**THE HIGH COURT**

[2021] IEHC 127

**[2018 No. 383 SP.]**

**IN THE MATTER OF THE ESTATE OF JOHN T. CRONIN (DECEASED)**

**AND**

**IN THE MATTER OF THE SUCCESSION ACT, 1965**

**BETWEEN**

**PADRAIG O'CONNELL**

**PLAINTIFF**

**AND**

**THOMAS O'CONNELL AND BREDA (BRIDIE) MURPHY**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Nuala Butler delivered on the 26th day of February, 2021**

**Introduction**

1. The testator, John T. Cronin, made a will with the assistance of a local solicitor on 12th July, 1990. He died more than 23 years later on 11th October, 2013 without having updated that will. This case arises because of material changes to the testator's assets which occurred between the date of his will and the date of his death and which, in turn, give rise to difficult questions as to whether the intentions expressed in the will can be read as applying to his assets as they stood at the time of his death. In particular, the court is asked to decide if an asset held by the testator at the time he made his will is significantly changed in form by the time of his death, whether a bequest of that asset in its original form is effective to entitle the beneficiary to receive the asset in its altered form.

2. The plaintiff is the executor of the testator's will and brought these proceedings by special summons dated 12th July, 2018 to obtain the determination of the court as to who is entitled to inherit some 8,937 shares in Kerry Group plc held by the testator at the time of his death. The questions posed for determination by the court are as follows: -

   (a) Whether the gift of Kerry Co-Operative shares to Thomas O'Connell includes the shareholding the deceased held in Kerry Group plc at the date of his death;

   (b) Whether the deceased's shareholding in the Kerry Group plc forms part of the residue of the estate.

   As will be seen, these are really different ways of putting the same question because, if the Kerry Group plc shares form part of the gift to Thomas O'Connell, then they do not form part of the residue of the estate and vice versa.

3. The first defendant, Thomas O'Connell, is a nephew of the testator and the principal beneficiary under his will. The gifts to Mr. O'Connell include an express gift of "Kerry Co-Operative shares". Through a process which is described in more detail below, over a period between 1993 and 2013 shares in Kerry Co-Operative were cancelled and exchanged for shares in Kerry Group plc. The testator held 1,411 shares in Kerry Co-Operative in 1993 and presumably a similar number when he made his will in 1990. By the time of his death, he held only 390 shares in Kerry Co-Operative. The remainder of

his Kerry Co-Operative shares had been cancelled and exchanged for Kerry Group plc shares of which he held 8,937. Mr. O'Connell contends that the gift to him of Kerry Co-Operative shares includes the Kerry Group shares received by the testator in exchange for a portion of his Kerry Co-Operative shareholding subsequent to making his will. He contends that this is so legally as the Kerry Group plc shares have been substituted for the Kerry Co-Operative shares but also contends that this reflects the intention of the testator as expressed on many occasions to him.

4. The second defendant, Mrs. Bridie Murphy, is a sister of the testator and was appointed by order of the High Court made under O. 15, r. 9 RSC on 21st January, 2019 to represent her own interests and those of the other residuary legatees and devisees and those entitled to a share in the partial intestacy arising in respect of the testator's estate. Mrs. Murphy is one of eleven persons, all siblings of the testator, who were entitled to share in the residue of his estate under his will. Only four of those named as residuary beneficiaries survived the deceased and as no provision was made in the will for the disposal of the shares of those residuary beneficiaries who pre-deceased the testator, seven-elevenths of the residue of the estate falls to be dealt with by way of partial intestacy. There are an additional 30 persons, nieces and nephews of the testator, entitled to share in this partial intestacy in varying proportions. In addition to her one-eleventh share of the residue, Mrs. Murphy is entitled to a one-tenth share of the intestate portion of the estate. On her behalf, it is contended that there is no ambiguity in the will. The will must be interpreted to speak from the date of the testator's death and consequently operates so as to pass the Kerry Co-Operative shares held by him at his death but not Kerry Co-Operative shares held by him during the course of his life but disposed of prior to his death. Extrinsic evidence as to what the testator's intention might have been as regards assets which are not addressed in the will is irrelevant. The Kerry Co-Operative shares held by the testator at the time of his death pass to the first named defendant in accordance with his will and the Kerry Group plc shares which are not expressly disposed of by the testator in his will fall into the residue of his estate.

5. This, in outline, is the dispute between the parties. In the balance of this judgment, I will set out how the particular circumstances giving rise to this dispute came about and how they fall to be resolved. However, it is worth observing that the Law Society frequently offers sound advice to the public regarding the advisability of seeing a solicitor in order to make a will. The need to re-attend a solicitor from time to time to ensure that a will is kept updated so that it accurately reflects the intentions of a testator in light of changing circumstances is also something of which the public ought to be made aware. The changes to Mr. Cronin's assets and changes in his family circumstances are all matters on which a local solicitor could have readily advised him. This would have ensured that effect was given to his intentions, whatever they might have been, whether by up-dating the will or by a solicitor's attendance recording that, having discussed the matter with him, the testator did not wish to make any changes to his will. Either way, knowledge that the testator had expressly considered and been advised upon the significance of his Kerry Group plc shareholding, would have enabled his surviving family to be confident that

effect was being given to his wishes and might have avoided this litigation and the significant costs which the testator's estate will necessarily incur as a result.

**Background Facts – Testator**

6. In many ways, the life and circumstances of the testator reflect the changes that have taken place in this country in the century since he was born. The testator was born in 1921 and was one of twelve children reared on a small farm at Ballahantouragh in County Kerry. He left school at the age of twelve or thirteen and began farming, ultimately inheriting the family farm which comprises 38 acres, from his parents. Some of his siblings emigrated, at least one joined the religious life and the others settled locally, marrying and having children. Although the testator never married, the evidence the court heard suggested that he was an integral part of a large extended family and was in regular contact with many of his siblings and his nieces and nephews living locally. The 38 acres held by the testator was of mixed quality and, in his active farming days, he was principally a dairy farmer. This is of some significance because as a milk supplier to a local creamery which ultimately became part of Kerry Co-Operative, he was allocated shares in Kerry Co-Operative from time to time from its foundation in 1973.

7. By all accounts, the testator lived a simple life. He resided in the same four-roomed house in fairly basic circumstances for all of his life. The house did not have running water until he was very elderly. Although he had electricity, he preferred to cook potatoes over an open hearth. The testator did not drive and, in his early years, he brought his milk to the creamery by horse and cart. He subsequently came to depend on his nephews for lifts to the creamery and to local marts and in his later years for transport to medical appointments and such like. In the years immediately preceding his death, he lived locally with his sister and latterly a nephew and although he no longer maintained an active dairy herd, he still attended regularly at his farm.

8. The testator lived frugally on the income received from the sale of milk and of stock. However, this simple lifestyle belied the fact that he was financially very secure. The share interest and dividends he received from Kerry Co-Operative and latterly from Kerry Group plc accumulated in the bank and at the time of his death, he had some €83,339 in various bank accounts in addition to his shareholdings. When valued for Revenue purposes in 2015, the testator's estate was given a total value of €649,498 including the farm and its assets valued together at €136,400. It is likely that the estate was undervalued as the 390 Kerry Co-Operative shares were given their face value for a total of €39,000. By the time of the proceedings, the court was informed by the executor that these shares had a real value of €272,438.

9. Even more striking is the steady increase in the value of the Kerry Group plc shares. In 2015, these were valued at €386,078. In November, 2017, the executor's solicitors wrote to all of those potentially interested in the testator's estate in connection with the issues now before the court, at which time the Kerry Group plc shares were worth €793,248. By the time the proceedings were issued, the Kerry Group plc shares had been valued in May, 2018 at €802,989. Finally, at the hearing of the case, the court was advised that these shares were now worth €1,059,140. As can be seen from this, not only have the

Kerry Group plc shares significantly increased in value since the testator's death, they now represent the asset of major value in his estate. Even according the Kerry Co-Operative shares their current real value rather than their face value, the Kerry Group plc shares are worth nearly two and a half times the value of all other assets in the estate combined. Consequently, the issue of how these shares should be treated is one of real practical significance to all of those who might potentially inherit.

10. The first defendant was clearly close to his uncle and it is obvious that at the time the testator made his will, he intended the first defendant to be his heir and the principal beneficiary of his estate. The first defendant had spent much of his childhood on the farm where his mother had grown up and from the age of about fifteen he spent his weekends working on the farm with his uncle. Once he had his own car, the first defendant drove his uncle to the creamery and to the mart. As an adult, the first defendant called to the farm to see to the cattle on a daily basis and dropped up to the house to see his uncle every other day.

11. The first defendant has sworn affidavits and given oral evidence in the proceedings. He describes having been told by the testator on a number of occasions that he would inherit the land and the shares when his uncle died. These discussions typically occurred when the first defendant made suggestions regarding farm improvements (such as building a slatted unit for cattle or re-seeding a particular field) to which his uncle would respond that he was not going to undertake those changes at that stage of his life but the first defendant would inherit the land and the shares and could do what he liked then as the farm would be his. The most recent of these conversations took place in the year before the testator's death. According to the first defendant, his uncle never mentioned Kerry Group plc shares specifically, referring instead to "the shares" or "all the shares" or the "Kerry Co-Operative shares", although he kept all of his share certificates carefully in a folder in a drawer. The testator also mentioned that his sisters would get the money he had in the bank but never mentioned his sisters inheriting any of his shares.

**Kerry Co-Operative – Kerry Group plc**

12. In order to appreciate the argument made by the first defendant to the effect that the reference in the testator's will to Kerry Co-Operative shares should be read as including Kerry Group plc shares, it is necessary to understand the origins of those two entities and the relationships between them.

13. Kerry Co-Operative was founded in 1973 in response to new market demands arising from Ireland joining the EEC. It is not a limited company being instead registered as a co-operative society under the Industrial and Provident Societies Act, 1893. It encompassed the business of a number of pre-existing creameries and its original membership comprised largely dairy farmers, such as the testator, to whom shares were allocated. Kerry Co-Operative expanded significantly in the following decade and in the early 1980s it diversified its business in response to a downturn in dairy production. This was a very successful move and by the mid-1980s, Kerry Co-Operative was a largescale food producer. This in turn gave rise to structural issues and a recognition that continued expansion would require significant capital investment which would be difficult for Kerry

Co-Operative to raise as a co-operative society. Consequently, in 1986, the members of Kerry Co-Operative agreed to the restructuring of its business through the establishment of a plc, Kerry Group plc, in consideration for which 90 million shares in Kerry Group plc were allocated to Kerry Co-Operative. The rules of Kerry Co-Operative required that it hold at least 50% of the issued share capital in Kerry Group. A public offering of Kerry Group plc shares through the Irish Stock Exchange also took place.

14. Over time, two things became apparent. Firstly, shares in Kerry Group plc were significantly more liquid than those of Kerry Co-Operative as a result of which it was perceived that it would benefit Kerry Co-Operative members to convert part of their shareholding into Kerry Group plc shares. Secondly, Kerry Group plc proved very successful and, as it grew, it required more control over its own affairs. Consequently, Kerry Co-Operative started a process whereby a proportion of individual member's shareholdings in Kerry Co-Operative were cancelled and members were issued with a *pro rata* number of Kerry Group plc shares. This commenced in 1993 with 5% of members' shares being exchanged for Kerry Group plc shares. Once this decision was taken at co-operative level, individual members did not have a choice as to whether they wished to participate. Some 71 of the testator's Kerry Co-Operative shares were cancelled in 1993 and he was allocated 775 Kerry Group plc shares in their place.

15. By 1996, a further share exchange was proposed. The effect of this would be to reduce the Kerry Co-Operative holding in Kerry Group plc below 50% and, consequently, it required a change in the rules of Kerry Co-Operative. This required a vote of the membership and members were provided with information and voting papers. The proposal gained national attention and was the subject of much local discussion and debate. It is not known whether or to what extent the testator, who was already in his 70s by this time, was aware of this debate nor whether he voted on the proposal or how he voted. In the event, the proposal was carried by a significant majority and the rule was altered so as to allow a reduction in Kerry Co-Operative's holding in Kerry Group plc to not less than 20%. This meant that a series of share exchanges could and did take place in 1997, 2002, 2006 and 2007 without further reference to members.

16. Over this period, Kerry Co-Operative effectively changed from being a co-operative society with an active creamery business to being an investment company. The creamery business originally carried out by Kerry Co-Operative is now carried out by Kerry Agri which is a division of Kerry Group plc., although some of Kerry Agri's creamery business in the south-west is carried out in premises formerly occupied by Kerry Co-Operative. Meanwhile, Kerry Group plc grew to become a significant global force in the agri-food sector. Both entities performed extremely well and their shares became valuable assets. In 2011, a further share exchange was proposed which would reduce the Kerry Co-Operative holding in Kerry Group plc below 20% and, consequently, a further rule change entailing a further vote of its members was required. By this time, the testator was 90. Again, the vote was passed and two further share exchanges took place prior to the testator's death, one in 2011 and the other in 2013. The upshot of all of this was that at the time of his death, the testator's shareholding in Kerry Co-Operative stood at 390

shares whereas his shareholding in Kerry Group plc was far more substantial at 8,937 shares.

17. The parties used different terminology to describe what occurred. The first defendant's case is cast in terms of Kerry Group plc shares being substituted for Kerry Co-Operative shares. The second defendant describes the process more colloquially as a share "spin-out" and focuses on the technical nature of the transaction, namely a cancellation of shares in one entity and an allotment of shares in a different entity. Either way, it is clear that on each occasion, Kerry Co-Operative shares were cancelled and Kerry Group plc shares were allocated to members in lieu of the cancelled Kerry Co-Operative shares. Although members of Kerry Co-Operative voted in 1996 and in 2011 to approve the rule changes which facilitated the share exchanges, they did not vote on each of the exchanges as they occurred, save of course that the terms of the exchanges proposed in 1996 and in 2011 were known when members were voting on the rule change. Thus, members of Kerry Co-Operative did not have an individual choice whether to hold onto their existing Kerry Co-Operative shares or, alternatively, to accept Kerry Group plc shares on each occasion that the share exchanges occurred. The share exchanges were effectively mandatory although envisaged and facilitated by the rules changes which the membership as a whole supported.

18. For present purposes, the significance of the relationship between the two Kerry companies lies in the argument made by the first defendant that, in the mind of the testator, Kerry Co-Operative and Kerry Group plc were interchangeable entities such that he viewed his entire shareholding as a Kerry Co-Operative shareholding notwithstanding that some of those shares had been cancelled and replaced by Kerry Group plc shares. Two expert witnesses canvased their opinions as to the extent to which an elderly farmer would appreciate the distinction between the two companies. Mr. Foley, on behalf of the first defendant, felt that most farmers in this category would not understand the special tax treatment nor be concerned with the different markets for selling the respective shares unless they were actively involved in the disposal of shares. They might be generally aware that they had "old" shares and "new" shares but, in his experience, their primary concern was knowing the bottom line, how much income they had and how much tax they had to pay. On the other hand Mr. Madden, who gave evidence on behalf of the second defendant, emphasised the distinction between the two companies evident through a range of factors impacting on the way in which a farmer would receive dividends or share interest, the way in which tax would have to be paid on those dividends or that share interest and the way in which the shares could be disposed of. In his view, farmers did know the difference between the two entities. Further, as a member of Kerry Co-Operative, the testator would have received notification of the proposed rule change and would have been entitled to vote on it in both 1996 and 2011. In particular, Mr Madden felt that there was huge local interest in the proposed rule change in 1996 and it would have been a major topic of conversation in the farming community in which he lived such that it would be very difficult for him to have been unaware of it.

19. Legally, Kerry Co-Operative and Kerry Group plc are two distinct entities having a different legal status and serving different economic purposes. Mr. Madden stressed these differences, the most important of which is that Kerry Group plc is a publically quoted company and its shares are readily traded on the stock exchange whereas Kerry Co-Operative shares can only be traded informally on what is described as the "grey market". Dividends are paid on Kerry Group shares whereas share interest is paid on Kerry Co-Operative shares and the timing and frequency of the payment varies as between the two entities. According to Mr Madden, these differences are evident from the testator's own accounts which show receipt by him of both share interest and dividends separately. Further, the testator's accounts show that he sold a tranche of his Kerry Group plc shares through the stock exchange in 2000. In fact, the testator engaged in a complicated transaction described as a "B and B" transaction whereby he sold and then re-purchased Kerry Group plc shares up to the value of his tax free allowance in 1999 in order to reduce the capital gains tax liability on the sale of an equivalent number of shares the following year. This transaction was handled for the testator by his nephew, an accountant, but in Mr Madden's view it would necessarily have required some discussion with the testator as regards his Kerry Group shareholding.

20. Whilst legally distinct, there is nonetheless a significant relationship between the two entities, not least reflected in Kerry Co-Operative's continued shareholding in Kerry Group plc. In addition, in earlier times the two entities shared premises and personnel and there was an overlap in directors, although more recently this no longer occurs. Further, the corporate branding used by the two entities was, at least during the testator's lifetime, very similar. The court was struck by the similarity in letterhead, presentation and style of the documents and correspondence emanating from the two entities which, at the very least, suggested a connection between the two and may even have had a greater capacity to confuse.

21. Finally, the court's attention was drawn to the provisions of s. 701 of the Taxes Consolidation Act, 1997, as amended. This section provides for the corporation tax and capital gains tax treatment of certain shares acquired by individuals pursuant to a share transfer taking place after 6th April, 1993. The transfer must be one made by a "society" of shares in a company of which the society has or has had control. The society must be one registered under the Industrial and Provident Societies Act, 1893 and must be an "agricultural or fishery society" which is defined under s. 133(1)(a), as amended. Amongst the conditions which must be satisfied by an agricultural society in order to come within the scope of s. 701, is that all or the majority of its members are mainly engaged in agriculture.

22. Section 701(4) provides that for the purposes of capital gains tax:-

*"(a) the cancellation of the original shares (or the appropriate number of those shares) shall not be treated as involving any disposal of those shares, and*

*(b) each member shall be treated as if the shares transferred to that member in the course of the transfer were acquired by that member at the same time and for the*

*same consideration at which the original shares (or the appropriate number of those shares) were acquired by that member…"*

Although the provision cited above comes from the Taxes Consolidation Act, 1997, it reflects an earlier provision which had been introduced in 1993 to facilitate share exchanges of this nature. As there is a very limited cohort of societies involved in the exchange and transfer of shares in a manner which comes with the scope of s. 701, it is not difficult to extrapolate that the Oireachtas intended that this special tax treatment would apply to the process commenced by Kerry Co-Operative in 1993.

23. Significant reliance was placed by the first defendant on s. 701. It was argued that the effect of s. 701 was that the testator was deemed to have acquired his Kerry Group plc shares at the time at which he in fact acquired his Kerry Co-Operative shares. Thus, it was contended that the deceased was deemed to have Kerry Group plc shares at the time he made his will, although he did not actually have them at that time. This contention is disputed on behalf of the second defendant who argues that the provisions of s. 701(4) are specifically for the purposes of the capital gains tax treatment of the shares disposed of and acquired in a share exchange and that the section does not operate so as to deem Kerry Group plc shares to have been acquired at the time of acquisition of Kerry Co-Operative shares for any other purpose.

**The Testator's Will**

24. The relevant portions of the testator's will provide as follows:-

*"I give, devise and bequeath my dwelling house and farm of lands at Ballahantouragh aforesaid together with all the stock, crops, farm machinery, furniture, chattels and Kerry Co-Operative shares and effects therein and thereon to my nephew Thomas O'Connell of Cordal East, Castle Island aforesaid absolutely.*

*All the rest residue and remainder of my estate, assets and effects of whatsoever nature or kind or wheresoever situate of which I may be seized or possessed at the time of my death I give, devise and bequeath to my sisters Margaret Hanratty, Nora Bastible, Kathy O'Connell, Mary O'Connell, Hanna O'Donoghue, Theresa Riordan, Breda Murphy, Elizabeth Cronin and Sister Benedict Cronin and my brothers Lawrence Cronin and Michael Cronin in equal shares absolutely and I appoint them my residuary legatees and devisees."*

**Submissions of the Parties:**

25. The central issue in these proceedings is the interpretation of the testator's will to ascertain whether the gift of Kerry Co-Operative shares in the terms in which it is expressed in the will covers the Kerry Group plc shares of which the testator was possessed at the date of his death. An initial argument in the first defendant's written submissions that the phrase "Kerry Co-Operative shares and effects therein and thereon" was intended to encompass something more than the shares themselves was not seriously pursued at trial. In any event, a more natural reading of the language used in the will, bearing in mind that it was prepared by a solicitor, suggests that "therein and thereon" is primarily a reference back to the earlier gift of the dwelling house and

farmland in the same paragraph. I do not think that the words "therein and thereon" are in themselves sufficient to enlarge the gift of Kerry Co-Operative shares so as to include any additional shareholding that the testator subsequently acquired.

26. Instead, the argument made by the first defendant was twofold. Firstly, it was contended that as the share exchanges which resulted in the testator being possessed of Kerry Group plc shares rather than Kerry Co-Operative shares reflected the outcome of an external process into which the testator had no input and over which the testator had no control, those shares should be treated as having been substituted for the Kerry Co-Operative shares which the testator clearly intended to gift to the first defendant. It was accepted that Kerry Co-Operative and Kerry Group plc are legally distinct entities but contended that this would not be readily apparent to a person in the testator's position. The first defendant went so far as to assert that the testator did not understand the distinction between Kerry Co-Operative and Kerry Group and that, as far as he was concerned, he simply had Kerry Co-Operative shares. Secondly, it was contended that the change in circumstances resulting from the change in the testator's shareholding created an ambiguity as regards the scope of the intended gift to the first defendant in the testator's will. Consequently, it was urged that extrinsic evidence should be admitted under s. 90 of the Succession Act, 1965 to clarify that the intention of the testator was to leave his entire shareholding to the first defendant. The first defendant did not contend that there was a contradiction on the face of the will but, rather, that such evidence should be admitted to assist in its construction. In this regard, it was strongly argued that it did not follow from the absence of any reference to Kerry Group plc in the will that the testator intended these shares to fall into the residue of his estate.

27. The second defendant argued against the admission of oral evidence in respect of the testator's intention on the basis that the will was clear in its terms. The failure to address an asset subsequently acquired did not amount to a contradiction nor give rise to any ambiguity or lack of clarity such that extrinsic evidence would be required to assist in the construction of the will. The second defendant relied on s. 89 of the Succession Act and the principle that a will is to be construed and to take effect from the date of death of the testator. Therefore, the court should not look firstly at the changes which had taken place to the testator's property since the date of the will in order to ascertain whether an ambiguity arose. Instead the court should look at the will itself and the assets held by the testator at the date of his death. Further, the second defendant emphasised that the intention the court is seeking to ascertain is the intention of the testator as expressed in the will. The first defendant had conceded that when executing his will in July, 1990, the testator did not intend to leave him Kerry Group plc shares as, at that time, he did not possess any Kerry Group plc shares. Extrinsic evidence could not be admitted to show what the testator's intention might have been on a date subsequent to the execution of the will in relation to an asset acquired after the date of the will and not mentioned in it. In summary, the second defendant contended that the court was not being asked to construe the testator's will but to reconstruct the testator's will to take account of assets subsequently acquired which are not expressly dealt with in the will itself. This, it was argued, was simply impermissible.

28. For completeness, ss. 89 and 90 of the Succession Act, 1965 provide as follows: -

*"89.—Every will shall, with reference to all estate comprised in the will and every devise or bequest contained in it, be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears from the will.*

*90.—Extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will."*

**Interpretation of Will – Presumption Against Intestacy**

29. Before looking at the admissibility of extrinsic evidence, I propose to deal briefly with a point made by the first defendant, albeit somewhat in passing, that a will should be construed so as to avoid an intestacy. The logic of this presumption flows from the inference that any testator who goes to the trouble of making a legally valid will does not, in principle, intend that his estate should be dealt with as if he had died intestate. The presumption is given statutory expression in s.99 of the Succession Act 1965 but in terms which refer to "the purport of a devise or bequest" admitting of more than one interpretation. In this case the testator made a will which, had he died just after he had made it in 1990, would have been effective to dispose of the entire of his estate in accordance with his intentions as expressed in the will. The will gave specific gifts to the first defendant and then gifted the entire of the residue to a group of residuary legatees. Generally, an intestacy or partial intestacy should not arise where the will includes a valid gift of the entire of the residue of an estate. However, in this case because 7 of the 11 siblings named as residuary legatees pre-deceased the testator and the residuary gift did not specify what was to happen with the portion gifted to any such pre-deceased legatee, a partial intestacy arose as regards seven-elevenths of the residue. In this context the first defendant suggests that the court should lean against construing the will so that the Kerry Group plc shares fall into the residue as it would follow that a significant portion of the shares would then by distributed by way of partial intestacy.

30. I am not convinced that the presumption operates in this manner. In this regard I note that s.99 talks in terms of favouring an interpretation under which a devise or bequest is operative where more than one interpretation of that devise or bequest is possible. It does not appear to require that an interpretation of a particular devise or bequest be preferred in order to ensure that a different devise or bequest is or remains operative. What the first defendant suggests is that because the death of some of the residuary legatees has created a partial intestacy in respect of the gift of the residue, the gift of the shares should be read in a particular way so as to prevent them falling into the residue. However, there is no ambiguity in the gift of the residue. There is an omission to deal with certain circumstances which have occurred which has had an impact on the distribution of the residue. It is not suggested that there is an alternate reading of the residuary gift available which would prevent the partial intestacy.

31. The real issue before the court is whether the specific gift of Kerry Co-Operative shares includes the subsequently acquired Kerry Group plc shares or alternatively whether those

shares fall into the residue of the estate. In my view it is largely coincidental that a significant portion of the residuary gift will now be distributed on a partial intestacy. This has not come about by virtue of the manner in which the gift of shares is expressed in the will nor how it might be construed by the court. Had the will not included a broadly expressed residuary gift, the position might be different. For example, had the gift to the siblings been described as including only the money held by the testator at his death, then an argument that the presumption against intestacy should operate so as to construe the reference to Kerry Co-Operative shares as including Kerry Group plc shares would be commensurately stronger as the alternative would be that a significant portion of the testator's estate would simply fall outside the ambit of his will altogether - which is presumed not to have been intended. That is not the situation here. Instead the court is trying to determine which gift a particular asset falls into in circumstances where the entire of the testator's estate is, *prima facie*, disposed of by his will. In my view it would be artificial to approach that task on the basis that the terms of the will should be construed against the residual gift because a number of the residuary legatees have since died. It would also be unfair to the surviving residuary legatees to have any gift to them affected by altering the construction of a different gift because of the happenstance of the death of some of the residuary legatees.

**Interpretation of Will - Extrinsic Evidence**

32. At the end of the first day of the trial, the court ruled on the first defendant's application to adduce evidence under s. 90 for the purpose of showing the testator's intention. The court accepted that an arguable case had been made out that there was an ambiguity arising as a result of events which had taken place since the date on which the will was executed. However, it was not possible to determine whether this ambiguity was such as to warrant the admission of extrinsic evidence without hearing the evidence itself. Therefore, I ruled that the court would hear the proposed evidence *de bene esse* and defer a formal ruling on its admission to this judgment. In that context I had been referred to and was mindful of the fact that whilst a similar approach was adopted in *Shannon v Shannon* [2019] IEHC 400 and oral evidence heard *de bene esse*, MacGrath J. ultimately decided not to admit that evidence, commenting:

> *"In my view, if anything, to admit extrinsic evidence in this case may have the contrary effect of introducing ambiguity into the terms of the will where they are otherwise clear on their face."*

33. The court was addressed on a large number of authorities in which extrinsic evidence had been rejected or, alternatively, admitted by the courts. The leading and most authoritative case in the field is *Rowe v. Law* [1978] IR 55 in which the Supreme Court adopted what might be considered a narrow reading of s. 90, the effect of which is apparent from the summary contained at p. 73 of Henchy J.'s judgment, as follows:-

> *"To sum up: s. 90 allows extrinsic evidence of the testator's intention to be used by a court of construction only when there is a legitimate dispute as to the meaning or effect of the language used in the will. In such a case (e.g. In re Julian) it allows the extrinsic evidence to be drawn on so as to give the unclear or contradictory*

*words in the will a meaning which accords with the testator's intention as thus ascertained. The section does not empower the court to rewrite the will in whole or in part. Such a power would be repugnant to the will-making requirements of s. 78 and would need to be clearly and expressly conferred. The court must take the will as it has been admitted to probate. If it is clear, unambiguous, and without contradiction then s. 90 has no application. If otherwise, then s. 90 may be used for the purpose of giving the language of the will the meaning and effect which extrinsic evidence shows the testator intended it to have. But s. 90 may not be used for the purpose of rejecting and supplanting the language used in the will."*

I accept the argument made on behalf of the first defendant that it is not necessary for there to be a contradiction on the face of the will for extrinsic evidence to be admissible. The section envisages that such evidence may be admitted to assist in the construction of a will. A legitimate dispute as to the construction of a will may arise where any of characteristics listed in *Rowe v Law* is absent, namely whether a will is clear, unambiguous and without contradiction. These are not cumulative requirements but rather illustrate of the types of circumstances in which extrinsic evidence may be appropriate to assist a court in the construction of a will. I accept that ambiguity may arise because of a change in circumstances since the will was made giving rise to an issue as to the meaning or effect of the language used. That may be a change in the testator's circumstances or in those pertaining to a beneficiary or the assets the subject of a gift. Thus, in principle extrinsic evidence is admissible in this case because of the significant change in the testator's assets since he made his will giving rise to some uncertainty as to how the will should be construed. However, this does not however dispose of the difficult issue raised by the second defendant as to the precise purpose for which such evidence can be admitted.

34. It is interesting to note that Henchy J. had framed the issue in *Rowe v Law* in terms which are not dissimilar to the issues arising in this case (from p. 69 of the report): -

*"…where there is a clear and unambiguous disposition in a will of portion only of a fund, and there is extrinsic evidence available in a court of construction to show that the testator really intended to make a disposition of the whole of the fund, does s. 90 of the Succession Act, 1965, allow the court of construction to use that extrinsic evidence for the purpose of superseding the clearly expressed intention in the will?"*

The court answered that question in the negative, although there was a strong dissenting judgment from O'Higgins C.J. The analogy is not exact for two reasons. Firstly, as Henchy J. subsequently points out, if extrinsic evidence had been permitted to advance the construction contended for by the appellants, it would, in his view, have enabled "*the court to rectify the will by giving testamentary effect to a disposition which is not to be found in the will and which actually conflicts with the disposition in the will*". In this case, although the construction urged on behalf of the first defendant would enable effect to be given to a disposition which is not expressly found in the will, it would not actually conflict

with any express disposition in the will. Secondly, on the facts in *Rowe v. Law*, there was no material change to the testator's estate between the date on which she made her will and the date on which she died. Consequently, her intention as expressed in her will related to essentially the same assets that were admitted to probate as part of her estate on her death. Here, the court is asked to construe the testator's intention expressed in respect of a particular asset of which he was in possession at the time he made his will as extending to cover a different but related asset of which he was not in possession at the time he made his will.

35. It is this latter feature of the case which makes it particularly problematic. Almost all of the authorities to which the court has been referred concern cases in which it was contended that either the beneficiary of a gift (Bennett v. Bennett (Unreported, 24th January, 1977, Park J.); In Re *Tomlinson, Lindsay v. Tomlinson* (Unreported, 13th February, 1996) and *Marren v. Masonic Haven Ltd* [2011] IEHC 525)) or the gift itself (*In Re Collins, O'Connell v. Bank of Ireland* [1998] 2 IR 596 and *Gibb v Flynn* (Unreported, Barron J., 21st December 1983)) had been misdescribed in a manner which, in most of the cases, would have made it impossible to give any effect to the gift at all. In each of those cases (save *Gibb v Flynn* where it was deemed unnecessary), extrinsic evidence was admitted to show what the testator actually intended by the language used in the will. Invariably the extrinsic evidence related to the description of property or identity of persons in existence and known to the testator at the time the will was made and therefore property or persons in respect of whom the testator clearly intended to express a testamentary intention. Other cases referred to concerned a mistake of fact clearly evident in the terms of a condition to which a gift was subject (*Corrigan v. Corrigan* [2007] IEHC 367) and a very clear contradiction in the terms of the will such that all of the clauses could not simultaneously be given effect (*Lynch v. Burke* [1999] IEHC 22). None of the cases dealt with the presumed intention of a testator in respect of an asset of which he had not been in possession at the time the will was made.

36. The underlying theme running through these cases – misdescription and mistake - brings into focus the argument made on behalf of the second defendant to the effect that there is no legal basis for introducing extrinsic evidence to show what the intention of the testator might have been as regards an asset which he did not own at the time he prepared his will and in respect of which he does not purport to make any disposition in his will. There is certainly a difference of substance between saying that the words used were intended to mean something other than what they apparently say and that the words used indicate that the testator would have had a specific intention as regards something which is not mentioned at all. It was a central plank of the second defendant's case that the intention in respect of which evidence could be admitted under s.90 could only be the intention of the testator as of the date of the will, in other words what the testator actually meant by the words used. It was not suggested that a testator could not have an intention at the time of making a will in respect of assets that he might acquire in the future. However, where a gift in a will is not expressed in terms which encompass future assets of the type being gifted, it cannot be said that the testator has an intention in relation to them.

37. As noted, oral evidence was heard from three witnesses, the first defendant, Mr. Chris Foley, an accountant and tax advisor called as an expert witness by the first defendant, and Mr. David Madden who has 40 years' experience in the preparing of accounts for farmers, albeit without a formal accountancy qualification, called by the second defendant. The evidence of the two expert witnesses was of considerable assistance to the court in understanding the origins and development of both Kerry Co-Operative and Kerry Group plc. However, their evidence as to what the testator may or may not have understood as regards these entities and his shareholdings in them was necessarily speculative since neither of them had ever met the testator in either a personal or a professional capacity. Mr Foley felt that a farmer of the testator's age and background would probably not have been aware of or understood the difference between the two companies and their shareholdings, but that this would vary on a case by case basis depending on the farmer. Mr Madden believed that a farmer in the testator's position would be aware of the distinction, not least because the share exchanges and the gains people made were major topics of conversation locally. The testator's own accountant, also a nephew of his, was not called.

38. Having considered the evidence, particularly that of the first named defendant, I have come to the conclusion that it is not necessary for me to formally rule on whether it should be admitted under s. 90. This is because I do not find that evidence, even taken at its height, to constitute compelling evidence as to the testator's intention in relation to the disposition of an asset which he did not own at the time he made his will. In my view, as the evidence does not establish on the balance of probabilities that the testator actually had the intention contended for, the question of whether the language used should be construed to give effect to this intention does not arise. This is not to say that I found Mr. O'Connell to be anything less than a truthful witness. I accept that he honestly believes that his uncle intended to leave the Kerry Group plc shares to him as part of "all of the shares" which his uncle owned at the date of his death. However, Mr. O'Connell's belief as to his uncle's intention is of limited evidential value where the basis for that belief as recounted in his evidence does not possess the necessary probative quality to displace the plain meaning to be deduced from the text of the will. This is for the following reasons.

39. The evidence of the first defendant amounts in substance to having been told by his uncle on a number of occasions that his uncle intended to leave his farm and his shares to him so that when he inherited he would have sufficient funds to carry out whatever work he wished on the farm. As it happens, leaving aside the Kerry Group plc shares altogether, the testator's will achieves this. In addition to the farm and the farm assets, the first defendant inherited Kerry Co-Operative shares with a current value in excess of €250,000. In other words, reading the words "Kerry Co-Operative shares" as being limited to Kerry Co-Operative shares is not inconsistent with the sentiments expressed by the testator, namely that his nephew should not just inherit the farm but that he would also, through the shares, have sufficient funds to make improvements to the farm. Consequently, comments made generally by the testator during the course of his lifetime about the contents of his will in circumstances where he had provided generously for the

nephew to whom he was speaking, cannot be read as reflecting any contrary intention to that expressed in his will.

40. Insofar as the first defendant recalls his uncle saying to him that he was leaving the money in his bank accounts to his sisters, that statement is only partially accurate. Firstly, the residuary gift is expressed in terms which are broader than simply a reference to cash or bank accounts. In fact, neither cash nor bank accounts are mentioned at all although they are necessarily incorporated in the gift of "*all the rest residue and remainder of my estate, assets and effects of whatsoever nature or kind*". Further, the pool of residuary legatees consisted not just of the testator's sisters but all of his siblings including two brothers. Again, this is not to suggest that the first defendant's evidence was untruthful in any way; rather his uncle's comments did not accurately reflect the terms of the will that he had made. Even though making a will is an important and serious step, sometimes people do not remember the full detail of all the testamentary choices they have made, especially over the passage of time. For various reasons people may choose to be vague about their financial affairs even to those closest to them, for example here the testator never told the first defendant how much money he had in the bank. On occasion people may even misrepresent the contents of their wills or of changes made to wills, knowing that they will not have to live with the consequences. Whilst there is no reason to believe that this testator was being anything other than honest in his discussions with his nephew, at the same time he was not entirely accurate. It is not possible at this stage to know whether that was as a result of deliberate vagueness or simply not remembering accurately the terms of his own will.

41. Finally, it is notable and, indeed, stands to the first defendant's credit that he does not assert that the testator ever made any specific comment to him about Kerry Group plc shares. It is argued on the first defendant's behalf that this indicates the testator did not appreciate the distinction between his Kerry Co-Operative shares and his Kerry Group plc shares. I have some difficulty accepting that proposition, for which there is no direct evidence. In short, it is simply not possible for the court to conclude on the evidence that the testator was unaware either that he possessed Kerry Group plc shares or that the Kerry Group plc shares he possessed were materially different to his Kerry Co-Operative shares. The testator as a member of Kerry Co-Operative would have received information and correspondence at the time votes were taken in 1996 and in 2011. Although he was been very elderly by 2011, he was still actively farming and in his early 70s in 1996. Subsequent to each of the share exchanges, he received share certificates from Kerry Group plc which he kept carefully; he received both share interest from Kerry Co-Operative and dividends from Kerry Group plc with matching documentation and correspondence from both of those entities. The interest and dividends are recorded as part of his annual income in the tax returns exhibited in the proceedings as is documentation evidencing the sale of Kerry Group plc shares by the testator in 2000. In light of all of this evidence, the court cannot conclude that just because the testator never mentioned Kerry Group plc shares to the first defendant and referred generically to "my shares" or "all the shares", he was necessarily unaware of the fact he had shares in that company or that it was distinct from his shareholding in Kerry Co-Operative. To

paraphrase somewhat – an absence of evidence of awareness is not the same thing as evidence of the absence of awareness. In addition, for the court to infer that the testator was unaware of the distinction between the two entities, it would have to conclude that the testator paid no heed to documentation provided to him, the important elements of which were kept by him, over 20 years.

42. Of course, it might equally be said that on the basis of this evidence the court could not definitively conclude that the testator was aware of all of these matters. This is true, but certainty is not required. The purpose of s. 90 is to admit extrinsic evidence of the testator's intention in order to assist in the construction of a will where there is an ambiguity or contradiction in its terms. In my view, such evidence must be capable of establishing the contended for intention on the balance of probabilities. While the section does not place any limit on the type of evidence which might be admitted, it would be difficult for a court to infer a positive intention from an absence of evidence of the testator's views regarding a salient fact. There is a significant difference between finding that a testator may not have been aware of an asset and, consequently, did not make express provision for that asset in his will and finding that a testator may not have been aware of an asset and, consequently, must be taken as having intended to include that asset in the specific disposition of a different asset under his will. Extrinsic evidence under s.90 is to be admitted to show the intention of the testator. A lack of awareness of an asset or a lack of appreciation of its financial or other significance, is not of itself evidence of intention in relation to it.

43. However, as I have indicated above, the evidence before the court is simply not cohesive enough to allow the court conclude, without a considerable degree of speculation, that the testator was unaware of his Kerry Group plc shareholding or of its distinct nature from his Kerry Co-Operative shareholding such that he necessarily intended the gift to the first defendant to include both. Consequently, I do not find myself in the same position as Barron J. in *O'Connell v Bank of Ireland* [1998] 2 I.R. 596 where he acknowledged, having heard extrinsic evidence, that the testator intended to leave the plaintiffs a gift which was not expressed in her will. In her will the testator left the plaintiffs the contents of a house, but not the house itself, which was not otherwise mentioned in the will and consequently passed with the residue. Barron J. held that evidence explaining how that might have come about was inadmissible as there was no ambiguity or lack of clarity in the terms of the will itself. Equally there was no suggestion that what appeared in the will did not reflect the intentions of the testator. Rather, the intention of the testator as regards the plaintiffs was frustrated by the omission from the will of any reference to the gift she had planned to make. I am not in a position to make a similar finding that this testator intended to leave his Kerry Group plc shareholding to the first defendant. If he did, it may well be that his intention was frustrated by omission – i.e. the failure to draft the will to provide a sufficiently inclusive gift of shares or the failure to make a codicil when the testator came into possession of the shares. However, even on this analysis, the authority of *O'Connell v Bank of Ireland* suggests that the court could not admit extrinsic evidence to establish the intended gift.

44. In circumstances where I do not find the evidence given by the first defendant or the expert witnesses to be of sufficient probative value to enable the court to reach any conclusion regarding the testator's intention, it is not necessary to formally rule as to whether that evidence should be admitted. This might be regarded as incongruous in circumstances where a considerable portion of this judgment has been taken up with the discussion of that evidence. However, I am expressly reserving my position on this because I acknowledge that there is a significant legal dispute between the parties as to whether extrinsic evidence under s. 90 should ever be admitted to show the intention of the testator other than on the date he executed his will. The second defendant argues, strongly, that although the will speaks from the date of death, it is the intention of the testator on the date he executed the will, and only on that date, which is relevant. The first defendant contends that because the will speaks from the date of death, it is the intention of the testator at the date of his death which is relevant. The determination of that issue should await a case in which the evidence, if admitted, would have a meaningful impact on the outcome of the case.

**Change in Property disposed of by Testator**

45. Although the first defendant's case is primarily based on the need for extrinsic evidence to assist in the construction of an ambiguous will, his second argument is not dependent on that evidence and can be considered on a standalone basis. The first defendant contends that the gift to him of Kerry Co-Operative shares should be read as including the Kerry Group plc shares because the issuing to the testator of the Kerry Group plc shares in lieu of his cancelled Kerry Co-Operative shares resulted from transactions over which the testator had no control. This position is materially different to circumstances in which a testator might chose to sell shares which he held at the time of making a will and to use the proceeds of sale to purchase a different stock of his choosing. Consequently, the Kerry Group plc shares should be regarded as having been partially substituted for the Kerry Co-Operative shares mentioned in the will. The second defendant disagrees and argues that the circumstances of this case do not conform with the limited circumstances in which courts have found that notwithstanding a change to specific property which is the subject of a gift in a will, the property remains substantially the same thing so as to prevent the doctrine of ademption applying.

46. In normal course, where a testator makes a gift in his will of a specific item of property which no longer exists or which he no longer owns at the date of his death, the gift will fail and is said to be adeemed. To determine whether a gift has been adeemed, the court must construe the terms of the will to ascertain exactly what the testator intended to leave. In particular, a court must look to the extent to which the phrasing of the gift by the testator can be taken to have contemplated a change in the form of the property the subject of the gift. Obviously, a gift that is phrased generally will be far less likely to be held to have been adeemed than one which is phrased specifically. Had this testator simply left his "shares" to the first defendant no issue would arise just because some of the shares he held at his death were not the same as those he held at the date of the will. Much of the case law to which the court was referred on this topic dealt with gifts of stocks and shares and the consequences of structural alterations to the underlying

investments and companies in which a testator held those shares. The parties urged on the court differing interpretations of two of those cases, namely, *Slater v. Slater* [1907] 1 Ch 665 and *Jenkins v. Davies* [1931] 2 Ch 218. However, the starting point for considering both of these cases is the earlier decision of *Oakes v. Oakes* (1852) 9 Hare 666.

47. In *Oakes v. Oakes*, which shares some factual similarities with the present case, the testator's will bequeathed to the plaintiff all of his Great Western Railway shares and all other railway shares of which he was possessed at the date of his death. At the time he made his will, the testator owned various classes of Great Western Railway Company shares. Between the date of the will and the date of the testator's death, the Great Western Railway Company (with the approval of its members) exercised a statutory power to convert its shares into capital stock so that, on his death, most of the testator's original shareholding in the Great Western Railway Company had been converted into stock in the same company. The testator had also bought additional stock after the date of the will. It was not known if the testator had attended the meeting at which the resolution was passed. The issue before the court was whether the original gift was a specific gift of shares which had been adeemed or, alternatively, whether the gift of railway shares covered the stock in the same company owned by the testator at the date of his death. Firstly, the court held that the word "shares" in its ordinary meaning did not include stock (its decision on this issue was overturned by subsequent case law and indeed that distinction is not one with any particular resonance in modern times). However, a distinction was drawn between the stock which had been purchased by the testator subsequent to the date of his will and which did not pass as part of the gift and the stock which represented his original shareholding, which did. The difference was explained by Turner V.C. as follows: -

> *"So, in this case, the testator had this property at the time he made his will, and it has since been changed in name or form only. The question is whether a testator has at the time of his death the same thing existing – it may be in a different shape – yet substantially the same thing.*
>
> *I think that the £7,000 exists in the same state substantially as it existed at the date of the will and that it passed under the bequest. I think the present case is more strong in favour of that construction, inasmuch as it is not shown that the testator in any respect concurred in the conversion of the shares into stock."*

The test posited by the court was whether the gift had changed in name or form only such that it was substantially the same thing. However, it is apparent that the court also regarded it as important that the testator had not personally been responsible for or concurred in the conversion of the shares into stock.

48. The application of this test in subsequent cases ensured that gifts were not adeemed where the following changes had taken place between the date of a will and the date of the death of the testator: the sub-division of shares (*Re Pilkingtons Trust* [1865] 6 New Rep 246; *Re Greenbury* [1911] 55 Sol. Jo. 633); shares held in a bank which merged with

another bank (*Re Clifford* [1912] 1 Ch. 29); shares held in a company which was wound up but reconstructed and reincorporated in the same name (*Re Leeming* [1912] 1 Ch 828).

49. The strictness with which the test has been applied seems to have varied from time to time and not always with a clear rationale for the distinction between cases. However, drawing on the last sentence of the passage from *Oakes v. Oakes* quoted above, courts appear to have placed some emphasis on the extent to which the testator exercised an element of choice or control over the changes made to the original shareholding. Thus, in In *Re Lane, Luard v. Lane* [1880] 14 Ch D 856 when debentures which a testator held at the date of his will became payable, the testator accepted the company's offer of an option of converting them into an equivalent amount of debenture stock rather than accepting payment. In holding that the gift of debentures did not cover the debenture stock, the court relied not only on the differences between the two but also on the fact that the testator had made a choice in accepting the debenture stock offered. Hall V.C. stated: -

> *"I do not think that Oakes v. Oakes governs this case. It appears to me that this will is not sufficient to pass the new thing which the testator acquired and which he took in exercise of his option instead of the thing which he had bequeathed by his will. I hold it to be a substantially different thing from that which he gave, and that it does not answer the description contained in the will."*

50. The second defendant relies on *Slater v. Slater* (above) to argue that the shares in Kerry Group plc, being a completely different company, do not pass as part of the gift of Kerry Co-Operative shares under the will. That case was argued on the basis that ademption depended on the presumed intention of a testator to deprive the legatee of the thing which had been gifted to him, so that where the nature of thing had been changed by legislation and not by any act of the testator, ademption did not occur as no intention to deprive could be shown. The testator had left the interest arising from money invested in Lambeth Water Company to the plaintiff. Between the date of the will and the testator's death, the Lambeth Water Company was acquired by the Metropolitan Water Board under statute and stock in the water board was issued to the testator as compensation for the stock previously held by him in the water company. The statute under which the undertaking of the water company was vested in the newly created water board allowed the water company to accept stock in lieu of cash by way of payment. The Lambeth Water Company prepared a scheme which was notified to its members and, under the terms of that scheme, water board stock was issued to the testator. Once the water company had made its choice, individual members of the water company did not also have a choice between accepting compensation in cash or in the form of water board shares.

51. The Court of Appeal held that the gift could not be applied to the Metropolitan Water Board shares in the testator's possession at the time of his death. Firstly, Cozens-Hardy M.R. rejected the proposition that ademption could not apply where the change to the

property had been brought about by a process external to the testator's own choice or actions, stating: -

> "*There was a time when the courts held that ademption was dependent on the testator's intention, on a presumed intention on his part; and it was therefore held in old days that when a change was effected by public authority, or without the will of the testator, ademption did not follow. But for many years that has ceased to be law, and I think it is now the law that where a change has occurred in the nature of the property, even though effected by virtue of an Act of Parliament, ademption will follow unless the case can be brought within what I may call the principle of Oakes v. Oakes…*"

Thereafter, the *Oakes* test was applied with Cozens-Hardy M.R. asking the rhetorical question "*where is the thing which is given*?" and reaching the firm conclusion that the stock held by the testator at his death was not the same thing as that the subject of the gift in the will. Of course, the second defendant here also argues that, on the facts of this case, "*the thing*", namely, the Kerry Co-Operative shares still exist with a number of such shares being held by the testator at the time of his death so that the gift of these shares has not failed and is not adeemed. The other members of the court agreed, with Sir Gorrell Barnes P. speaking in terms of the "*absolute annihilation or extinction*" of the testator's interest in the water company and the compensation awarded being *"an allotment of different stock in a different concern".*

52. The first defendant argues that the subsequent decision of *Jenkins v. Davies* (above) conflicts with the decision in *Slater v. Slater* and, without quite going so far as to suggest that *Slater* was overruled, suggests that by reason of its factual similarity *Jenkins* should be preferred. In *Jenkins*, the testator left all of the monies he had invested in the *Swansea Harbour Trust* on certain trusts. Subsequent to the date of the will the undertaking of the Swansea Harbour Trust was vested by statute in the Great Western Railway Company and the statute provided that stock in the railway company should be issued "*in substitution*" for Swansea Harbour stock. Section 12 of the relevant statute provided that references in "*any Act of Parliament, deed, will, codicil, book, document, instrument or writing*" to Swansea Harbour Trust stock "*shall be deemed to be a reference to the stock of the company… substituted therefore*" (i.e. Great Western Railway Company stock). The Court of Appeal held that the bequest operated to pass the substituted Great Western Railway stock under the will. The first defendant argues by analogy that Kerry Group plc shares should be regarded as having been issued in substitution for Kerry Co-Operative shares and the gift construed so as to pass those shares to the first defendant.

53. In urging that *Jenkins* should be preferred to *Slater*, the first defendant relies on the fact that, as in *Jenkins*, the testator here had no control over the change in the structure of the company nor any choice over the form in which he received compensation for his cancelled shares. This, it is argued is a distinction between *Jenkins* and *Slater* that makes the former more relevant to this case. However, on a close reading of the two cases, I do

not think that this distinction is accurate. The choice as to the form of compensation in *Slater* (cash or stock) was one made by the water company whose undertaking was being transferred to the water board and was not made on an individual level by shareholders. The shareholders were notified of the proposed scheme under which the water company elected to take stock but the report is unclear as to whether the scheme required the approval of the shareholders in order to become operative. Even if it did, once it was approved, individual shareholders had no real choice as regards keeping their original investments or the form of compensation they received. Therefore, in neither case did the individual shareholder have any real control over the change made to the stock once decisions had been made at a corporate level and consequently the legal context in both cases is similar to this.

54. Further, the description in *Jenkins* of the new stock as having been substituted for the original stock (a phrase upon which the first defendant relies) was not, in my view, intended generally to refer to all transactions in which one type of share is replaced by another. Instead, the Court of Appeal was using the statutory language of the provision which expressly dealt with the consequences of the change which that statute authorised. That section (s.12) repeatedly referred to the stock as having been substituted and how the substituted stock was to be treated. It is unsurprising that the court used the same words. The stock was regarded as having been substituted because the statute said it was to be so regarded, not because the court had examined the underlying nature of the transaction and decided that substitution was what in fact had occurred. Therefore, I do not think that *Jenkins* is authority for the proposition that where testator has received shares in a company in exchange for shares in a different company which he previously held, those shares are to be regarded as having substituted one for the other for testamentary purposes.

55. In reality, the distinction between *Slater* and *Jenkins* lies in the fact that in *Jenkins*, the replacement shares were governed by a statutory provision which expressly stated that any reference to the earlier stock in any document including in a will would be deemed to be a reference to the new stock which had been substituted for it. Indeed, it is notable that the starting point taken by the members of the Court of Appeal was that, absent s. 12, it was clear that the will would not operate to convey the railway stock. As Lord Handworth M.R. put it on p. 230 of the report: -

> *"It is plain that the words of the gift in the will would not convey the Great Western Railway stock by words indicative of the stock of the Swansea Harbour Trust. But to meet any difficulty arising from the change of stocks s. 12 of the Act was passed."*

Lawrence L.J. expressed a similar view on p. 233: -

> *"I agree with the learned judge that but for s. 12 the bequest of the Swansea Harbour stock would have been adeemed."*

Thus, were it not for the statutory provision, the outcome in *Jenkins* would have been the same as that in *Slater*.

56. In this context, the first defendant identifies a statutory provision, namely s. 701 of the Taxes Consolidation Act, 1997 (which has been set out above), to make the case that the testator should be deemed to have acquired his Kerry Group plc shares at the time he acquired his Kerry Co-Operative shares and, thus, to have been in possession of them at the time he executed his will. In my view, there are two flaws in this argument. Firstly, taking the argument at its height, even if the testator were deemed to have been in possession of Kerry Group plc shares in 1990, this would not necessarily have the effect of making a gift of Kerry Co-Operative shares apply to Kerry Group shares. The statutory provision in *Jenkins* did more than simply deem railway shares to have been acquired at the time harbour shares were actually acquired by shareholders. It provided that after the date of the transfer every reference to harbour shares was to be read as if it were a reference to railway shares in every type of document imaginable and for all purposes. The effect of this provision was to ensure that an express gift of the original harbour shares was to be read as if it were a gift of the substituted railway shares. Section 701(4) does not purport to and does not have this effect.

57. I acknowledge that this argument was made in circumstances where the first defendant also contended that the extrinsic evidence showed the testator's intention to have been that he should inherit all of the shares. That argument was, at least in part, designed to meet the second defendant's argument that the only relevant date as regards the testator's intention was the date he made his will and that as he did not own Kerry Group plc shares on that date he could not have had any specific intention as regards them. It is very much open to question whether a testator can be held to have had a specific testamentary intention as regards assets which he is deemed to have owned on the date of his will but did not actually own and which he does not expressly mention in his will. However, it is unnecessary to determine this question in circumstances where I have held that the evidence available to the court was not sufficient to enable me to conclude that the testator had an intention to leave his Kerry Group plc shares to the first defendant.

58. Secondly, and more fundamentally, the provisions of s. 701(4) are expressed to apply for the purposes of capital gains tax. In effect, an artificial construct is put in place to ensure that the type of share exchange undertaken by Kerry Co-Operative would not have unintended tax consequences for either the co-operative or its shareholders. There is no basis for treating a statutory provision, the terms of which limit its application to a specific purpose, as applying more generally in order to achieve a different purpose. For these reasons s.701(4) is not analogous to the statutory provision in issue in *Jenkins*.

59. This still leaves an issue as to whether, notwithstanding the non-applicability of *Jenkins* to the facts of this case, the court should nonetheless conclude that the gift of Kerry Co-operative shares is effective to pass Kerry Group plc shares to the first defendant. It is indisputably the case that the share exchanges (as distinct from the rule changes) took place without any input on the part of the testator such that he effectively had no choice in the cancellation of his Kerry Co-Operative shares nor in the issuing to him of Kerry Group plc shares. I do not accept the second defendant's characterisation of the testator having "allowed" this to happen as it suggests far greater agency over the transactions

than any individual member of the co-operative actually had. Of course, it does not follow that the testator did not support the changes which left him a wealthy man.

60. Does the fact that the testator had no personal control over the changes make a legal difference? Historically it would have as regards the doctrine of ademption at the time when it was necessary to show a presumed intention on the part of the testator that the gift would no longer be operative. However, that is no longer the position and a change effected either by statute or by the act of a company which alters an investment so that it can no longer be said to be substantially the same thing - albeit in a different form or under a different name - may cause a gift to fail. The test in *Oakes v Oakes* can be seen as a two part test – the thing must be substantially the same and the change must not be one which the testator has brought about through his own choice or action. The fact that a testator did not bring about the change himself is not sufficient to allow the gift of an investment to be traced into its altered form unless it is also shown that the thing remains substantially the same.

61. The first defendant posited a number of scenarios which it was suggested showed that notwithstanding the legal distinction between the two entities they were in fact interchangeable in this context. Firstly, if the testator had made a gift of his "Kerry" shares, this would have been sufficient to ensure that both passed to the first defendant. I agree but not because the two are interchangeable; rather the description is broad enough to cover both. Secondly, it was contended that if the process of Kerry Co-Operative shares being exchanged for Kerry Group plc shares had run to a completion so that at the time of his death the testator held only Kerry Group plc shares, then by analogy with the misdescription cases discussed above, the gift of the Kerry Co-Operative shares would be interpreted so as to pass the Kerry Group plc shares. I am not convinced that this is correct. There is a distinction, evident from *O'Connell v Bank of Ireland,* between a misdescription in and an omission from a will. The testator clearly intended when drawing up his will to leave his Kerry Co-Operative shares to the first defendant. There was no misdescription involved. The substitution cases discussed in this section of the judgment cover a range of scenarios where some or all of the testator's original holding in an investment is changed. As far as I can ascertain, the outcome of the cases has never depended on the extent - in the sense of the quantity - of the original investment which had been changed. Instead the outcome of those cases depended on the extent to which the changed thing remains substantially the same as the original, coupled with the extent to which the testator can be said to have deliberately brought about the change.

62. In this case the testator was not responsible for the decisions and actions which resulted in his Kerry Co-Operative shares being exchanged for Kerry Group plc shares. Of itself this is not enough to allow the court to treat the Kerry Co-Operative shares as being substituted by the Kerry Group plc shares. Whilst the history of Kerry Group plc is very much intertwined with Kerry Co-Operative, the two are distinct entities with different legal structures and carry on different businesses. Significantly, Kerry Co-Operative continues to exist as a separate legal entity. It has neither been changed into nor absorbed by

Kerry Group plc. It is not possible to say that notwithstanding the exchange, the testator's shareholding in Kerry Group plc remains the same thing as his shareholding in Kerry Co-Operative. The change is more than one of form or name; it is one of substance.

**Conclusions**

63. For the reasons set out in this judgment, I am unable to conclude that there is a sound legal basis for treating the gift to the first defendant of the testator's Kerry Co-Operative shares as carrying with it a gift of the testator's Kerry Group plc shares which the testator did not own at the time he made his will. Consequently, I will answer the questions posed in the special summons as follows:-

(a) The gift of the Kerry Co-Operative shares to Thomas O'Connell does not include the shareholding the deceased held in Kerry Group plc on the date of his death; and

(b) the deceased's shareholding in the Kerry Group plc forms part of the residue of his estate.