By then the donor was in her 94th year. The notice was served on the three notice parties. By the end of July 2019 both appellants had issued a notice of objection to registration pursuant to the statute.

49. In late October 2019 the respondents brought the application before the High Court to secure registration of the EPA, supported by medical evidence that the donor was by then mentally incapable.

Basis for objection

50. The primary basis asserted by the appellants for the objection to the respondents' suitability as attorneys was the disposition of the Glanbia shares in late 2016 and the application of the proceeds to the renovations of the Farmhouse.

No s. 8 application

51. The statutory framework in Part II of the 1996 Act includes s. 8 which confers certain functions on the High Court prior to registration: -

> "Where the court has reason to believe that the donor of an enduring power may be, or may be becoming, mentally incapable and the court is of the opinion that it is necessary, before the instrument creating the power is registered, to exercise any power with

respect to the power of attorney or the attorney appointed to act under it which would become exercisable under section 12 on its registration, the court may on application to it by any interested party exercise that power under this section and may do so whether the attorney has or has not made an application to the court for the registration of the instrument." (emphasis added)

52. It was open to the appellants or either of them at all material times from late 2016 onward had they the slightest reservation as to the donor's capacity, to raise either verbally or in writing with the respondents any issue they had concerning the sale of the shares and to seek any information in relation to same. If dissatisfied with the response it was further open to them to apply to the High Court pursuant to s. 8; to bring to the attention of the court any concerns they had as to her lack of mental capacity and any relevant issues concerning the disposition of the shares, the safeguarding of the proceeds of sale or the proposed application of the funds.

53. No adequate explanation was ever advanced to the High Court for the failure and omission of the appellants to bring such an application in the critical years between 2016 and 2019. The respondents throughout contended, and the trial judge accepted, that at that time their mother had mental capacity and the transaction in all respects reflected her intentions.

54. The failure to act during those critical years (a relatively extensive period of time), to voice any reservations or concerns, called for an explanation. The fact that a complaint was first articulated at a point after almost three years had elapsed and only after the appellants had been served with a notice of intention to apply for registration of the EPA, connoting as it did that their mother was then mentally incapable, called for great scrutiny and care on the part of the High Court judge. As it will be recalled, the donor was 90 years of age at the time of the transaction and by the time the transaction was first impugned she was 93 years of age.

55. The absence of any reasonable explanation for the delay in contesting the Glanbia share sale until after a point when the appellants knew that their mother was not in a position to

independently confirm whether she had given her full, free and informed consent in regard to same entitled the judge to conclude that such an approach significantly undermined the ground of objection based on unsuitability.

Burden of proof

56. The burden of proof in regard to objections rests upon the objecting party. That is apparent from the structure of s. 10(2) of the 1996 Act. The structure of s. 10(1) is also noteworthy. It provides: -

> "On an application for registration being made in compliance with section 9 the Registrar of Wards of Court shall, unless subsection (2) applies, register the instrument to which the application relates." (emphasis added)

57. The burden resting on the appellants to establish unsuitability of the respondents was not discharged on the balance of probabilities. That such is the case is conceded by them. Although there are distinctions between the provisions of s. 10 of the 1996 Act and the somewhat analogous provisions of the Enduring Powers of Attorney Act 1985 (England and Wales) which was subsequently repealed by the Mental Capacity Act 2005 (England and Wales), nevertheless I am satisfied that the trial judge was correct in citing the decision in *In re W. (Enduring Power of Attorney)* [2001] Ch. 609, para. 47 *per* Arden L.J. (as she then was) where she noted: –

> "…as I see it, the legal burden remains throughout on the objector, the person presenting the notice of objection. If the objector fails to establish his objection, the instrument must be registered. The court has no residual discretion to refuse registration."

58. When faced with an objection to registration of an EPA the High Court is entitled to proceed on the basis that the donor must be taken to have given consideration to a great number of material and relevant matters when choosing her attorneys. When electing as between a

number of potential candidates, be they children or otherwise, she must be considered to have evaluated her options and come to a considered conclusion in electing as to which amongst them she reposed the greatest trust and confidence in to attend to her welfare and make care decisions for her as she would wish to be cared for, should the eventuality come to pass towards which the instrument creating the EPA was directed, namely should she become mentally incapable of managing her own affairs.

59. When a court is confronted with a proposition that the chosen attorneys of a donor are unsuitable in the context of a s. 10 application, it must approach this assertion having due regard to all the surrounding circumstances bearing in mind that the attorneys represent the considered choice of the donor for that task in the first instance. Regard can and should also be had, where relevant, to the dynamics of inter-familial relations and the extent to which an objector has had a hostile or conflictual relationship with the chosen attorneys or the donor in the past.

60. Had the appellants seen fit to act with reasonable expedition in 2016 or 2017 and raise concerns as soon as the relevant information regarding the transaction was in their possession and at a time when their mother was, apparently, *compos mentis*, they could have swiftly alerted the High Court to their concerns and the basis for same and thereby definitively established by means of a fact-finding inquisitorial process whether the transaction was valid in equity or ought to be set aside on grounds of undue influence or otherwise in light of decisions such as *Carroll v. Carroll* [1999] 4 I.R. 241. An application pursuant to s. 8 of the 1996 Act could have been instituted where issues concerning mental capacity could have been comprehensively ventilated. The donor herself might have given evidence on affidavit or otherwise with regard to her capacity, understanding, wishes and intentions and the quality of her consent to all aspects of the transaction could have been fully evaluated.

EPA registration and costs

61. Prior to the introduction of the 1996 Act it will be recalled that the Law Reform Commission prepared its report L.R.C. 31-1989 on *Land Law and Conveyancing Law: (2) Enduring Powers of Attorney*. Neither that report nor the Act address the issue of costs.

62. The process of registration of an EPA is governed by the terms of the 1996 Act. Registration executes the intention of the donor as embodied in the instrument creating the power of attorney in the first place. The moving party/parties and the notice parties are already pre-ordained by the terms of the original instrument and must be taken to have assented to their respective roles thereunder. In general where a routine application is made for registration of an EPA, the default position ought to be no order as to costs.

63. As already stated, the 1996 Act makes no express provision as to costs. Indeed expenses are referenced only in the context of s. 12(2)(b)(iii) which empowers the court where an instrument has been registered, to:

> "…
>
> (b) give directions with respect to –
>
> …
>
> (iii) the remuneration or expenses of the attorney, whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive, or the payment of additional, remuneration…"

The purpose of the 1996 Act

64. The manner in which the 1996 Act is framed suggests that the assets and estates of the donor of the EPA are primarily to be made available for her welfare needs, care, maintenance and upkeep and are not to be viewed as generally available for disbursement in connection with

the costs of adversarial litigation pursued in the context of the process of registration of the EPA itself. The scheme of the Act is welfare oriented.

65. An order for costs ought not normally be made in favour of or against a notice party or attorney who voluntarily elects to attend an application for registration of an EPA pursuant to the 1996 Act. There are no "winners" in such an application which was foreshadowed from the execution of the instrument by the donor and assented to by parties who freely agreed to assume their respective roles as attorney or notice party in pursuance of the welfare of the donor. It is important, in light of the public interest and welfare objects of the Act, that a court dealing with a contested s. 10 application, adopts a conservative approach where litigation costs are sought out of the donor's estate and otherwise keeps in sharp focus the public interest remit of the 1996 Act, as amended, when called upon to exercise its discretion in an *inter partes* costs application.

The costs regime

66. In the instant case the notice of motion was issued on 22 October 2019 some days after the commencement of Part 11 of the LSRA 2015 on 7 October 2019. S.I. No. 584 of 2019 and O. 99 (recast) came into operation on 3 December 2019 some months after the notice of motion was brought. They were in operation for upwards of five months prior to the hearing in May of the following year. No formal arguments were made before the High Court as to whether the recast version of O. 99 or its predecessor was applicable, and since the bulk of costs were incurred subsequent to its coming into operation nothing turns on the point in this appeal. Regard can to be had to the fact that, as regards the relevant provisions of O. 99 (recast) and the earlier iteration of O. 99, no material distinction is to be found relevant to this case.

67. The pre-3 December 2019 iteration of O. 99, r. 1A(1)(c) was drafted in wide terms and provided: -

"The High Court, in considering the awarding of the costs of any action…or any application in such an action, may, where it considers it just, have regard to the terms of any offer in writing sent by any party to any other party or parties offering to satisfy the whole or part of that other party's…claim, counterclaim or application…"

68. Since the within proceedings were instituted subsequent to the commencement on 7 October 2019 of Part 11 of the LSRA 2015, I am satisfied that the proper allocation of costs falls to be determined primarily by reference to ss. 168 and 169 with due regard to O. 99 RSC (recast).

69. The default position now obtaining is that a wholly successful party in civil proceedings is generally entitled to an order for costs against the unsuccessful party, save as otherwise provided such as in s. 169(5), unless the court on an express and reasoned basis, in the exercise of its discretion, including pursuant to O. 99, r. 2(1) RSC (recast), orders otherwise. A non-exhaustive check-list of the factors to be taken into account by a court in the exercising of its discretion are enumerated in s. 169(1) LSRA 2015.

Discretion

70. Section 169(1) provides: -

"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including-

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue and contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation." (emphasis added)

The deployment of the preposition "including" makes clear that the factors specified at subparagraphs (a) to (g) are merely illustrative and non-exhaustive.

71. Part of the legislative intent underlying the new costs regime under the LSRA 2015 is to encourage parties to adopt a pragmatic and reasonable attitude to litigation. A party who elects not to accept a reasonable offer to compromise proceedings runs the risk that there may be costs implications attendant on that decision.

72. Under the framework of s. 169, there are two broad categories of considerations which a court can have regard to in determining costs: (i) the nature and circumstances of the case, and (ii) the manner in which the proceedings were conducted by the parties. The factors identified at subparagraphs (a) to (g) inclusive are primarily directed to the behaviour of the parties and the conduct of the litigation. The criteria include examples of what might be characterised as litigation misconduct and call for an evaluation by the trial judge of the reasonableness or otherwise of conduct and steps taken in the overall context of the litigation in light of the nature of the proceedings.

73. Order 99, r. 2(1) RSC (recast) provides:-

"The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."

O. 99, r. 3(1) (recast) requires the High Court, in considering an application for costs, to have regard to the matters set out in s. 169(1) of the LSRA 2015, where applicable.

74. Murray J. in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183, having considered O. 99 (recast) alongside ss. 168 and 169 of the LSRA 2015, observed at para. 19 the general principles now applicable to the costs of proceedings including the following of relevance in this case:-

> "(a) The general discretion of the Court in connection with the ordering of costs is preserved (s. 168(1)(a) and O. 99, r. 2(1)).
>
> (b) In considering the awarding of costs of any action, the Court should 'have regard to' the provisions of s. 169(1) (O. 99, r. 3(1)).
>
> (c) In a case where the party seeking costs has been 'entirely successful in those proceedings', the party so succeeding 'is entitled' to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).
>
> (d) In determining whether to 'order otherwise' the court should have regard to the 'nature and circumstances of the case' and 'the conduct of the proceedings by the parties' (s.169(1)).
>
> (e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).
>
> (f) …
>
> (g) Even where a party has not been 'entirely successful' the court should still have regard to the matters referred to in s. 169(1)(a)-(g) when deciding whether to award costs (O. 99, r. 3(1)).

(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs or costs from or until a specified date (s. 168(2)(a))."

Standard of review on appeal

75. The Supreme Court in *M.D. v. N.D.* [2015] IESC 66, [2016] 2 I.R. 438 emphasised in the judgment of MacMenamin J. at para. 46 that an appellate court "will, in general, be slow to interfere with the exercise of a trial judge's discretion in awarding costs".

76. Charleton J. in *Mungovan v. Clare County Council* [2020] IESC 47 articulated that discretion thus: -

"Costs are at the discretion of a court under s. 169…The exercise of this discretion as to the award of costs by the High Court or on appeal requires an overall view and is not easily disturbed, being as it is a discretionary matter and one where the ruling will be made in the context of findings of fact and law best adjudicated by the judge or court making same." (para. 5)

77. In considering the approach to a review on appeal of a costs order in *O'Reilly v. Neville* [2020] IECA 215, Collins J. observed: –

"55. Decisions as to costs under Order 99 generally involve a significant degree of judgment/discretion, though of course the High Court is not at large. The discretion must be exercised judicially and on a reasoned basis: see for instance *Cork County Council v. Shackleton* [2007] IEHC 334, at para 4.1. …the specific terms of Order 99, Rule 1A(1)[(c)] clearly confer a large measure of discretion on the High Court.

56. On appeal, this Court will be slow to interfere with the exercise of a High Court judge's discretion in relation to costs and significant weight is given to the views of the judge. But even a discretionary decision of the High Court is subject to review - that is, of course, an important part of the rationale for requiring cost decisions to be reasoned, so that they can be reviewed. Furthermore, it is clear that this Court's power of review

> is not dependent on the demonstration of any error of principle on the part of the High Court judge: see *Godsil v. Ireland* [[2015] IESC 103, [2015] 4 I.R. 535], at paragraphs 65 & 66, as well as *MD v. DD* [2016] 2 I.R. 438, at paragraph 46 (*per* MacMenamin J.)."

In bonis Morelli; Vella v. Morelli

78. The net effect of ss. 168 and 169 when considered together with O. 99 (recast) is to place the principles governing the awarding of legal costs primarily - but not exclusively - on a statutory footing. The appellants sought in this appeal to rely on the principles enunciated by Budd J. in *Vella v. Morelli* which represented a restatement of well-established jurisprudence as of 1968. The decision accords with s. 168(1)(b) of the LSRA 2015 which provides that a court may: -

> "…where proceedings before the court concern the estate of a deceased individual, or the property of a trust, order that the costs of or incidental to the proceedings of one or more parties to the proceedings be paid out of the property of the estate or trust."

79. It was argued on behalf of the appellants that, were the principles in *Vella v. Morelli* to be applied, notice parties such as the appellants who advance a real and genuine ground or concern that falls within s. 10(3) of the 1996 Act should be entitled to have the issue determined "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" as observed by Budd J. at p. 34. The implicit logic being that the estate of the donor should also be potentially available to defray such costs although the appellants never sought a costs order against the donor contending rather that there be no order as to costs.

80. The appellants contended that the trial judge failed to take sufficient account of the nature of the within proceedings and the role and function of the appellants as notice parties pursuant to the 1996 Act. In addition, it was posited that the court in making the order for 6/7ths

of the respondents' costs established a precedent which risked undermining the freedom of notice parties to raise *bona fide* objections or concerns they had, lest they be penalised by an order for costs being made against them in the event that the threshold for establishing "unsuitability" within the meaning of s. 10 is not met.

81. The appellants contended that a departure from the general rule in this case was well justified in light of the dictum of Murray C.J. in *Dunne v. Minister for the Environment* and reliance was also placed on the subsequent judgment of Cooke J. in *BUPA Ireland Ltd. v. Health Insurance Authority* [2013] IEHC 177. In *Dunne v. Minister for the Environment*, Murray C.J. outlined circumstances when the court may exercise its discretion to deviate from the general rule, observing at para. 27 that same fell to be determined "on a case by case basis" and decided cases indicate the nature of the factors which may be relevant to such an exercise.

82. The line of authorities based on probate and testamentary suits relied upon by the appellants is distinguishable to an extent insofar same concern the estate of a deceased party and the emergence of a testamentary document of such a nature which "calls for an investigation of the circumstances surrounding the making of the will" (*Vella v. Morelli*, p. 31). Generally, probate jurisprudence reaching back to *Fairtlough v. Fairtlough* (1839) 1 Milw. 36 distils the considerations governing the exercise of discretion for the granting of costs to an unsuccessful litigant out of a deceased's estate down to two:

(1) was there reasonable ground for litigation; and,

(2) was it conducted *bona fide*.

In the present case, the unexplained and (particularly in the context of the age of the donor) excessive delays in raising any concern for a number of years regarding the known facts of the transaction greatly undermined the possibility of aligning the factual matrix with that which obtained in *Vella v. Morelli* - a judgment which established enduring precepts which readily align with key principles in the current statutory and regulatory costs regime.

83. It was argued on behalf of the appellants that notice parties under the 1996 Act, unlike plaintiffs in a testamentary suit, are not pursuing the proceedings in furtherance of their own interests, but rather to protect the position of the donor. In a given case that may well be a significant factor in the exercise by a court of its general discretion under O. 99, r. 2(1) and s. 168 or its specific discretion on a reasoned basis to direct otherwise having regard to the factors enumerated in s. 169(1). However, the manner in which such an issue is raised and pursued by a notice party in inquisitorial proceedings which concern the welfare of a person who now lacks mental capacity is of crucial importance. In light of the key findings of the trial judge including the lack of *bona fides* of the appellants (a finding for which there was some evidence and which, in the circumstances and in light of the standard of review applicable in this appeal, ought not to be disturbed for the reasons stated below) and the absence of a valid basis to assert the unsuitability of the respondents to act as attorneys, that line of argument is not open to the appellants in the instant case.

84. The process of application for registration of an EPA is inquisitorial in nature and directed to the welfare and interests of a donor reputed to have become mentally incapable. Had no objection as to suitability been made at the hearing and the notice parties elected to attend, undoubtedly the court would have made no order as to costs. The appellants would nevertheless have been entitled to put their concerns on affidavit before the court so that same could be considered by the judge and taken into account without having to embark on a lengthy adversarial hearing. Further, appropriate directions under s. 12 could have been made to meet all concerns found by the court to have been properly identified to protect the donor's welfare.

85. The default position should be that where welfare-oriented issues and concerns are raised by a notice party or any other interested party in an application of this kind, the information should be put before the court on affidavit with all supporting documentation and

unless the absence of *bona fides* is established there should ordinarily be no cost consequences arising for the notice party.

Mediation

86. There was evidence that at the exhortation of the President of the High Court the matter was initially put back to enable the parties to engage in alternative dispute resolution by means of mediation. This accords with s. 169(1) of the LSRA 2015 which provides:

> "(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—
>
> …
>
> (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation."

87. The appellants were not legally represented at the point when a process of mediation was sought to be established and they sought to impose preconditions which undermined the entire process. I consider it reasonable on balance to disregard their non-engagement in mediation for the purposes of a consideration of the issue of costs since it appears that they lacked any understanding of the implications of their stance.

The *Calderbank* rules

88. The so-called "*Calderbank* rules" emanate from the 1975 case of *Calderbank v. Calderbank* [1975] 3 W.L.R. 586 in which Mr. Calderbank rejected an offer from his wife to settle a matrimonial suit on terms more generous to him than the eventual award made by the court. Cairns L.J. proposed that although "without prejudice" negotiations should be conducted

without prejudice to the legal issues, the positions adopted in those negotiations should be referred to following judgment when the issue of costs fell to be determined by the court.

89. The underlying principle is that, where a "without prejudice save as to costs" proposal is made and a party receives an award which is less or no greater than a prior offer, then that party should, subsequent to the trial, be at risk of paying their own costs together with those of the other party from a time 28 days after the offer was made. The objective is that such a letter should cause the parties to focus on an early and reasonable compromise.

90. The *Calderbank* regime is not universally approved of. It has come in for marked criticism in England and Wales in the area of family law as a blunt instrument, particularly where a party to a matrimonial suit "loses" narrowly and they are nonetheless obliged to discharge the entire costs of the other party from a date 28 days subsequent to receipt of the *Calderbank* letter of offer.

91. Some of the jurisprudence pointed to its resultant unfairness and unintended outcomes, particularly where complex financial orders in family law proceedings had been crafted by the court tailored to the respective needs of the parties and dependent children which stood to be effectively unravelled and undermined by the costs impact of the *Calderbank* rules operating, particularly in connection with protracted litigation or a long running trial. Mostyn Q.C. (sitting as a deputy High Court judge) in *G.W. v. R.W.* [2003] EWHC 611 (Fam), [2003] 2 F.L.R. 108 at para. 88 observed: -

> "…It can be seen that vast sums can swing on even the smallest failure to guess accurately. And there is no premium for guessing really well."

In response to concerns the rule was modified in England and Wales only in relation to certain family law proceedings in 2010 and its operation in family law is now greatly restricted.

92. *Calderbank* letters have been criticised also in the area of commercial law for their overly tactical deployment and the perceived imposition of unfair prejudice to one party,

particularly in circumstances where there is an established imbalance in the ability of the parties to finance the litigation. No such imbalance is contended for in the instant case, however.

93. In this jurisdiction where an outcome was achieved that was better than the terms of the *Calderbank* letter it was generally considered fair and just that costs be paid by the unsuccessful party. A *Calderbank* letter is of relevance now in the context of s. 169(1)(f) which entitles a court to have regard to "whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer". Its sending and any response are an aspect of "the conduct of the proceedings by the parties" to which the court must have regard. I take the reference to "an offer to settle" as being to an admissible offer to settle and undoubtedly a letter written "without prejudice save as to costs" is such.

94. A comprehensive review of the treatment of the *Calderbank* rules is to be found in the judgment of Collins J. in *O'Reilly v. Neville* (*ante*).

Findings

95. A crucial factor to be borne in mind having regard to the offer letter of 5 February 2020 was that it proposed to register F. alone as attorney and that E., the first named respondent, would step away and not be registered as attorney and that each side would bear their own costs. It is not in dispute that this offer was roundly rejected and a counter offer was advanced. Notwithstanding the rejection of the offer, at the hearing before the trial judge arguments with regard to the unsuitability of F. to act as attorney were not meaningfully pursued.

96. For three months prior to the hearing the appellants were aware that E. was willing, as a compromise, to step away and not seek registration as attorney. They rejected that proposal and sought instead an outcome supplanting the second respondent and at variance with the wishes of the donor as expressed in the instrument creating the EPA. The proposal advanced by way of counter-offer was contrary to the wishes of the donor. Further, such a step,

appointing one or both appellants as attorneys, was not permitted by the terms of the 1996 Act. The High Court had no power to make the order sought under the 1996 Act.

97. By the time the matter came on for hearing in May 2020, over three and a half years had elapsed since the sale of the shares.

98. The non-adversarial process of registration pursuant to s. 10 is not intended to be availed of for the purposes of ventilating grievances or canvassing that the court embark upon an investigation into transactions that took place at a time when *prima facie* the donor had legal capacity and where it is demonstrable that the objectors/notice parties were broadly aware of the share sale transaction for an appreciable time yet refrained from taking any timely step to query the transaction or to challenge its validity. In the instant case it appears that not even a conversation was had or letter written to any party in 2016 or 2017, or at any time up to 2019, expressing any reservation concerning the disposition of the shares, the capacity of the donor or the application of the proceeds notwithstanding that, as the trial judge found, both appellants were aware of the material facts more or less contemporaneously.

99. There is certainly force in the arguments advanced that where genuine suspicions exist, or concerns regarding the suitability of a proposed attorney, the scheme of the 1996 Act provides for such a matter to be brought to the attention of the court at the point of an application for registration pursuant to s. 10. However, the approach of the appellants went far beyond laying the evidence before the High Court to ensure that it was appropriately appraised of same.

100. In the instant case there were a number of significant distinguishing elements. The appellant, G., stated in evidence that he was primarily motivated by his preference that his mother should continue to be cared for by the family. However, he himself had a limited relationship with her and was in no position to care for her. It appears that a major objection was that she had been placed in the nursing home “prematurely”. When he swore an affidavit

on 17 July 2019 he suggested that it had only recently come to his attention that the shares had been sold. It is clear from cross-examination, as the trial judge found, that he had been made aware of that fact several years before. He accused his brother E., the long-time primary carer of their mother, of engaging in "a dressed up scheme to extract money from [her] and put it out of reach for her future care and/or the Fair Deal Scheme." The appellant, H., freely acknowledged that he was aware in 2016 that the Glanbia shares were being encashed. He too was of the view that she ought not to be cared for in a nursing home and that she would be "much happier residing in a familiar residence within the care of her family as opposed to residing in a nursing home".

101. In effect, the hearing was conducted not merely for the purposes of ousting the respondents as attorneys but also to have the share sale transaction set aside or rescinded and an equal number of shares vested by E. in their mother's name. In substance it was conducted as an equity suit seeking equitable-type reliefs. The delay of many years was rightly a cause of concern to the trial judge. Both appellants were aware, more or less contemporaneously, that the shares were being sold and they were well aware as to the manner in which the proceeds of sale were being applied. It was found by the trial judge that the income from the renovated properties, towards which renovation the proceeds had been applied, was available on a continuing basis for the donor's care and upkeep in the nursing home.

102. The explanations offered for the appellants' delay were not credible. Delay defeats equity. The appellant, H., stated at para. 8 of his affidavit: -

> "…I say that while I did not express concerns about the manner in which the Glanbia shares were converted into cash, I now have concerns that the proceeds of the sale of those shares have not found any meaningful application directly to my mother's benefit. I say that I would not raise any particular issue if the proceeds of the sale had been

> applied to renovate a property specific to my mother's ongoing care but circumstances have changed and there is need for my brother…to take account in her interest."

When viewed against the evidence of H. that argument is wholly unconvincing as the trial judge found. Likewise, the suggestion that their mother be released into the care of H. and his spouse was unrealistic having regard to the medical evidence of her current health conditions combined with the history of his limited capacity to provide care for her over the previous decade.

103. Where a transaction is sought to be set aside on equitable grounds such as undue influence, it is incumbent on the claimant to act with expedition and the equitable doctrine of laches is engaged where delays are apparent. The trial judge was confronted with a state of affairs in which the lapse of time in question was critical insofar as the appellants, with knowledge of the sale and the manner in which the proceeds had been applied and with knowledge of the ever declining cognitive health of their mother, stood by and allowed the monies to be applied towards the renovation of the two accommodation units for letting, only to launch their concerns years later at a point when the donor's cognitive capacity had declined and she lacked mental capacity and when, as the trial judge found, she clearly required nursing home care which her primary carer, E., was no longer in a position to provide.

104. That lapse of time coupled with the conduct which led to the appellants raising these issues would have made it inequitable to entertain such a claim had an equity suit been brought at such a remove in time. The conduct or acts of the appellants during the course of the delay period (in allowing the proceeds be applied to the renovation works on the building, in refraining from expressing any reservation or concern with regard to that course of action and in refraining from taking any step to ascertain the mental capacity of their mother as of late 2016/early 2017 or to even endeavour to elicit her own contemporaneous views in regard to the transaction and whether it reflected her wishes) means that the balancing of equities results

in the laches and the detrimental steps taken in good faith by E. and F., and acquiesced in by both appellants, further entitling the trial judge to reach the conclusions which he did in relation to costs.

105. Indeed it will be recalled that in *Allcard v. Skinner* (1887) 36 Ch. D. 145 the English Court of Appeal held that, although the appellant had made gifts at a time when she was subject to undue influence such that she would have been entitled to claim restitution, since she had delayed for five to six years in seeking recovery of the gifts, her claim was barred by laches and acquiescence. Furthermore, in the circumstances she was ordered to pay costs.

Conclusions

106. It will be recalled that s. 169(1) uses the word "including" in identifying subsections (a) to (g) inclusive, clearly indicating that it is not intended to be an exhaustive exposition as to the factors to be taken into account by a court in exercising its discretion in a given case. The default position under the provision is that a party who is "entirely successful" in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings *unless* the court, in the exercise of its discretion, orders otherwise. The reasons for such an order must be stated. An application of the "costs follow the event" principle makes clear that the registration application was a purely procedural application in an inquisitorial process anticipated at the time of execution of the EPA by the donor in 2008 in respect of which neither side could assert entitlement to a costs order against the other or the donor under the legislation or the Rules on the basis of being "entirely successful".

107. Section 169(1) of the LSRA 2015 provides that one of the factors to which a court should have regard to in allocating costs is whether a party made an offer to settle the matter the subject of the proceedings, and, if so, the date, terms and circumstances of that offer.

108. The court should also have regard pursuant to s. 169(1)(b) to whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings - a consideration of

particular relevance here where the approach adopted rendered an inquisitorial application lengthy, confrontational and adversarial with ensuing escalation of costs.

109. Both of these statutory criteria were particularly applicable to the present case.

110. The instant case turns on its own particular facts. The appellants' delay and the manner of their approach to raising the share transaction as having been improperly brought about was unsatisfactory.

111. The default position applies generally to all "civil proceedings" and to inquisitorial applications which become adversarial. The only express exceptions to this are the special rules applicable to certain categories of environmental litigation as provided for in s. 169(5) of the LSRA 2015.

112. The appellants did not establish that an application for registration pursuant to s. 10 of the 1996 Act, where notice parties seek to raise objections on grounds of suitability, constitutes a new category of action to which special rules in relation to costs apply such as would suspend, modify or alter the general operation of s. 169 of the LSRA 2015. Such a proposition is contrary to the statutory intent clearly evinced in the section itself. The trial judge was correct in determining that, as a matter of principle, no special rules in relation to costs should apply where an objection as to suitability is raised and adversarially contested under s. 10.

113. I am satisfied that costs in applications brought pursuant to the 1996 Act can in appropriate cases - particularly where routinely and inquisitorially presented or where the court is satisfied that the sole intention is to appraise it of matters material to the welfare of the donor - be subject to additional considerations beyond the ambit of those expressly set out in ss. 168 and 169 of the LSRA 2015 and O. 99. This is so given the very significant public interest in ensuring that the interests and welfare of the donor of a power of attorney who is becoming or has become mentally incapable may be considered within the statutory (LSRA 2015) and regulatory regime.

114. The language of s. 168 is very wide and encompasses significant flexibility so that the trial judge was entitled to have regard to all the material circumstances of the case and the conduct of the proceedings by the parties. There was evidence before the trial judge which, on balance, entitled him to conclude that the contention that the respondents as proposed attorneys were unsuitable pursuant to s. 10(3)(d) was not reasonable and that in all the circumstances the litigation was not conducted *bona fide*. The following factors are relevant:

i. in the case of the respondent, F., it was conceded in the course of the hearing that issues regarding her suitability to act as attorney were not being pursued;

ii. the appellant, H., knew of the share transaction contemporaneous with its occurrence;

iii. H. also was in regular contact with his mother and was well placed to raise issues regarding her capacity at the time or obtain evidence if he had concerns that there was a want of capacity on her part to enter into the transaction or that she further lacked capacity to consent to the application of the proceeds of sale of the shares towards the renovation of the property;

iv. it ought to have been obvious to H. that his proposal that he would take on the care of his mother in his own household in all the circumstances that obtained was substantially unrealistic; and,

v. with regard to the appellant, G., the court did not accept his contentions that he had been unaware of the share sale transaction until his mother moved into the nursing home in May 2019. The court also noted the fraught nature of his relationship with his sibling, E., one of the respondents.

115. The judge had the opportunity of hearing each of the witnesses in turn and of assessing their demeanour in court. In proceedings such as involve inter-familial relationships, as frequently the registration of an EPA does, it is important that the parties' conduct be taken

account of so that it is evaluated in the overall context of surrounding events and in particular in the context of delays or omissions or elements which tend to suggest that objections to a relatively routine procedural application are driven by potentially extraneous or personal considerations.

116. Under s. 169(1)(a) of the LSRA 2015 the trial judge was entitled to have regard to his finding on the evidence that H. actually agreed to the sale of his mother's shares and was aware of and acquiesced in the transaction at the time and that G. shortly thereafter learned of the transaction from H. (contrary to his assertions which were significantly undermined in cross-examination) and acquiesced in same, a finding not appealed against. Thus, the ostensible principled basis for the objections to the suitability of the respondents fell away and were not maintainable. The trial judge was entitled, in light of all of the evidence before him, including the demeanour and stance of each of the witnesses in turn, to conclude that the objections were not reasonable and that the appellants had not established genuine suspicions such as would have justified the course of action and the approach to this case which they elected to adopt. The appellants freely conceded in the course of the appeal that the objections advanced as to the suitability of the respondents pursuant to s. 10(3)(d) were not legally sustainable.

117. No explanation was given as to why the issue of the donor's capacity or any other aspect of the transaction was not raised in 2016 or 2017 with any due expedition. It was reasonable for the trial judge to infer, as he demonstrably did, that at the time neither appellant had any contemporaneous *bona fide* concerns regarding the capacity of their mother to enter into the transaction or in respect of the application of the funds for the renovation of the property.

118. Their contemporaneous conduct was consistent with that conclusion and the trial judge was entitled to conclude that had any *bona fide* concerns existed it was open to the appellants in 2016 and 2017 to bring an application to the High Court pursuant to s. 8. The fact that the appellants failed to avail of their rights to make formal objections or raise issues pursuant to s.

8 of the 1996 Act in the pre-registration period called for an explanation and none was forthcoming. I observe that otherwise they could have spoken to their mother or the respondents; written or emailed the respondents; or caused a solicitor to communicate in writing or otherwise with their mother and/or with the respondents and each of them to articulate any reservations and concerns and to seek information.

119. The absence of any contemporaneous step of any kind querying any aspect of the transaction, coupled with the failure thereafter to act with reasonable expedition, such as would enable a comprehensive ascertainment of the capacity of their mother at the time in 2016 to enter into the transaction was fatal to the appellants' stance and undermined their *bona fides*, as the evidence disclosed.

120. Many of the issues agitated in the notice of appeal, including that the funds of the share sale were applied towards the renovation of a property beneficially owned by E. in which their mother had a right of residence, that she was around 90 years of age at the time of the share sale and had not been capable of independent living for some time, are issues which were known to the appellants in 2016 and 2017. Yet no prompt step was taken to have the matters enquired into, or have the transactions set aside if need be, at a time when their mother could have given evidence or instructed a solicitor. It is significant that no appeal was brought against the findings of the High Court in that regard.

121. Notice parties and other interested parties must understand that the service of notice leading to an application for registration by an attorney under an enduring power is not to be viewed as an opportunity for the notice parties to dredge up for plenary ventilation the accumulated inter-familial grievances, issues or disputes as may hitherto have developed between the parties.

122. The stance of the appellants escalated the proceedings into a full-blown hearing, equivalent in many respects to an equity suit, lasting three days. The conduct towards the

mother and in particular the threats to remove her from the nursing home which necessitated an application for interim relief from the High Court added further to the costs.

123. Had the *Calderbank* offer been accepted, pragmatism would have prevailed and F. would have been the sole attorney. In the circumstances I am satisfied that the trial judge considered the sequence of events and correctly identified the relevant legal principles of ss. 168 and 169 of the LSRA 2015, O. 99 RSC and the authorities. He had regard to the fundamental features of the letter of offer of 5 February 2020 which was a valid *Calderbank* letter. In comparing the proposal therein contained with the outcome of the proceedings and the order he made on 12 May 2020, he correctly determined that the *Calderbank* offer represented an outcome significantly better for the appellants than what was achieved at the conclusion of the hearing.

124. It is not correct for the appellants to contend that merely because the trial judge gave directions upon the registration pursuant to s. 12 in light of the facts and evidence before him that that measure in and of itself established the *bona fides* of the appellants or either of them in objecting to the suitability of the respondents as attorneys. The judgment correctly determined that a distinctly higher burden of proof falls to be discharged to demonstrate the unsuitability of an attorney pursuant to s. 10(3)(d) when compared to the threshold for directions pursuant to s. 12 which empowers the court to give directions at the behest of "the donor, the attorney or any other interested party", which clearly extends to persons outside the notice parties such as a friend, relative, carer or proprietor of a nursing home. The latter provision is welfare orientated and directed to the day to day care of the donor while she is mentally incapable.

125. I am satisfied that the judgment was comprehensive and carefully calibrated. The order made by the High Court judge in imposing nine clear directions on the attorneys within the meaning of s. 12(2)(b) of the 1996 Act was necessitated in the interests of the donor and did

not in and of itself support the core contention that the respondents, E. and F., were unsuitable persons to act as attorneys within s. 10(3)(d) since the burden of proof in that regard had not been discharged by the appellants at the trial.

126. The application of the share sale proceeds in the manner outlined by the first named respondent was not established by the appellants to have been otherwise than with the knowledge and consent of the donor. It is significant that the trial judge found as a fact that the donor had capacity at the time the shares were disposed of and when the proceeds were applied for the renovation works. That finding was not appealed against.

127. A number of extraneous issues were agitated which in and of themselves or in combination did not afford valid grounds of objection under s. 10(3)(d) of the 1996 Act directed to the suitability of the respondents. Those included the failure to pay the Capital Gains Tax liability in a timely manner and the initial overestimation by the first named respondent of the sum he contributed towards the renovation works. I am satisfied that the High Court was entitled on the evidence before it to find that the matters relied on in opposing registration of the EPA did not establish unsuitability of the attorneys. It is significant in the circumstances that those findings were not appealed.

128. There was no evidence that the initial understatement as to the sum realised by the share sale on affidavit was deliberate nor could it fairly be concluded on the evidence before the trial judge that material information as to that aspect had been deliberately withheld from the appellants by E. The trial judge was entitled to accept the explanation offered. The overstatement of E.'s own contributions to the renovations was unsatisfactory, it being a matter peculiarly and directly within E.'s own knowledge, but does not suffice on its own in my view to entitle this court to interfere with the exercise of discretion of the trial judge to make the costs order appealed against.

129. There was merit in the approach identified by the trial judge at para. 42 of his judgment:-

> "If in the light of all the circumstances one is to depart from full costs to the winner in private law proceedings, the logical way to do so where a losing party achieves a modest benefit, but has failed on the substance, is to ask what the hearing would have looked like had that party taken the appropriate approach and limited themselves to the relevant and pertinent issues or those that could be said to have made headway on. In the present case the contrast is, therefore, between the hearing that actually took place and what would have happened if the objectors had limited themselves to seeking directions…"

At para. 43 he observed:-

> "…there can be no pretence at any exact measurement of what the costs might have been, and the time expended will have to serve, in the absence of anything more definite, as a very rough and ready proxy for the level of additional costs that were generated by the way the case was actually approached. While this methodology is not in any sense mechanical, I should add that the result thereby arrived at seems to me an appropriate reflection in this case of the proportion of extra costs that were unnecessarily incurred and for which the [appellants] should be liable."

At para. 45 he observed:-

> "…Taking the more favourable estimate from [the appellants'] point of view…of seven hours and taking an estimate of one hour for the hypothetical hearing, had it actually been limited to the issues on which the [appellants] made some headway, a time estimate which has not effectively been countered, and having regard to the general principle of costs following the event, I should award costs to the [respondents], but in all the circumstances should discount the costs in favour of the [respondents] by one-seventh."

130. A significant discretion was vested in the trial judge including pursuant to O. 99, r. 2(1) RSC (recast) and I am satisfied that he properly exercised that, adverting to the material facts in doing so. The trial judge was well within the bounds of his discretion in choosing one-seventh of the costs as the appropriate fraction representing the time the hearing would have taken if the appellants had confined themselves to the issue of directions. He clearly identified his reasoning and the basis on which he exercised his discretion pursuant to O. 99, r. 2(1) (recast) and the LSRA 2015.

131. It is of significance that the appellants have not appealed against the substantive order registering the EPA and the determination of the trial judge that they had failed to establish that the respondents or either of them were unsuitable to be the donor's attorneys.

132. I would accordingly dismiss the appeal.

Costs

133. This appeal being brought in civil proceedings and the respondents being entirely successful in relation to same, the respondents would ordinarily be entitled to an award of costs against the appellants. However, this court enjoys discretion to order otherwise as is clear from s. 169(1) of the LSRA 2015 and O. 99, r. 2(1) RSC (recast). In my view the proper allocation of costs in respect of this appeal should be that the appellants pay one half of the respondents' costs in respect of this appeal when same are ascertained.

134. I come to this view for the following reasons:

i. Given the extensive reliance by the Superior Courts on the seminal decision in *In bonis Morelli; Vella v. Morelli* for over half a century in relation to the determination as to the allocation of costs not just in probate and testamentary suits but more generally in relation to non-adversarial proceedings, it was not definitively clear to the appellants that the historically broader application of the principles in that case had been modified by the LSRA 2015 and the terms of O. 99 (recast).

ii. Further, it is in the public interest that the correct approach to costs in applications of this kind under the 1996 Act are clarified for the benefit of future donors, attorneys, notice parties and other interested parties and all concerned with the operation of the 1996 Act and the interests and welfare of older persons who are or are becoming mentally incapable. The appeal was warranted to bring clarity to the issue.

iii. The appellants erred in directing their objections towards the asserted unsuitability of the chosen attorneys for the reasons stated above, which resulted in the very significant and unnecessary escalation in the length of the High Court hearing and consequent costs incurred. However, it is relevant to the exercise of discretion that they did raise issues (within the meaning of s. 169(1)(b) of the LSRA 2015) which informed the trial judge as to the ambit, nature and extent of s. 12 directions required to be made for the benefit of the welfare of the donor.

iv. This judgment outlines that in light of the applicable standard of review the High Court judgment and order as to the trial costs must remain undisturbed. Nevertheless, I must have regard to the nature and circumstances of this case and the fact that it is in the public interest that notice parties efficiently avail of the opportunity presented by an application for registration of an EPA to put before the court for its information any material fact or matter considered relevant so as to ensure that appropriate welfare-oriented directions can be made for the donor's benefit.

v. I am satisfied that the directions made under s. 12(2) of the 1996 are enduring in nature and enure for their mother's benefit and almost certainly would not have been made but for the intervention of the appellants and that is a circumstance which in my view weighs in favour of the appellants.

vi. The appeal was conducted with expedition and directed only to the net issues raised and the concerns of the appellants for clarity as to the extent of a notice party's entitlement to resist costs in relation to registration of EPAs.

vii. The appeal has resulted in clarity as to the reasonable expectation of notice parties and attorneys engaged in inquisitorial proceedings and applications concerning a person who is or may be becoming mentally incapable

viii. It is relevant generally and pursuant to s. 169(1)(c) that E. in his first affidavit significantly overstated his own inputs into the costs of the renovation works in the Farmhouse. That expenditure was a detail directly within his own knowledge and in an already fraught familial situation where a high degree of distrust obtained it was unsatisfactory that he overstated his own expenditure in the manner in which he did.

135. If either party wishes to contend for an alternative order, they have liberty to apply to the Office of the Court of Appeal within 14 days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the court, the requesting party may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

136. Edwards and Ní Raifeartaigh JJ. confirm their assent to the above judgment which is being delivered electronically by reason of the Covid-19 pandemic.