THE HIGH COURT

[2023] IEHC 100

[2015 No. 9608 P]

IN THE MATTER OF JOHN RICHARD COX DECEASED

AND

IN THE MATTER OF THE SUCCESSION ACT 1965

BETWEEN

ANTHONY COOMEY (LEGAL PERSONAL REPRESENTATIVE OF THE LATE JOHN RICHARD COX, DECEASED)

PLAINTIFF

AND

MARY SALLY COX

DEFENDANT

JUDGMENT of Mr. Justice Denis McDonald delivered on 3rd March 2023

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Introduction

1. In these proceedings, the plaintiff, in his capacity as personal representative of John Richard Cox, deceased, seeks an order setting aside a Deed of Transfer made on 18th March 2005 by which the late Mr. Cox transferred his house and lands near Dundalk, County Louth, from his sole name into the joint names of himself and the defendant, his wife. The Deed of Transfer records the transfer of the lands comprised in two named folios in the Register of Freeholders, County Louth from John Richard Cox to himself and his wife, the defendant. The transfer is stated to be *"in consideration of the natural love and affection which he bears for his wife"*. Mr. Sheehan, solicitor, of Aaron Kelly & Co., acted as solicitor for both parties in this transaction. The circumstances in which the Deed of Transfer was executed will be considered in more detail at a later point in this judgment.

2. As originally framed, the claim made by the plaintiff was advanced on a number of grounds. It was alleged that the Deed was procured by duress and/or undue influence on the part of the defendant. In the alternative, it was alleged that the transaction constituted an unconscionable bargain. In addition, it was alleged that *"a forensic documents examiner"* had *"found there was insufficient handwriting evidence to*

support the proposition that the first signature of the deceased appearing on the signature page of the said transfer was that of the deceased". The plaintiff also raised a plea of *non est factum* to the effect that the deceased understood that he was signing something other than a deed of transfer. However, on Day 1 of the hearing, it was confirmed by counsel for the plaintiff that the plaintiff was no longer pursuing any allegation that the signature of the late Mr. Cox on the Deed of Transfer was a forgery. In opening the case, counsel for the plaintiff confined the challenge to the Deed to the issues of undue influence and unconscionable bargain. The plaintiff did not advance any case based on the plea of *non est factum*. In addition, the plaintiff did not pursue the allegation of duress. It should also be noted that, insofar as his case on undue influence is concerned, the plaintiff does not go so far as to allege that there is evidence of actual undue influence exerted by the defendant over her late husband. Instead, the case made by the plaintiff is that, at the time of execution of the Deed of Transfer, the circumstances were such as to give rise to a presumption that the Deed was executed by the plaintiff as a consequence of the undue influence of the defendant. The plaintiff contends that, having regard to the principles established in the case law (discussed below), it is not necessary for him to establish actual undue influence on the part of the defendant. The plaintiff contends that the evidence, discussed below, establishes that, at the time of execution of the Deed, the relations between the late Mr. Cox and the defendant were such as to raise a presumption that the defendant had influence over her husband. On that basis, the plaintiff submits that, if the defendant wishes to uphold the validity of the transaction, she bears the onus of rebutting the presumption of undue influence.

3. In the defence delivered on behalf of the defendant, an objection was taken that the plaintiff was guilty of inordinate and inexcusable delay in pursuing the claim and

that the proceedings should be dismissed on that basis. However, in the course of the hearing, counsel then acting for the defendant confirmed that this element of the defence was no longer being pursued. That was the only issue which was abandoned. The balance of the defence (in which the defendant denies each element of the plaintiff's claim) remains in place. In addition to denying each element of the plaintiff's claim, the defence also raised the following issues: -

(a) In para. 7, the defendant maintained that a will and codicil made by Mr. Cox in June and August 2005, respectively, had been procured by reason of duress or undue influence exerted upon him by his daughters, Jennifer Coleman and Michelle Cox (wrongly described as *"Jennifer Cox and Michelle Coleman"* in the defence), and that Mr. Cox was not acting freely and voluntarily at that time and that he had *"succumbed to the pressure for peace sake"*. Curiously, para. 7 of the defence raises this plea expressly *"without seeking to impugn the validity of the Will… or the Codicil…"*. In addition, it should be noted that, at the resumed hearing in 2022, the defendant (who was, by then, acting in person) made the case that the 2005 will did not represent the instructions of her husband, the late Mr. Cox, but, instead, had been drafted or dictated by Mr. Paul Callan SC, a friend of the Cox family. While the defence does not contain a counterclaim seeking to set aside the will and codicil, the defendant has run her case as though such a counterclaim has been made and the plaintiff has accepted that I should determine the issue as though such a counterclaim had been properly pleaded;

(b) It was also claimed that, in executing the Deed of Transfer on 18th March 2005, Mr. Cox was acting freely and voluntarily and with the benefit of

independent legal advice and that he had the capacity to and did in fact understand the nature and effect of the transfer;

(c) It was further contended that, in light of the marital status of Mr. Cox and the defendant, the presumption of advancement (as explained in greater detail below) applied to the transfer.

4. The action was at hearing before me for six days in May 2018. At that time, the defendant was represented by solicitor and counsel and the plaintiff's witnesses called during that period were cross-examined by counsel for the defendant. A total of ten witnesses for the plaintiff were called during that period. The case was a distressing one as it involved a familial dispute and the giving of evidence by the daughters of Mr. Cox against their own mother. As noted above, it also involved an allegation by the defendant that her own daughters had exercised undue influence over their father in the execution of his will and codicil in 2005. On Day 1 of the hearing, I urged the parties to consider whether the dispute between them could be amicably resolved rather than airing the matter in open court. I repeated that entreaty on Day 4 of the hearing. Although the hearing continued, it appears to be clear that, in parallel with the hearing, the parties' legal representatives were holding without prejudice negotiations. Subsequently, on 9th May 2018 (Day 6 of the hearing), I was informed by counsel for both parties that the proceedings had been settled on terms that were reduced to writing. These terms were quite detailed and plainly reflected extensive interaction between the legal teams. I was asked to make an order receiving and filing the settlement agreement executed by the parties and I was also asked to strike out the proceedings with no order as to costs but with liberty to apply. An order to that effect was therefore made by me and I expressed my thanks to the parties and their legal advisers and I expressed the hope that the settlement would provide an opportunity to the family to put the dispute

behind them. Counsel for the son of Mr. and Mrs. Cox also attended to confirm that he was satisfied that his client understood the agreement which he had signed (in addition to the parties before the court).

5. Under the terms of settlement, the defendant was required to dispose of certain lands out of which certain payments were to be made to the children of the late Mr. Cox and the defendant. However, it subsequently transpired that, prior to the settlement agreement and unknown to the plaintiff and the defendant's children, the defendant had executed an option agreement dated 19th February 2018 in favour of Soleirtricity Ltd under which she purported to grant an option to Soleirtricity Ltd to purchase the lands comprised in the folios in question. The option agreement was furnished to the plaintiff's solicitors by the solicitors then acting for the defendant by letter dated 17th June 2019. Thereafter, the plaintiff obtained a report from an engineer which confirmed that the area of land to be sold under the settlement agreement was part of the lands comprised in the option agreement. Against that backdrop, the plaintiff brought an application before me under that part of my order made on 9th May 2018 which gave the parties liberty to apply in connection with the terms of settlement. In the meantime, the defendant discharged her solicitors and swore an affidavit on 11th November 2019 in which she disowned the settlement agreement. In that affidavit, she claimed that she did not feely consent of her own volition to sign the settlement agreement and that she had been *"intimidated, bullied and coerced"* into signing the agreement which she did at approximately 1:30 am on the morning of 9th May 2018.

6. The matter subsequently came before me on 19th December 2019 at which point both the plaintiff and the defendant sought orders setting aside the settlement agreement and indicating a preference to resume the hearing which had begun in May 2018. In light of the attitude taken by both sides, I made an order, by consent, on that day setting

aside the settlement agreement. I appreciate that such a course is quite unusual. However, in circumstances where both sides were agreed that the settlement agreement should be set aside and the trial resumed, I could see no reason why effect could not be given to the desire of the parties. Thus, for example, *Foskett on Compromise,* 8th Ed., 2015, at para. 6-35 states that: -

> *"Where parties are unable to agree that, for whatever reason, their agreement should be set aside and treated as rescinded, a fresh action instituted for the purpose will be required."*

It follows that, if the parties do consent to set aside a settlement and to treat it as having been rescinded (as the parties did here), a fresh action is not required. Moreover, this course had the advantage that the defendant (who is now unrepresented) would be able to take the benefit of the extensive cross-examination conducted by counsel on her behalf during the course of the hearing in May 2018. I confirm that, prior to making the order setting the judgment aside and directing that the trial should be resumed, I made sure that this was what was understood and intended by the defendant. She confirmed that she did understand and she, nonetheless, urged me to proceed to set the settlement aside. It was originally intended that the hearing would resume in early course in 2020. However, the COVID-19 pandemic intervened. This was not a suitable case to be heard by way of a remote hearing on the Pexip platform operated by the Courts Service. In those circumstances, it was not possible to resume the hearing of the action until 26th April 2022. Thereafter, it was heard over a period of three days in April 2022. This judgment now addresses the issues which were the subject of the hearing of May 2018 and April 2022.

Background

7. The late Mr. Cox (known as Bunny Cox) was born on 13th February 1924. He died on 9th January 2006, not long before what would have been his 82nd birthday. He and the defendant (who I will refer to as Mrs. Cox) were married in 1974. Mr. Cox was some 20 years older than his wife. They had four children, namely Jennifer, Suzanne, Michelle, and a son. Each of the daughters gave evidence at the hearing on behalf of the plaintiff. The son was not called as a witness. For that reason, I do not propose to address his position in any detail in this judgment save to note that both Mr. and Mrs. Cox appear to have been of the view that his inheritance should be addressed on a different basis to that of his sisters. Thus, for example, in the 2005 will (described below), provision was made for the creation of a discretionary trust in favour of the son.

8. Mr. Cox was a well-known horse trainer. He conducted that business from the family farm near Dundalk, County Louth. He was also a breeder of racehorses, and he was a qualified veterinary surgeon. Because of its proximity to Dundalk, the farm had significant development potential, albeit that there was also a concern that part of the lands might have to be acquired by compulsory purchase order in relation to a road scheme. There was no valuation evidence given at the trial but there was no dispute between the parties that the lands were considered by the family to have a value of at least €30 million at the time of the events in issue in these proceedings. There was also no dispute between the parties that the farm comprised approximately 180 acres. There can certainly be no doubt that the lands had considerable development potential. In the words of one witness, it was a unique situation to have a farm of *"180 acres there in the middle of Dundalk and not developed"*. While it may be an exaggeration to say that the farm was in the middle of Dundalk, it is clear, on the evidence, that the farm is on

the edge of Dundalk. In the course of the evidence on Day 5 of the hearing, it was suggested that the family home was no more than one mile from the centre of Dundalk.

9. Previously, in addition to the lands near Dundalk, Mr. Cox had a second farm in Blackrock, County Louth, which he sold at some point in the 1980s. According to his daughter, Jennifer Coleman, the breeding side of his operations were conducted at this farm in Blackrock, while the training of racehorses was undertaken at the stables at the farm near Dundalk. There were 35 stables there. Jennifer Coleman (who was born in 1975) is the eldest of the four children of Mr. and Mrs. Cox. Jennifer Coleman did a course in veterinary nursing in 1994 and 1995 at University College Dublin. She then commenced a course in 1995 at West Oxfordshire College in breeding and training of thoroughbred horses. At that time, Jennifer Coleman said that Mr. Cox had expressed the wish that she might take over the horse training licence on completion of that course. However, upon completion of that course, an opportunity arose in a well-known stud in Australia which Jennifer Coleman decided to take up. It was there that she met her husband, a veterinary surgeon, and they married in 2000. Since then, Jennifer Coleman and her husband returned to Ireland and, for many years, they have been based in County Tipperary.

10. Ms. Suzanne Cox is the second eldest daughter of Mr. and Mrs. Cox. She was born in 1979. She was at a local school until 1998. From there, she went to a college in England for a one-year course, following which she undertook a further course under the auspices of the Irish National Stud. Subsequently, she worked for two years at the Jebel Ali Racecourse in Dubai. Throughout her childhood, she had helped out on the family farm and had experience as an amateur jockey. After she returned from Dubai in the course of 2002, she had discussions with Mr. Cox and they agreed that she would take over his trainer's licence when it expired in February 2003. The handover of the

licence is unsurprising given that Mr. Cox was in his late seventies at that time. Subject to what I say below, Suzanne Cox was still living in the family home in 2005.

11. Michelle Cox is the youngest of the four children of Mr. and Mrs. Cox. She was born in 1982. After leaving secondary school, she attended the Dublin Business School to pursue business studies. Like her sisters, she rode horses from a young age and obtained a licence as an apprentice when she was seventeen. She subsequently got an amateur jockey's licence. She worked part-time in Dundalk in a bar in order to assist with the expenses of putting her through college. Michelle Cox was still living at the family home outside Dundalk in 2005 although, as outlined below, she moved out of the home for a period during that year as a consequence of what she described as tension within the household.

12. In due course, it will be necessary to outline the most relevant elements of the evidence in more detail. Before doing so, it may be helpful, at this point, to identify the relevant legal principles which apply in cases of this kind.

Relevant legal principles

13. As noted in para. 2 above, the plaintiff's challenge to the validity of the Deed of Transfer is now confined to two grounds, namely presumed undue influence and unconscionable bargain. The other grounds pleaded in the statement of claim are no longer being advanced. For completeness, it should also be noted that no case is made that the transfer gave rise to a resulting trust in favour of Mr. Cox. As Prof. Biehler explains in *"Equity and the Law of Trusts in Ireland"*, 7th Ed., 2020, at p. 176, where the owner of property makes a transfer of it to another person for no consideration, a presumption of a resulting trust arises unless there is sufficient evidence of a contrary intention to rebut the presumption (such as evidence that the transferor intended to make a gift) or unless the so-called *"presumption of advancement"* dictates otherwise. The

traditional view was that a transfer of property from a husband to a wife did not give rise to a presumption of a resulting trust. In the case of transfers of property from a husband to a wife, the view taken in the past was that the husband was presumed to have intended to have made a gift of the property to his wife. This became known as the presumption of advancement and, in the case of transfers of property from husband to wife, this presumption was treated as negativing the presumption of a resulting trust. The presumption of advancement is based upon the notion that a husband had an obligation to provide for his wife. Given the principle of equality between spouses within a marriage implicit in Articles 41 and 42 of the Constitution, *Biehler* suggests, at p. 209, that it must be doubtful whether the presumption of advancement continues to be good law. That is not to say that gifts of property from one spouse to another are legally questionable. On the contrary, most transactions of that kind are unimpeachable in circumstances where there is clear evidence that the donor spouse intended to provide a gift to the donee spouse. As *Biehler* observes at p. 176, it is the actual intention of the donor which is the governing consideration. Thus, where there is evidence to show that the donor intended to make a gift, the presumption of a resulting trust will not arise and the transfer will take effect in accordance with its terms.

14. In circumstances where the plaintiff's challenge is confined to his case based on presumed undue influence and unconscionable bargain, it is unnecessary to consider issues in relation to resulting trusts or the presumption of advancement. It is true that, as noted in para. 3(c) above, the defendant has sought to invoke the presumption of advancement in her defence. However, given that the plaintiff is not seeking to make a case based on a resulting trust, it is unnecessary to consider the presumption of advancement any further. It is sufficient to identify the legal principles which apply in the context of a claim based on undue influence and a claim based on unconscionability.

But, in so far as undue influence is concerned, it is necessary to separately examine the principles which apply in the context of the plaintiff's challenge to the Deed of Transfer and those which apply in the context of Mrs. Cox's challenge to the 2005 will and codicil. The principles which apply in the context of a testamentary document are different to those which apply to a gift as between living persons.

Undue Influence in the context of the plaintiff's challenge to the Deed of Transfer

15. It has long been recognised that there are two categories of cases which can arise in this context. The first category comprises cases where a claimant relies on evidence of actual undue influence. The second category comprises cases where the claimant does not have evidence of actual undue influence but makes the case that the circumstances are such as to give rise to a presumption of undue influence. In order to come within the latter category of case, a plaintiff must show that there was something in the relationship between the parties which, without proof to the contrary, gives rise to an implication that a gift of property may have been procured due to the influence of the recipient (i.e. the donee). Classically, this arises where there is a relationship of dependence by the donor on the donee or where there is a particular relationship of trust and confidence between the donor and donee such that the donee is in a position to influence the actions of the donor. In such cases, where the plaintiff proves that the circumstances are sufficient to give rise to a presumption of undue influence, the onus passes to the defendant to prove that the transaction under challenge did not arise as a consequence of undue influence.

16. The classic explanation of the difference between these two categories of case is to be found in the judgment of Cotton L.J. in *Allcard v. Skinner* (1885) 36 Ch. D. 145, at p. 171, where he said: -

> *"These decisions may be divided into two classes - First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."*

17. In these proceedings, the case made by the plaintiff falls into the second class of case. This is important. It is not alleged that Mrs. Cox is guilty of fraud or a deliberately wrongful act (to paraphrase Cotton L.J. in *Allcard v. Skinner*). The plaintiff does not allege that there is evidence that Mrs. Cox wrongfully, and for her own selfish purposes, procured her husband to execute the Deed of Transfer. Instead, the plaintiff confines his case to the contention that the circumstances give rise to a presumption of undue influence. Thus, in the event that the plaintiff succeeds in showing that the circumstances give rise to a presumption of undue influence, the burden will then fall on Mrs. Cox to prove that the Deed was the result of the free exercise of Mr. Cox's intentions. If the plaintiff succeeds in establishing that this is a case where the

presumption arises, then, in accordance with the views of Cotton L.J. in *Allcard v. Skinner*, the court would intervene, not on the grounds that Mrs. Cox has committed a wrongful act as against her husband but, on the grounds of public policy in order to ensure that there is no scope for abuse of a relationship of trust and confidence. The court, in such cases, takes what might be described as a prophylactic approach unless the defendant shows that there is no need to intervene.

18. Keane in *"Equity and the Law of Trusts in the Republic of Ireland"*, 3rd Ed., at para. 28.04, explains that the presumption of undue influence arises where two elements are present: -

> *"First, one party must have derived a significant benefit from the transaction. Most commonly this will arise where there is a substantial gift of property which cannot be accounted for by the motives which ordinarily actuate people. Second, the relationship between the parties must be such that the donor places a special degree of trust in the donee, and the donee is in a position by reason of the relationship to exert a particular degree of influence on the donor. The law has recognised certain categories of relationships as being of this nature, such as parent and child, guardian and ward, solicitor and client, spiritual adviser and believer, and trustee and beneficiary. The most important of these defined categories are dealt with in more detail below."*

19. However, although *Keane*, in the passage quoted above, refers to certain categories of relationship where it has been recognised that the presumption will arise, the courts have made it clear that the principle discussed here is not confined to the recognised categories of relationship. As Budd J. explained in *Gregg v. Kidd* [1956] I.R. 183 at p. 194: -

> *"The courts have never confined the application of the principle to any stated forms of relationship. To do so would fetter that wide jurisdiction to relieve against all manner of constructive fraud which courts administering equitable principles have always exercised."*

20. Similar observations were made by Gilligan J. in *Prendergast v. Joyce* [2009] 3 I.R. 519 at p. 532. In the same case, Gilligan J., at p. 533, emphasised that the presumption of undue influence arises from a consideration of the actual relationship between the donor and donee at or shortly before the time of the transaction under challenge coupled with the relevant circumstances such as the age, position in life, state of health and other particular vulnerabilities of the donor. These factors were also identified as relevant by Budd J. in *Gregg v. Kidd* at pp. 194-195: -

> *"The influence may arise or be acquired in many ways, such as through disparity of age or the mental or physical incapacity of the donor or, indeed, out of a mere dependence upon the kindness and assistance of another. To bring the principle into play it must be shown that the opportunity for the exercise of the influence or ascendancy on the donor existed, as where the parties reside together or meet frequently. While close family relationship creates a situation where influence is readily acquired, mere blood relationship is not sufficient of itself to call the principle into play; it must be shown that the actual relations between the parties give rise to a presumption of influence."*

21. Where a plaintiff seeks to rely on the presumption of undue influence in a case which does not fall into any of the established categories of relationship of the kind described by *Keane* at para. 28.04, the plaintiff will be required to provide evidence that (a) the donor reposed a special degree of trust and confidence in the donee and (b) that the nature and circumstances of the gift are such as to justify a presumption that it was

procured by undue influence. The position in such cases is explained by *Keane* in para. 28.05 as follows: -

> *"A presumption of undue influence will also arise in any case where the evidence establishes that the donor placed special trust or confidence in the donee. This form of presumption must, however, be carefully distinguished from that arising in the defined categories; it is essentially an evidentiary presumption which will only arise if, at the conclusion of the plaintiff's case, the court holds that there is a prima facie case that the plaintiff reposed a special degree of trust and confidence in the defendant, and the nature of the gift is such as to justify a conclusion that it was procured by undue influence. The defendant may in turn adduce rebutting evidence to satisfy the court that the plaintiff reposed no such trust or confidence in the defendant or that, if he did, the gift was not procured by undue influence on his part. In contrast, in the defined categories, the presumption that the donee reposed a special degree of trust in the donor and that the donor was in a position to exercise undue influence is effectively irrebuttable. The defendant may, however, satisfy the court by rebutting evidence that he did not in fact exercise undue influence on the donee in relation to the particular transaction. As to the nature of the transaction that triggers the presumption, it has been held in the English cases that there must have been 'manifest disadvantage' to the person invoking the presumption."*

22. In order for the presumption to arise, it is not necessary to show that, at the time of the relevant transfer of property, the donor lacked mental capacity or that the donor was not mentally alert. This was made clear by Barron J. in the Supreme Court in *Carroll v. Carroll* [1999] 4 I.R. 241 at p. 263. That is not to say that the mental state of the donor will never be relevant. Plainly, if the donor's mental faculties were in any

way impaired, this would place the donor in a more vulnerable position and make the donor more susceptible to influence.

23. If the plaintiff is to succeed in this case, he will need to be in a position to establish that the case falls within the class of case discussed by *Keane* at para. 28.05. It is well established in this context that a relationship between spouses is not, of itself, sufficient to give rise to a presumption of undue influence. This is clear from the decision of Kelly J. (as he then was) in *Irish Bank Resolution Corporation v. Quinn* [2011] IEHC 470, the decision of the Court of Appeal in *De Kretser v. Ulster Bank (Ireland) Ltd* [2016] IECA 371 and the decision of Keane J. in *McCormack v. McCormack* [2017] IEHC 733. In *McCormack*, a wife sought to challenge an agreement with her estranged husband under which she agreed to relinquish her share in a business that they had operated as a partnership. One of her grounds of challenge was that the agreement had been procured through the presumed undue influence of her husband. It was argued that her claim fell into the second class of case identified in *Allcard v. Skinner*. This was rejected by Keane J. who said, at para. 311: -

> *"I do not think that this case falls into that category. The basis upon which it is asserted that it does is that the parties were wife and husband at the material time. This is not a transaction between an elderly widower and a son as in Carroll; nor one between an elderly woman and her son, as in Lynn; nor one between a vulnerable elderly woman and her nephew as in Prendergast v Joyce [2009] 3 IR 519. While in the last of the three cases just mentioned, Gilligan J was careful to make clear (at 532) that the categories of relationship to which the presumption applies are neither closed nor rigid, I share the view expressed by Murphy J for the Supreme Court in Bank of Nova Scotia v Hogan [1996] 3 IR 239 (at 247-8) that, while references have been made in the*

courts of other jurisdictions to women being treated "more tenderly" by the law than others and to the "the invalidating tendency" applied by courts in relation to transactions between a husband and a wife, the consequence is not that the presumption applies but that it may be possible to identify circumstances in a particular case which would more readily raise the presumption in favour of a wife than any outside party. I can identify no such circumstances in this case, in view of the conclusions of fact I have already reached. The parties dealt as equals. They were broadly the same age; of broadly similar education and experience; in similarly straitened circumstances, and had similar access to advice. Neither was suffering from any intellectual disability or cognitive impairment. Neither was significantly more vulnerable than the other. Both were experiencing similar stresses and strains."

24. While that decision makes clear that a relationship between spouses will not, of itself, give rise to a presumption of undue influence in the context of a gift by one spouse to the other, counsel for the plaintiff nonetheless stressed that, in *McCormack*, there was clearly no evidence to give rise to a presumption of undue influence in the particular circumstances. Counsel also emphasised the way in which Keane J. acknowledged that it might be possible to identify circumstances in a particular case which would make it appropriate for a court to hold that the presumption applies. This is consistent with the views expressed in para. 28.05 of *Keane* quoted in para. 21 above. That paragraph suggests that, in a case of this kind (where the class of relationship does not of itself give rise to a presumption of undue influence) a plaintiff must satisfy two criteria:

(a) First, the plaintiff must show that the donor of the gift reposed special trust and confidence in the donee;

(b) Second, the plaintiff must show that the nature of the gift is such as to justify a conclusion that it was procured by the undue influence of the donee. *Keane* suggests in this context that what must be shown is that the gift was to the manifest disadvantage of the donee.

25. It is important to keep in mind that the presumption of undue influence will not arise where all the facts are known. As Barron J. observed in the Supreme Court in *Carroll v. Carroll* [1999] 4 I.R. 241, at p. 263, *"once the full facts are known, it is a matter for the Court to determine whether there was or was not undue influence. In such case, the presumption really plays no part"*. In making that observation, Barron J. cited the decision of Lowry L.C.J. in *Reg. (Proctor) v. Hutton* [1978] N.I. 139. In that case, a gift by an aunt to a niece was challenged on the grounds of presumed undue influence. However, the niece gave very clear and comprehensive evidence at the hearing which satisfied Lowry L.C.J. that the niece had exercised no influence over the aunt. Lowry L.C.J. held that, in those circumstances, the presumption did not arise. In contrast, in *Carroll v. Carroll*, there was insufficient evidence to suggest that the donor had intended to benefit the donee to the extent of virtually all of his property. In that case, the donor was the elderly father of the donee. In the Supreme Court, Barron J., at p. 265, highlighted that the evidence demonstrated that the donor did not realise what he had done since he continued to tell his other children that there would always be a home for them in the property.

26. Having regard to the principles discussed above, it is clear that, if the plaintiff is to succeed in these proceedings, he bears the onus of establishing that the particular circumstances in which the Deed of Transfer was executed in this case gives rise to a presumption that it was procured by the undue influence of Mrs. Cox. If, however, there is sufficient evidence before the court to establish that the Deed represents the free and

independent expression of Mr. Cox's intentions, then there is no scope for raising a presumption of that kind. On the other hand, if that evidence is unavailable or insufficient, and the plaintiff succeeds in establishing that the presumption arises, the onus will then fall on Mrs. Cox to rebut the presumption. While the case law makes it clear that the rebuttal of the presumption is not confined to any particular method, the most usual way to rebut the presumption is to show that the donor had advice from an independent person who was aware of all of the relevant circumstances. This is clear from the decision of the Supreme Court in *Carroll v. Carroll* at p. 264. It is not essential that the independent advice should come from a solicitor. However, in many cases (including the present), it is the advice of a solicitor which is relied upon. The judgments of Budd J. in *Gregg v. Kidd* and of Barron J. in the Supreme Court in *Carroll v. Carroll* address the type of advice that must be available. In short, the advice must be truly independent, it must be comprehensive and it must be given with knowledge of all relevant circumstances. It must also be such as a competent advisor would give if acting solely in the interests of the donor. In *Carroll v. Carroll*, at pp. 265-266, Barron J. explained the position as follows, in the context of advice given by Mr. Joyce, the solicitor who had acted for the donor and donee in that case: -

> *"The question of advice by a solicitor was considered by the High Court (Budd J.) in Gregg v. Kidd [1956] I.R. 183. At pp. 201 and 202, Budd J. approved certain principles from the judgment of Farwell J. in Powell v. Powell [1900] 1 Ch. 243. These were:*
>
> *(1) A solicitor who acts for both parties cannot be independent of the donee in fact; and*

(2) to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing it should be established that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person. Further, the advice must be given with a knowledge of all relevant circumstances and must be such as a competent advisor would give if acting solely in the interests of the donor.

Accepting these principles, there can have been no independent advice given by Mr. Joyce since at best he was acting for both parties. In any event his evidence was lacking in two important respects:

(1) he did not have knowledge of all the relevant circumstances; and

(2) he did not give advice, he merely set out to carry out the donor's instructions.

Even if he had been the donor's solicitor what he did would not have saved the transaction. As I have said before, a solicitor or other professional person does not fulfil his obligation to his client or patient by simply doing what he is asked or instructed to do. He owes such person a duty to exercise his professional skill and judgment and he does not fulfil that duty by blithely following instructions without stopping to consider whether to do so is appropriate. Having done so, he must then give as to whether or not what is required of him is proper. Here his duty was to advise the donor to obtain independent advice.

In the present case whatever independence Mr. Joyce may have had has been destroyed by his acting in the present proceedings as solicitor to the personal representative of the donee."

27. The judgment of Farwell J. in *Powell v. Powell* [1900] 1 Ch. 243 provides further detail as to the kind of advice that is required. In that case, Farwell J. pointed out that it is the duty of the solicitor to protect the donor against himself and not merely against the personal influence of the donee. That case was concerned with a transaction involving a child and a stepparent. Farwell J. made clear that the solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the transaction. At p. 247, he said: -

""He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances; and if he is not so satisfied, his duty is to advise his client not to go on with the transaction…"

28. Farwell J. also suggested that the solicitor should refuse to act if the advice is not taken. However, in *Gregg v. Kidd*, Budd J., at p. 202, suggested that it is not necessary in all cases for the solicitor to refuse to continue to act although *"in some extreme cases that may be the proper course"*.

29. In the present case, one solicitor acted for both parties and, if I come to the view that the plaintiff has established that the presumption of undue influence arises, it will be necessary to consider the nature of the advice given by Mr. Sheehan and the interaction which took place between Mr. Sheehan and Mr. and Mrs. Cox in advance of execution of the Deed of Transfer.

Undue influence in the context of Mrs. Cox's challenge to the 2005 will and codicil

30. Before addressing the alternative basis on which the plaintiff challenges the Deed of Transfer (namely unconscionability), I should address the principles which apply in the context of the challenge made by Mrs. Cox to the 2005 will and codicil. As noted previously, Mrs. Cox makes the case that the will and codicil were procured through the undue influence either of Mr. Callan or of the daughters of Mr. and Mrs. Cox. There is, however, a very significant difference between the approach taken in the context of wills and that taken in the context of gifts or transfers between living persons. It is well settled that, in the case of wills, there is no scope for raising a presumption of undue influence. The party alleging undue influence must, therefore, prove that the will was, as a matter of fact, procured by the undue influence of another person. *Biehler*, at p. 887, cites in this context the decision of Costello J. (as he then was) in *Healy v. McGillicuddy* [1978] ILRM 175 and the decision of Murphy J. in *Lambert v. Lyons* [2010] IEHC 29. The position was further confirmed by Noonan J. in *Rippington v. Cox* [2015] IEHC 516. That case provides some explanation for the difference in approach taken in respect of wills. In that context, Noonan J. referred, at para. 44, to an extract from *Spierin on the Succession Act 1965* (4th ed., 2011), at para. 537, where the author cited the explanation for the lack of any presumption given in *Williams on Wills* to the effect that: *"… in the case of wills, these relationships (most of them) are naturally the source and reason for the testator's bounty …".* I would add that, in the case of a gift by will, the donor will, by definition, no longer be at any disadvantage as a consequence of the gift. At the time the gift takes effect, the donor will be dead. At that point, there is no longer any need to ensure that the donor is not disadvantaged by a person in whom the donor had placed trust and confidence.

31. As the reference to *Williams on Wills* confirms, the position taken in England & Wales is the same. Coincidentally, I was referred by Mrs. Cox to an English decision, namely *Wharton v. Bancroft* [2011] EWHC 3250 (Ch) in the context of her defence to the plaintiff's claim based on undue influence. This was a decision which was first mentioned by Mrs. Cox after she had discharged her legal team. She said that, in the course of the 2018 hearing, she had been advised of its existence by junior counsel then acting for her. She could not recall the name of the case but enquiries were made of junior counsel who previously appeared for her (along with two senior counsel) and the decision was duly identified. I was, however, erroneously, given a copy of a later judgment in the same case, namely *Wharton v. Bancroft* [2012] EWHC 91 (Ch), which dealt solely with the question of the costs of the proceedings. However, I was able to identify the earlier 2011 decision through a search on the BAILII website. As noted above, Mrs. Cox understood that the decision would assist her in defending the claim made by the plaintiff against her. But it is clear that the decision was concerned solely with an allegation of undue influence in the context of a will. It, therefore, does not assist in relation to her defence of the claim in relation to the Deed of Transfer. On the other hand, it provides a very useful summary of the principles which apply in the context of Mrs. Cox's allegation that the 2005 will and codicil were procured by undue influence. In *Wharton v. Bancroft,* the applicable principles were summarised by Norris J. at para. 30 as follows: -

> *"The relevant principles have recently been summarised by Lewison J in Edwards v Edwards [2007] WTLR 1387 and by Morgan J in Cowderoy v Cranfield [2011] EWHC 1616, and it may be taken that I have their summaries well in mind. In the instant case I have had particular regard to the following:*

(a) *Execution of a will as a result of undue influence is a fact that must be proved by those who assert it.*

(b) *They must establish that there was coercion, pressure that has overpowered the freedom of action of the testator without having convinced the will of the testator. If the evidence only establishes persuasion, then a case of undue influence will not be made out.*

(c) *Where the line between "persuasion" and "coercion" is to be drawn will in each case depend in part upon the physical and mental strength of the testator at the time when the instructions for the will are given. Was the testator then free and able to express his own wishes? Or was the testator then in such a condition that he felt compelled to express the wishes of another?*

(d) *In many cases the fact of undue influence cannot be proved by the direct evidence of witnesses but is an inference to be drawn from other proven facts. It is sometimes said that an inference of undue influence should not be drawn unless the facts are inconsistent with any other hypothesis. The danger of that formulation is that it may cause one to lose sight of the relevant standard of proof: so I have paid particular attention to what was said by Morgan J at para 141 of Cowderoy:*

> *"The requisite standard is proof on the balance of probabilities but as the allegation of undue influence is a serious one, the evidence required must be sufficiently cogent to persuade the court that the explanation for what has occurred is that the testator's will has been overborne by coercion rather than there being some other explanation"*

(e) The fact of undue influence is in truth a complex of facts involving the establishment (by proof or inference) of the opportunity to exercise influence, the actual exercise of influence, the actual exercise of influence in relation to the will, the demonstration that the influence was "undue" (ie went beyond persuasion), and that the will before the court was brought about by these means."

32. Having regard to the principles summarised by Norris J. in *Warton v Bancroft*, it is clear that, if Mrs. Cox is to succeed in her challenge to the 2005 will and codicil, she will have to prove that execution of the will and codicil were procured through the undue influence of either Mr. Callan or her own daughters. In other words, it will be necessary for Mrs. Cox to prove all of the relevant facts which establish that the will and codicil do not represent the wishes of Mr. Cox but instead represent the wishes of someone else who exercised undue influence over Mr. Cox or, in so far as Mrs. Cox alleges duress, a person who coerced Mr. Cox.

Unconscionability

33. As noted in para. 13 above, in addition to making a case based on presumed undue influence, the plaintiff also seeks to challenge the Deed of Transfer on the basis that it represents an unconscionable transaction. As *Biehler* explains, at p. 913, a transaction may be set aside on the grounds of unconscionability where one party is at a serious disadvantage by reason of poverty, ignorance or some other factor such as old age, such that unfair advantage may be taken of that party. The court will intervene particularly where a transfer of property is made for no consideration at all or where the consideration represents an undervalue and where the transferee acts without the benefit of independent legal advice. It would be rare to see the principle invoked in the context

of a transfer between spouses. However, that is not to say that the principle can never apply in relation to such transactions.

34. At p. 913, *Biehler* cites the succinct description of the circumstances which will warrant intervention by the court given by Kitto J. in *Blomley v. Ryan* (1956) 99 CLR 362 at p. 415 where he said: -

> *"whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands."*

35. In *Carroll v. Carroll*, Denham J. (as she then was) approved the following explanation of the principle given by Gavan-Duffy J. in *Grealish v. Murphy* [1946] I.R. 35 at pp. 49-50, albeit that she clearly did not approve of some of the examples given by him (which are entirely unacceptable in a modern concept and, for that reason, will not be quoted by me). In *Grealish v. Murphy*, Gavan-Duffy J. said: -

> *"The issue thus raised brings into play Lord Hatherley's cardinal principle (from which the exceptions are rare) that Equity comes to the rescue whenever the parties to a contract have not met upon equal terms ...; the corollary is that the Court must inquire whether a grantor, shown to be unequal to protecting himself, has had the protection which was his due by reason of his infirmity, and the infirmity may take various forms. The deed here was in law a transaction for value ... ; however tenuous the value may have proved to be in fact, and, of course, a Court must be very much slower to undo a transaction for value; but the fundamental principle to justify radical interference by the Court is the identical principle, whether value be shown or not, and the recorded examples*

run from gifts and voluntary settlements (including an abortive marriage settlement) to assignments for a money consideration. The principle has been applied to improvident grants, whether the particular disadvantage entailing the need for protection to the grantor were merely low station and surprise (though the grantor's rights were fully explained) …, or youth and inexperience …; or age and weak intellect, short of total incapacity, with no fiduciary relation and no 'arts of inducement' to condemn the grantee…"

36. *Carroll v. Carroll* provides a useful example of the circumstances in which a transaction will be set aside on the grounds of improvidence and unconscionability. In that case, the donor transferred his property (comprising a public house incorporating the family home) to his son reserving to himself a right of residence. The relevant conveyance recited that this was done in consideration of natural love and affection. At the time of the transaction in 1990, the donor was in his late 70s. He had a number of health complaints. He was partially deaf and he also suffered from poor eyesight. His wife had died of cancer in the previous year and he was quite depressed as a result. This made him quite dependent upon his children, albeit that there was no evidence to suggest that his mind was impaired. In addition to the donee, the donor had two daughters. Although they understood from what the donor told them that he had executed a document to assist his son in running the business, they had no knowledge that he had executed a conveyance of the property. Moreover, even after execution of the conveyance, their father continued to tell them that he would look after them and that they would have a right to reside in the property for their lifetime. It emerged that a single solicitor had acted both for the donor and the donee. It was held by Shanley J. in the High Court that the solicitor had made no enquiries of the donor as to whether he had any assets apart from the property, the subject of the conveyance. He also did not

ask any questions concerning any other children of the donor. After the donor's death, his daughters challenged the conveyance, both on the grounds of presumed undue influence and on the grounds that it represented an unconscionable transaction. Shanley J. accepted that the donor was a man who was mentally alert at the date of the transfer, but he held that the solicitor who acted for both parties was not aware of the family circumstances, the position of the other members of the family, the totality of the assets held by the family members or the assurances which had been given by the donor to the daughters as to their right to use the property during their lifetime. Shanley J. came to the conclusion that this was a clear case where the equitable jurisdiction should be invoked with a view to setting the transaction on the grounds of its improvidence. This finding was in turn upheld by the Supreme Court. At p. 259, Denham J., having cited the passage from the judgment of Gavan-Duffy in *Grealish v. Murphy*, said: -

> *"In light of the evidence, of the omissions in relation to the legal advice given, the fact that there was no evidence that the transfer was read over to Thomas Carroll senior, his frail health, his lack of practically any other assets, his relationship with his daughters and all the circumstances, there was clear evidence upon which the learned trial judge could come to the determination, which he did, at p. 232, that: -*
>
> > *"This in my view is a clear case where the equitable jurisdiction can and should be invoked with a view to setting aside the transaction on the grounds of its improvidence."*
>
> *I would affirm his conclusion."*

37. In these proceedings the plaintiff seeks to make the case that, notwithstanding that the Deed of Transfer represents a gift between spouses, there is a parallel between the facts in *Carroll v. Carroll* and the facts here and that there is no evidence to suggest

that Mr. Sheehan, the solicitor who acted on behalf of Mr. Cox and Mrs. Cox in the transaction, had any understanding of the circumstances of the children at the time the transaction was entered into. The plaintiff also highlights that the Deed of Transfer executed by Mr. Cox was of virtually all of his assets at a time when their value had increased substantially and at a time when the plaintiff contends Mr. Cox had made many promises to his daughters that they would be looked after.

The evidence given at the hearing

38. Having outlined the relevant principles which govern the causes of action asserted on both sides in these proceedings, it is next necessary to turn to the evidence given at the hearing. That evidence was given over the course of five days in 2018 and two days in 2022. The evidence dealt with the family circumstances (including the health of Mr. Cox), the making of the 2005 will and codicil and also with the circumstances relating to the execution of the Deed of Trust on 18 March 2005.

39. According to Jennifer Coleman, Mr. Cox had surgery in Beaumont Hospital in 1994 to remove cancerous tissue from his lungs. Thereafter, he appears to have recovered but his health began to deteriorate in late 2004. His mother-in-law died in February 2005. Not long afterwards, he became ill with pneumonia. He was admitted to hospital on 29th March 2005. He remained in hospital until 5th April 2005. However, he was in and out of hospital from time to time thereafter until arrangements were made to provide oxygen to him at home. The supply of oxygen at home was perceived by the daughters as a means to minimise Mr. Cox's hospital stays and they urged their mother to make the necessary arrangements to allow that to happen. Ultimately, in May 2005, Jennifer Coleman stayed for a time at the family home and organised a supply of oxygen. The underlying problem in 2005 appears to have been cancer but it is unclear from the evidence when such a diagnosis was made.

40. Michelle Cox suffered a fall from her horse in March 2005 and broke her wrist. At that point, she went to stay with her sister, Jennifer, in Tipperary. She was in Tipperary for the Cheltenham Gold Cup on 18th March 2005. The Gold Cup was clearly an important event in the lives of the family. I had the sense from the evidence that, for the Cox family, the Gold Cup was the equivalent of the All-Ireland finals for fans of GAA sports. As described further below, this was also the day on which the Deed of Transfer, the subject of the plaintiff's claim, was also executed. In circumstances where the evidence in relation to that issue was given at a later point in the trial, I will defer addressing the execution of the Deed until I come to consider the evidence of Mrs. Cox and of Mr. Sheehan, solicitor.

41. Suzanne Cox was also absent from the family home on 18 March 2005. In her evidence, she explained that she went into Dundalk on the day of the Gold Cup to watch it in a local bar. Relations between Suzanne Cox and her parents were not good at this time. Her parents disapproved of her partner. In light of the extent of disagreement between her and her parents, she moved out of the family home for a period at the end of April or beginning of May 2005. In addition, at one point, her parents instructed William Fry to write a letter to her complaining about her behaviour.

42. Suzanne Cox subsequently went to Limerick Races because she had a horse racing there. Michelle Cox accompanied her. Michelle Cox returned to the family home outside Dundalk on the evening of 20th March 2005. Nothing was said to her about the signing of any Deed by her father. When she arrived home, she was concerned about her father's state of health. She described his breathing as being *"very bad"* and that she was very worried about him. She also described how, at about this time, her father gave her the task of opening the post. In the course of opening the post at that time, she opened up an envelope containing a cheque book which previously had been issued in

her father's name solely. She was surprised to see that it was now in the name of both Mr. and Mrs. Cox. When she asked her father about it, Mr. Cox replied that his hand had been giving trouble and that he had found it very difficult signing. According to Michelle Cox, he told her that *"Mummy got me to sign something so she can write cheques on my behalf"*.

43. It is necessary to address the events of 30th May 2005. At that time, Jennifer Coleman was present at the family home. She was planning to return to Tipperary later that evening. Mr. Cox was then in the Louth County Hospital receiving treatment for pneumonia but he was due to be discharged that day. On that morning, her sister, Michelle Cox found a letter addressed to Mr. Cox from Aaron Kelly & Co. Solicitors to which was attached a will made by her father in 1991. Michelle Cox was very upset when she read the will because it left everything to Mrs. Cox. Jennifer Coleman was also very upset. Both she and Michelle Cox gave evidence that their father had, on many occasions, led them to believe that he would look after them in his will. For example, Jennifer Coleman gave evidence that she had a conversation with Mr. Cox on the evening of his 80th birthday on 13th February 2004. Her first child had been born the preceding December. On the night of his birthday, he remarked how he never thought that he would live to see a grandchild and he felt very proud. She also said that he mentioned to her that he must look at his will now that he had a grandchild. According to Jennifer Coleman, both she and Michelle were in shock on seeing the 1991 will. They raised the matter with Mrs. Cox and then decided to visit their father in Louth County Hospital. It is clear from the evidence that their visit caused great upset to Mr. Cox. On Day 7 of the hearing, Michelle Cox gave the following evidence in relation to this visit to her father: -

"A. ...so we decided we need to go to my father and confront him with it just to make sure he was aware of it. Jennifer drove down to Louth County Hospital where he was, we were expecting him in his room, like he normally would be, really happy to see us and instead he was out in his wheelchair, we could see him when we were walking in. He was crying. He was very distressed. There was a nurse, I think she has her hand on his shoulder. As we walked up to him he was on the 'phone and I remember him saying: "Oh they are here, they are here, come quick." He was crying. It was heartbreaking to see how distressed he was. So we walked over to him.

Q. When you say he said: "They are here, they are here, come quick", who was he talking to?

A. I am presuming -- oh he was talking to my mother.

Q. How was he talking to her?

A. Well she knew that we were on our way over to him because we were after telling her that we were going to go to the hospital to confront him over it. So he knew we were on our way.

Q. Yes. Okay. He was on the phone?

A. He was on the 'phone, yes.

Q. *We approached him and we were: "Hi Dad, are you okay?" Before we even spoke hardly he said: "That is not my will. That is not my will." He just threw it down. "That is only an old farmer's will." Jenny said: "We are just very disappointed, Dad, because it is your will."*

A. *He kept repeating himself and saying: "It is not my will, it an old farmer's will. It is not what I want. That is not what I want.*

Q. *Okay. How did that incident end then?*

A. *We tried to calm him down. We were like: "It is fine." I am not sure exactly. We wheeled him back to his room and we just tried to calm him down.*

Q. *Did you then leave?*

A. *We had to leave him there. We tried to wheel him back to his ward but he held on to the railing and wouldn't let us.*

Q. *Yes.*

A. *It was terrible. We didn't know what to do. We were just so upset. We ended up having to leave him. We knew that Sally was on her way down.*

We knew there were nurses around. We said that we would just leave him be and call him in a couple of days."

44. Michelle Cox gave a similar account of her visit to her father in the hospital on that day. According to Michelle Cox, she saw her father several days later, on which occasion he said: *"I have made things right"*. Michelle Cox also said that her understanding of her father's reference to an *"old farmer's will"* may relate to the fact that, at the time the 1991 will was made, the land was probably of agricultural value only and that, since that time, it had become quite valuable for development purposes.

45. Michelle Cox also gave evidence of a visit to her father in hospital a few days before he died on 9th January 2006. She described him as very close to death and very ill. She said that Mr. James Smith (who was appointed an executor of the 2005 will described below) was also present along with Mrs. Cox. In the course of her evidence, Ms. Cox said that, while she was there, her mother said to Mr. Smith: -

"Jimmy go up to Bunny and assure him that everything will be okay, that you are going to look after everything and he can rest assured everything will be okay."

Ms. Cox said that she was standing beside Mr. Cox's bed and she saw and heard Mr. Smith go up to her father and *"reassure him that he will look after everything and that everything will be okay, the way that he wanted it to be?"*. Ms. Cox then described her father's reaction as: *"He just look* (sic) *relieved and he thanked him, he thanked him"*.

<u>The terms of the 1991 will</u>

46. As described further below, Mr. Cox made a new will in June 2005 which, in contrast to the 1991 will, made significant provision for each of his children. For completeness, I should explain that the 1991 will had been prepared by William Fry, solicitors. Under that will, Mr. Cox appointed Mr. Neville O'Byrne of William Fry and

Mrs. Cox to be his executors and trustees and Mr. Cox left the whole of his estate to Mrs. Cox subject to a proviso that she should survive him by a period of 30 days. In the event that she did not survive him for that period, he left his house, lands, outbuildings, farm machinery, equipment and livestock upon trust for his son, subject to a right of residence in the house for his daughters in the event that they were unmarried and did not have a home of their own. In addition, in the event of the death of Mrs. Cox within the 30-day period, his bloodstock, horsebox, lorry, trailer and jeep were left to such of his children who would be actively involved in training horses at the date of his death. In that event, the residue of the estate was left to his daughters in equal shares.

The lead-up to the execution of the June 2005 will

47. The events described in paras. 43 to 45 above are relevant to the execution of a new will by Mr. Cox in July 2005. The evidence of Mr. Paul Callan SC is also relevant. As noted in para. 3(a) above, Mrs. Cox has contended that the 2005 will was drafted or dictated by Mr. Callan, who was a friend of the Cox family. Mr. Callan gave evidence that he visited the Cox family home on a number of occasions during the course of 2004 and 2005. He gave evidence that, in April or May 2005, Mr. and Mrs. Cox raised a problem they were experiencing with their daughter, Suzanne. While Mr. Callan did not go into detail, this appears to relate to the view held by Mr. and Mrs. Cox that Suzanne's partner at that time was unsuitable. In that context, Mr. Callan said that they raised an issue with him as to whether Suzanne would be in a position to claim an inheritance that could impinge upon possible development contracts which were then believed to be imminent in respect of the lands. Mr. Callan explained that, in response, he drew their attention to s. 117 of the Succession Act 1965. His evidence was that, either on that day or on a subsequent day, he provided several copies of s. 117 to them

and told them to take the advice of their solicitors, William Fry, in relation to the issue. He also said: -

> *"I said for my guess I said I think a court would do, a court might and of course it's all subject to the court, a court might say 50% for the wife in these circumstances, 20% for* [his son] *because he has special problems and he'll have to be looked after. You know I didn't want to go in to that but I mean obviously problems for the rest of his life and pressure on the girls for that after Sally passes on and 10% to each of the girls, bearing in mind the contribution they had made to the house in their lives, that they had gone that far. I said that.*
>
> *Now I think that that may have been misunderstood at a later stage, as thinking that I was making a suggestion about a Will. I was making no suggestion about a Will as such. That's all I ever said about a Will as such*
>
> *until later when a query, when I'd gone to America in the month of May, came back towards late May, I think it was then, to find out that Mr. Cox had been at the farm and wanted to see me."*

48. Mr. Callan clarified that the reference to Mr. Cox having been at the farm was a visit by Mr. Cox to Mr. Callan at the latter's farm while Mr. Callan was away in the United States. Mr. Callan explained that, in response, he went to visit Mr. Cox only to find that he was in hospital. He then went to the hospital but there were a number of family friends there at the time and he did not discuss the matter any further with Mr. Cox. However, on a later occasion, he called to Mr. Cox's home (after Mr. Cox had been discharged from hospital). According to Mr. Callan, Mr. Cox wished to discuss who he should appoint as executor. It is therefore clear that Mr. Cox was, at this time, actively considering writing a new will. This is consistent with the evidence given by

Jennifer Coleman and Michelle Cox, both of whom said that, not long after their visit to their father in hospital in May 2005, he told them that he had *"made things right"*. Mr. Callan said that both Mr. and Mrs. Cox were present on that occasion and that he suggested that Mr. Cox should appoint Mrs. Cox together with another member of the family and *"a good businessman"* as executors.

49. At some point in June 2005, Mr. Neville O'Byrne of William Fry Solicitors was instructed to prepare a new will on behalf of Mr. Cox. A draft will was prepared by William Fry. Under the draft will, Mr. O'Byrne and Mrs. Cox were named as executors. Under this draft will, Mr. Cox proposed to give 50% of his house and farm to Mrs. Cox, 10% each to his three daughters and 20% to trustees upon trust for the benefit of his son. This coincides with the suggestion made by Mr. Callan as to how a court might divide the estate in the event that one of the children were to bring proceedings under s. 117 of the Succession Act 1965 albeit that he stressed that this was no more than a suggestion on his part. For completeness, it should also be noted that it is doubtful that s. 117 would have been of any utility to the children of Mr. and Mrs. Cox given the provisions of s. 117(3) and given the legal effect of the Deed of Transfer (in the event that it is found to be valid).

50. In light of the allegation made by Mrs. Cox that this will was drafted by Mr. Callan or at his direction, it is necessary to consider the evidence available in relation to the genesis of this will in more detail. At the time of the trial, Mr. O'Byrne was known to be ill and he did not give evidence. However, the William Fry file was placed in evidence by Mr. Owen O'Sullivan of that firm without objection from counsel for Mrs. Cox. It is clear from the William Fry file that Ita O'Connor, legal executive, of William Fry, attended Mr. Cox on 8th June 2005 to take his instructions. Mr. Callan was present when Ms. O'Connor attended. In his evidence, Mr. Callan said that he had

stressed to Mr. Cox that he should instruct Ms. O'Connor as to the identity of the executors whom he (Mr. Cox) had chosen namely Mrs. Cox, Jennifer Coleman and Mr. James Smith, a family friend. In this context, I should explain that, prior to the attendance, Ms. O'Connor made a number of manuscript notes, apparently taken in respect of a telephone call *"from street somewhere"*. Those notes appear to record instructions from Mr. Cox that he wished to leave half of everything to Mrs. Cox, 20% to his son on trust and 10% each to his three daughters. The note also appears to record that Mr. O'Byrne and Mrs. Cox were to be appointed as executors and trustees. It is unclear whether these instructions were relayed directly by Mr. Cox or by Mrs. Cox on his behalf. There is certainly no evidence that the call was from Mr. Callan. This was followed by a fax dated 8th June 2005 which refers to *"Draft 8th June 2005"* with the notation *"WF444689V1"*. Mr. O'Sullivan confirmed that the reference to *"V1"* is the way in which William Fry would designate the first version of a document prepared by the firm. This is the first draft of the 2005 will. That fax was sent to Mr. Patrick Lawlor who it is believed received it on behalf of Mr. and Mrs. Cox who did not have a fax machine of their own at their family home. The fax was sent at 10:57 a.m.. I believe it is likely that this was sent in advance of Ms. O'Connor's attendance on the same day. I believe that it is safe to assume that the draft was prepared on the basis of the instructions given over the telephone. At this point, the draft will suggested that the executors and trustees to be appointed were Mr. O'Byrne, Mrs. Cox and Mr. Brabazon, the brother of Mrs. Cox.

51. When Ms. O'Connor attended Mr. and Mrs. Cox, Mr. Callan was also present. A discussion took place about who was to be appointed executors and trustees under the will. This was when, according to Mr. Callan, Mr. Cox insisted that the persons to be appointed were Mrs. Cox, her daughter, Ms. Jennifer Cox, and Mr. James Smith, a

friend of the family. In the meantime, the previous version of the will faxed to County Louth was seen beside the telephone in the family home by Michelle Cox. She noted the names of the executors and she was concerned that this was not in accordance with Mr. Callan's advice. In her evidence, she confirmed that Mr. Callan had previously told her that her father wanted his wife, Jennifer Coleman and an independent person to be named as executors. When Michelle noted that the draft will suggested that Mr. O'Byrne was to be appointed, she got in touch with Mr. Callan. Mr. Callan then wrote to Mr. O'Byrne of William Fry on 10th June 2005 in the following terms: -

> *"Mr. Cox who has been a close friend of mine has recently requested my advices in relation to his Will.*
>
> *On that occasion, after full discussion, he confirmed in my presence that his Executors ... would be ... his wife ..., his daughter Jennifer ... and Mr. Smith, a family friend.*
>
> *I was present when a member of your firm, Ms. Ita O 'Connor, was informed by Mr. Cox that these were to be his Executors and Trustees and that the Executors and Trustees mentioned in an earlier draft Will should be altered accordingly.*
>
> *This afternoon Mr. Cox's daughter Michelle informed me that she understood that there was now or might be a change in the position in relation to the appointment of Executors and Trustees. I called to Mr. Cox in the past few hours and in the presence of his wife, he confirmed that he did not wish any alteration to the three Executors and Trustees whose names were conveyed to Ms. O'Connor.*

In light of the foregoing, I would suggest that you take Mr. Cox's instructions as to his intended Executors and Trustees lest there be any doubt as to his testamentary intentions."

52. This letter was faxed to Mr. O'Byrne on the same day under a cover sheet marked *"Urgent"*. On same day, Mr. Callan wrote to Mr. Cox in the following terms: -

"Dear Bunny,

After my visit to you this afternoon and my discussion with you at which Sally was present, I wrote as per the enclosed letter to Neville Byrne.

Please read this letter which I am sure you will agree is a correct and factual resume of what was discussed and confirmed on the occasion of my visit.

After Mr. Neville Byrne received my letter he telephoned me and stated categorically that he had no wish whatsoever to be an Executor or Trustee of your last will.

In those circumstances it is clear that there is no problem or difficulty in your nominating your wife Sally, your daughter Jennifer and Mr. Smith as your Executors and Trustees.

As I emphasised to you in our conversation I am firmly of the view which is shared by barrister colleagues which I have consulted that the most suitable persons to be appointed as Executors and Trustees are you[r] *wife, your selected daughter and an independent sensible friend or relative with business experience."*

53. While the correspondence from Mr. Callan demonstrates that he intervened in relation to the identity of the executors, there is no evidence that he was involved in any

way of the drafting of the 2005 will which was executed by Mr. Cox on 11th June 2005. It is true that the division of the estate followed the general contours of the suggestion that he had made to Mr. and Mrs. Cox as to how he thought a court (in the event of a claim under s. 117 of the Succession Act 1965) might divide the estate between Mrs. Cox and the Cox children. But that does not mean that Mr. Callan dictated the terms of the will. The key point is that William Fry (who had also prepared the 1991 will) were retained. They took their instructions from Mr. Cox. They did not take instructions from Mr. Callan albeit that he sought to intervene in relation to the identity of the executors. As will be seen below, Mr. O'Byrne of William Fry took issue with Mr. Callan in relation to his correspondence on that issue. In all respects, William Fry plainly took their instructions directly from Mr. Cox.

54. Consistent with the note made by Ms. O'Connor, the will was prepared on the basis that Mr. Cox left 50% of his house and farm to Mrs. Cox, 10% to each of his three daughters and 20% to trustees upon a discretionary trust for the benefit of his son. Given the value the land was understood to have, that division was a fairly logical and unsurprising one. It meant that very substantial provision was made for Mrs. Cox while the children all benefited significantly. The fact that greater provision was made for his son than for his sisters is explained by the fact that he was perceived to have greater needs than his sisters. That said, the gifts to the three daughters were, by any measure, quite valuable. If the estate was worth something of the order of €30 million (as everyone appears to have believed) then the value of each of the daughters' share equated to €3 million.

55. The will was executed on Saturday 11 June 2005. Mrs. Cox explained that Mr. Cox had been in hospital at this time but that she brought Mr. Cox home on the morning of that day. According to Michelle Cox, the following people were present in the family

home at the time the will was executed, namely Chetwin Cox (a cousin of Mr, Cox and one of the named executors) together with his sister, Ms. Diana Bell (who was an attesting witness to the execution of the will) and Mr. Bill Lawlor (the other witness to the execution of the will). The will named Mrs. Cox, Chetwin Cox and James Smith as executors and trustees. However, the typed version of the will had identified Mr. O'Byrne as an executor. In the form in which the will was executed, Mr. O'Byrne's name has been struck out in manuscript and the name of Chetwin Cox has been inserted in manuscript in its place. Mr. O'Byrne prepared a detailed attendance note on 30th June 2005. In that attendance, Mr. O'Byrne noted that, in advance of its execution, he had a number of conversations with Mr. Cox in relation to the will. He also noted his interactions with Mr. Callan in relation to the identity of the executors. The attendance is in the following terms: -

> *"During the afternoon of 9 and 10 June, I had a number of conversations with Bunny Cox with regard to his will. On the afternoon of 9 June, I discussed the position with regard to executors with him, when he told me that my name should be reinserted. He said he had been advised by Paul Callan that solicitors could not act as executors under wills and that they had a conflict of interest and I assured him that such was not the case. At the time of this call which was on his mobile phone, he was in Louth County Hospital and I arranged to go up and meet him on the Saturday morning to have the will executed at his house at approximately 11 o'clock…*
>
> *I also advised him, as I did again on the Saturday morning when I met him, that the will, as it was currently structured, could lead to capital acquisitions tax problems, depending on the value of the land.*

On the Friday afternoon, the office rang me to say they had received a fax from Paul Callan which effectively advised me to be sure that I had got correct instructions from Bunny Cox regarding his will, and in particular with regard to executors.

I then spoke to Paul Callan and, having ascertained that he appeared to be inter-meddling in this matter as a friend of Bunny Cox, I assured him that I had no desire to be an executor and that if Bunny Cox did not want me to be an executor, I had no problem with this.

I then went to Dundalk on the Saturday morning. I met Mr and Mrs Cox at their property. On the way in I was approached by one of Mr Cox's daughters, Michelle Cox, who handed me a letter which contained a letter from Paul Callan to Bunny Cox, assuring him that I did not want to be an executor among other things, together with a further copy of his letter to me on Friday.

I told Michelle Cox to be absolutely clear, that I did not want to be an executor and that I was certainly not insisting on the same. She said to me words to the effect that they were afraid their mother would have too much power and that this was the reason they were looking for her other sister to be an executor. I clearly took from this that the assumption being made by some members of the family, supported by Mr Callan, was that I was not objective or impartial and that in any voting for executors, I would be likely to support Mrs Cox. Because I was not to be an executor, anyway, the matter did not arise.

I then spoke to Mr Cox on his own and I went through the will with him. He told me that he wanted his cousin, a Mr Chetwin Cox, to be an executor in my place and I made the appropriate amendment to the will.

He muttered something to be about conflicts of interest and solicitors not being executors. I told him that whoever had advised him of this was incorrect and that solicitors had acted as executors for many years.

It was quite clear to me that there was a power struggle going on between Mrs Cox and her daughters, who were supported by Paul Callan, to try to ensure that she did not get too much power in the administration of the estate. This appeared to be the nub of the what was going on.

I went through the will with Mr Cox, having made the foregoing amendment, and he expressed himself satisfied with it. I again warned him about the CAT problem and the position with regard to [his son].

The will was then executed and initialled, in the presence of the two witnesses, Mrs Diana Bell and Mr Bill Lalor. The will was then left with Mr Cox, who handed it to his son … with instructions to put it in the safe…"

56. The reference to advice about capital acquisition tax problems should be noted. As explained below, this led Mr. and Mrs. Cox to approach Arthur Cox for further advice. The reference to a *"power struggle"* between Mrs. Cox and her daughters should also be noted. There clearly was a level of tension between the three daughters

and their mother during this period which seems to have been prompted by the discovery of the 1991 will which left everything to Mrs. Cox. According to Michelle Cox, she had moved out of the family home for a period at about this time and was living with a friend in Dundalk. She said that, at this time, *"there was a lot of tension at home"*.

57. Consistent with his file note of 13th June 2005, Mr. O'Byrne wrote to Mr. Cox on 14th June 2005 reiterating the advice he had given in relation to capital acquisitions tax and making it clear that he had never sought nor wished to be named as an executor, although he said that he had been willing to be appointed as executor. The letter also stated that: -

> *"The reason that my name was in the will when I went up to you on Saturday was that the will had been changed, to include my name as an executor, arising from our telephone call on Thursday afternoon, 9 June. It was only on Saturday morning you confirmed to me you did not want me as an executor…"*

58. There was also an exchange of correspondence between Mr. O'Byrne and Mr. Callan in which Mr. Callan made clear that his intervention was never intended to suggest that Mr. O'Byrne or any member of the firm of William Fry were not following Mr. Cox's instructions. More importantly, a conversation took place after the execution of the 2005 will between Mr. Cox and his cousin Ms. Diana Bell (who had been asked to attend in order to witness the will). Ms. Bell explained that Mr. Cox was like a brother to her and she knew him very well. Previously, he had indicated to her that he proposed to make a will dividing his estate in the manner directed by the 2005 will. Ms. Bell gave evidence that, after the will was executed, Mr. Cox was very happy and he told her that: *"At last now, it's a great weight off my shoulders … I know the children are going to be looked after properly and they're going to have enough money to do what they want*

with it." While, at the conclusion of cross-examining Ms. Bell, counsel for Mrs. Cox challenged her veracity generally, he did not raise any specific challenge in relation to what Ms. Bell said about this direct conversation she had with Mr. Cox. I should make clear that I do not believe that there is any basis to doubt Ms. Bell's evidence in this regard. While I think it is unlikely that Ms. Bell could remember the exact words spoken by Mr. Cox some thirteen years before she came to give evidence, I accept that some words to the effect quoted above were spoken by Mr. Cox. It is not every day that a person is asked to witness the execution of a will and I therefore accept that Ms. Bell is likely to be in a position to remember the events of that day and the sense of the words spoken by Mr. Cox. For completeness, it should be noted that Ms. Bell also expressed views about Mr. and Mrs. Cox and the Cox family but I do not believe that it is either necessary or appropriate to have regard to her evidence to that effect. I should make clear that I do not doubt that Ms. Bell's views are genuinely held by her but they seem to me to represent her subjective view. Although she was a reasonably frequent visitor to the Cox family home, I cannot be certain that she had sufficient knowledge of the family to form those views. But her evidence as to what was said to her by Mr. Cox on the day of the execution on his will in June 2005 is of a different character and is plainly relevant as to the state of mind of Mr. Cox at that time. Her evidence suggests that Mr. Cox thought that he still had a full disposing power over the property outside Dundalk and that, by the will, he had executed in her presence, he had provided for his children out of that property.

The circumstances leading to the execution of the 2005 codicil

59. The advice given by Mr. O'Byrne that the will might trigger unwelcome capital acquisition tax consequences clearly caused concern to Mr. Cox and Mrs. Cox. They approached their friend, Mr. Neil McCann (who was also potentially a purchaser of

their land), to know whether he could recommend an appropriate advisor. He suggested that they should consult Ms. Anne Corrigan of Arthur Cox solicitors. On 28th June 2005, Mr. McCann telephoned Ms. Corrigan of Arthur Cox who is a well-known and well-respected lawyer specialising in trust and succession law and in taxation. Ms. Corrigan gave evidence at the trial. Her evidence was extremely detailed, very clear and very helpful. Given the competing contentions of the parties to these proceedings, I believe that it is important to review Ms. Corrigan's evidence in some detail.

60. In her evidence, Ms. Corrigan said that, in the course of her telephone call with Mr. McCann, he explained that Mr. and Mrs. Cox (who he said were aged 79 and 55 respectively) required advice in relation to their wills; that Mr. Cox was seriously ill with cancer, and that the matter was urgent. He gave Ms. Corrigan their telephone number and asked her to call them. Ms. Corrigan telephoned the Cox family home the following day (i.e. 29th June 2005) and spoke to Mrs Cox. During that telephone conversation, Mrs. Cox told Ms. Corrigan that both she and Mr. Cox were very concerned that the new will that had been made just two weeks beforehand could have adverse tax implications. Ms. Corrigan's understanding was that the concern arose from the way in which, in contrast to the 1991 will, a gift would now be made of 50% of the estate to the four children of the family. The concern was that the gift to the children would not be subject to the same generous tax treatment as a gift between spouses. Mrs. Cox also advised Ms. Corrigan that her husband was seriously ill and that the prognosis was very poor. Ms. Corrigan asked Mrs. Cox to have the will faxed to her and it was subsequently faxed to her by Mr. McCann. Ms. Corrigan explained that, in view of Mrs. Cox's concern about the state of her husband's health, she looked at the will immediately. Following her review of the will, Ms. Corrigan wrote a detailed letter of advice of 29th June 2005 to Mrs. Cox. In that letter, Ms. Corrigan first recorded her

understanding of why the three daughters of the family might have been unhappy with the default provisions of the 1991 will. She said: -

> *"You indicated to me that the current will was executed at the instigation of your three daughters. Certainly I can appreciate that they may have been dissatisfied with the default provisions of the 1991 will, since you indicated to me that the house and farm are the only substantial assets owned by you and your husband and this was to pass in the event of the death of both you and your husband to your son .... The girls were to share in any residue of the estate, but since you indicated to me that there were no other substantial assets, then it would appear that the girls would have stood to inherit very little in comparison to* [your son].
>
> *I appreciate that the value of the farm is likely to have increased many times as a result of re-zoning since the 1991 will was made."*

61. In the same letter, Ms. Corrigan explained the tax implications of the gift to the daughters as formulated in the 2005 will. She said: -

> *"You indicated that because of the fact that the land has been zoned for development, it could be worth as much as €30m. In that event, your daughters' 10% interest under the will would amount to an inheritance of €3m each. Assuming that the girls have not received any gifts from their parents since 5th December 1991, each of them would have an exempt threshold of €466,725, and only the excess over this amount would be subject to CAT. However, if your daughters qualified for agricultural relief (as appears likely) then the value of their inheritance would be reduced by 90% so that they would be regarded as*

taking a taxable benefit of €300,000 only. This sum would be covered by their exempt threshold of €466,725 so no tax would be payable.

I attach as an appendix to this letter a summary of agricultural relief and the conditions to be satisfied to qualify for it. It would be important that these be reviewed in the circumstances of each of your daughters to confirm that they would each satisfy these conditions. You will note that there is a clawback of the relief if the property which is the subject of the gift/inheritance is sold within 6 years, and not replaced by other agricultural properly."

62. Earlier in the letter, Ms. Corrigan recorded the reasons why, based on what she had been told by Mrs. Cox, the previous experience of the daughters in agriculture and equine affairs was likely to assist them in qualifying for agricultural tax relief. She said:

-

"You have indicated to me that all four of your children are interested in farming. I understand that Jennifer, [your son] *and Suzanne all have agricultural science/equine qualifications, and your youngest daughter Michelle has a business degree and is likely to also complete an agricultural science/equine qualification. As mentioned when we spoke, and as detailed below, there are very valuable tax reliefs where an individual receives a gift or an inheritance or agricultural property."*

63. Ms. Corrigan then addressed the tax implications in respect of the trust created for the benefit of Mr. Cox's son. She explained that the trust would be subject to a 6% once-off charge on Mr. Cox's death together with a 1% annual tax charge unless the trust was established for the benefit of an individual who is *"because of age or*

improvidence, or of physical, mental or legal incapacity, incapable of managing that individual's affairs".

64. Ms. Corrigan explained that further discussions would be required in order to clarify whether the son would fall within the terms of this exemption. In her letter of advice, Ms. Corrigan also advised as to alternative will structures including the possibility that Mr. Cox could leave his entire estate to Mrs. Cox. She also made clear that, given his recent prolonged hospital treatment and the fact that he was then on medication, it would be important, if Mr. Cox did wish to make a new will, that a doctor should certify that he had the relevant capacity to do so.

65. It is also significant that, in her letter of advice, Ms. Corrigan set out her understanding that the farm was in the sole name of Mr. Cox at that time. She said, at p. 2 of her letter, that: -

> *"My understanding (which you are to confirm) is that the farm and family home in Dundalk are owned solely by your husband."*

It is clear that the advice which was given by Ms. Corrigan was based on the assumption that Mr. Cox was the sole owner of the house and farm. It should also be noted that Ms. Corrigan was very conscious that, at this point, she had not spoken directly to Mr. Cox and, for that reason, she organised a visit to the family home. On Day 1 of the hearing, Ms. Corrigan explained the position as follows: -

> *"…it is correct that I hadn't spoken directly to Mr. Bunny Cox at that point and that's why a meeting was arranged at their home because I think we had offered to meet there if the journey was too arduous for him and I think it was felt it was and so we went to visit him at his home."*

66. In response to the letter of advice, Mrs. Cox telephoned Ms. Corrigan on 6th July 2005. Mrs. Cox asked Ms. Corrigan if she felt that amendments were required to the

2005 will. Ms. Corrigan explained that she did not believe that there were any adverse issues arising from the will in circumstances where, on the basis of the information that she had received, each of the children should be in a position to avail of agricultural relief in respect of their respective shares. This conversation was followed by a letter from Mrs. Cox on 13th July 2005. In that letter, Mrs Cox stated that she needed to check if the farm and house was solely owned by her husband and she asked if it would be a *"big problem"* if the property was held in joint names. In turn, this was followed by a further telephone conversation on 28th July 2005. Ms. Corrigan made a note of the conversation in an attendance note of the same date in these terms: -

> *"I explained that if the property was jointly owned, all of it would pass to the surviving spouse rather than passing under the will and she is to check the position.*
>
> *In relation to agricultural relief, Sally indicated that the assets in the children's name at present are negligible so they all should satisfy the 80% test.*
>
> *In relation to the children receiving absolute shares, Sally indicated that her husband would like a codicil to the will stipulating that if some of the beneficiaries wished to realise their interests the others could buy them out.*
>
> *Sally also raised the possibility of including a stipulation that if the girls wished to realise their interest they should be obliged to sell at a maximum of €2m each, irrespective of market value (ie artificially fixing the value of the farm at €20m, even though it is now estimated at €35m. I queried if this reduced rate would apply also in the event of Richard or Sally wishing to realise their interest and*

she indicated that it would not. I pointed out that this could cause problems with the girls as they could perceive that they were being discriminated against whereas she and Richard were not. Sally accepted this point and decided to abandon this formula.

We have arranged to meet in Dundalk on Wednesday 17th August at 11.30am."

67. In her evidence on Day 1 of the trial, Ms. Corrigan confirmed that she had explained to Mrs. Cox that, if the property was held on a joint tenancy basis, then it would pass automatically to her by survivorship on the death of Mr. Cox, whereas, if the property was owned solely in Mr Cox's name, then it would pass under the provisions of his will. She also confirmed that: -

"Then we also discussed agricultural relief and, again, Sally indicated that she thought the children's assets were not material so they would qualify for the agricultural relief. That seemed to confirm that they didn't need to worry about tax being a problem on the 2005 will. In relation to whether Mr. Cox's daughters should receive and outright inheritance or not, Sally said that Bunny would like a codicil to the will dealing with this issue of the fact that there would be a number of co-owners and saying that if the beneficiaries wanted to realise their interests that other family members could buy them out. Other than that, effectively, I had outlined that I really thought that the June 2005 will was absolutely fine, that it didn't have any negative tax issues as they had been worried about so the only issue was that I had raised the fact that, as a number of co-owners, it might be a good idea to put something in there about how they might resolve issues on that front and also because there was a trust for [the son] *that I felt it was a little bit light on administrative powers and, perhaps, the*

codicil could add a few administrative powers but, really, that was going to be the sole function of the codicil, it wasn't changing the June 2005 will in any material."

68. With regard to the reference in the attendance of 29th July 2005 to the *"girls"* being obliged to sell at a maximum of €2 million in the event that they wished to realise their interest under the 2005 will, Ms. Corrigan advised against such an arrangement. She said: -

"I, generally, say to clients that I always think that what is sauce for the goose is sauce for the gander and if you are going to suggest some particular provision that it should apply, equally, to everybody so I expressed that view and said that that could cause a sense of resentment with Mr. Cox's daughters because they would perceive they were being discriminated against whereas [the son] *wasn't, for example, and she wasn't so Sally accepted that point and said that they would abandon that formula."*

69. Ms. Corrigan prepared a draft codicil to give effect to what had been discussed with Mrs. Cox. She also prepared a draft enduring power of attorney. She then travelled with a colleague, Ms. Edel Hargaden, solicitor, to the family home of Mr. and Mrs. Cox on 18th August 2005. On Day 1 of the hearing, Ms. Corrigan explained that, although she had been apprehensive about Mr. Cox's ability to execute a codicil to his will, she was satisfied, on meeting him, that he had full mental capacity. She said: -

"...as I said I had been somewhat apprehensive although I was bringing with me a draft codicil and a draft enduring power of attorney, in my mind I had reservations as to whether either of those two documents would be capable of being executed but when I met Mr. Cox he was really, in my opinion, completely fine mentally and full mental capacity. I suppose, I should mention I am from a

farming background myself and Mr. Cox was a farmer and we related very well to each other. He reminded me, very much, of my own father who was of a similar age. He was physically very frail and I think, I am not sure of this, whether he had some breathing apparatus but his breathing was certainly, very, very laboured, he was a very slight man, I think he had been an armature (sic) *jockey but mentally he was completely fine and he engaged fully in the conversation. My recollection is that, first of all, because Sally had mentioned in the call in advance that he might want to have a close family friend and advisor there and I had said, obviously, that was no problem if he wanted to do that and so when we arrived Chetwind* (sic) *Cox, his cousin, was there and the first discussion we had was whether he was comfortable to have him there because we were, clearly, going to be having very private discussions about his will and his property but he confirmed that he did want him there and he was going to be one of his executors and he was going to be one of the attornies so he was completely comfortable and said he had no difficulty with him being there…*

… we'd prepared the documentation so he said he was completely comfortable with him doing that. The first thing that I did was to recap with Bunny Cox the June 2005 will and what the will provided for and my recollection, as I said, my attendance note does not specifically says this but my recollection is that I raised the point that I had raised previously with Sally on the telephone as to who owns this property because, obviously, it is relevant and, certainly, my recollection is that he had indicated it was his and that was how the meeting proceeded. Certainly, if there was anything in my mind to suggest that that had

not been the case it would have been a point for me to follow-up. For example, if somebody said; 'I must check that point', I would tend to write to a client afterwards and say; 'you agreed to check this particular thing', but I didn't have a note of anything like that and I, certainly, came away believing that the property was Mr. Cox's and that there was no question about that…

That was on the basis of the discussion that I had with him as to what the will was, what it meant and that he was, in this will, giving property that he owned, 50% to his wife, 10% each to his daughters and 20% to his son. He discussed the background to the property, as I mentioned, very openly, I was a bit concerned would he hurt Mr. Chet Cox's feelings when he talked about the circumstances in which he came to own it because Chet was there and it was his father who had to sell the property so it was a very open discussion and, certainly, he had indicated that he had bought the property and I understood him to mean that he, solely, had bought the property."

70. Ms. Corrigan's views in relation to the mental capacity of Mr. Cox is also reflected in the contemporaneous attendance note taken by her on the day of her visit to Mr. Cox's home on 17th August 2005. In her attendance note, Ms. Corrigan stated: -

"I found Mr. Cox to be totally alert and have a full understanding of all of the issues we discussed. Chet left the house before our discussions on the codicil to the will were concluded to visit his sister Diana and Sally also left the room to prepare refreshments, so Edel and I had an opportunity to speak with him alone in relation to his will and the proposed codicil to it. Mr. Cox indicated that he was satisfied with his will of 11th June 2005 as supplemented by the codicil that we had discussed. He then proceeded to sign it, witnessed by myself and Edel."

71. On Day 2 of the hearing, Ms. Corrigan reiterated her view that Mr. Cox was fully capable of executing a will at their meeting in August 2005. She said: -

> *"In fact when we met him, although he was very frail physically, and his breathing was quite laboured, I didn't have any concern at all about his mental capacity. He engaged very fully in the conversation. We had discussions relating to all of his children. We had discussions relating to his property, and certainly my understanding then was that he understood the nature and extent of his property in the sense that he had indicated to me that he owned this farm that he knew was very valuable and he was talking about this possible additional purchase that he might make of the adjoining land. So he was fully able to participate in all of those conversations and I had no doubt that he fully understood exactly all of them…*
>
> *So in fact that is why we did not feel any need to call a medical practitioner to validate our position, both Edel and I felt very comfortable that he was completely competent. That was our evaluation."*

72. Ms. Hargaden was also of the view that Mr. Cox was *"mentally very alert"* although she found him very frail physically and she said that his breathing was compromised. Ms. Corrigan was asked whether she would have called a medical practitioner if she had been in any doubt and she answered: -

> *"Yes, if we had any doubt, yes, we would."*

On the same day, she also confirmed that Mr. Cox seemed to fully understand and recollect the terms of the will he had previously made in June 2005. Furthermore, under cross-examination, Ms. Corrigan confirmed that the matters discussed on this occasion were complex and that Mr. Cox did not have any difficulty in understanding them. Her

evidence was that he came across *"as a very bright man"*. She also made clear that, had Mr. Cox been acting under duress at that time, he had an opportunity to make that known to both Ms. Corrigan and Ms. Hargaden after Mrs. Cox left the room to make lunch. Ms. Corrigan highlighted that the codicil was in fact executed while Mrs. Cox was absent in the kitchen making refreshments.

73. While Ms. Corrigan accepted, in the course of her cross-examination on Day 2 of the hearing, that Mr. Cox never told her that he was the sole owner of the property, she emphasised that she was told by Mr. Cox that he had acquired the property from the father of Chetwin Cox and that he also outlined to her the very personal circumstances that led to the decision of Chetwin Cox's father to sell the farm to him. She also stressed that Mr. Cox did not say to her that he had bought the farm with his wife or that it was jointly owned or that he had executed a transfer into joint names. In this context, it is important to keep in mind that the entire exercise of drafting and executing a codicil would have been pointless had Ms. Corrigan known that the property was already held in joint names. It is entirely unrealistic to think that expert lawyers in this area (such as Ms. Corrigan and Ms. Hargaden) would have involved themselves in the process of drafting a codicil and giving detailed advice in relation to the 2005 will, if they had any reason to think that the property was already held in joint names.

74. Ms. Corrigan said that Mr. Cox spoke very fondly of his children on this occasion. She also said that the atmosphere on the day was very relaxed. She had the impression that the relationship between Mr. Cox and Mrs. Cox was a very happy one. Ms. Corrigan also said that Mrs. Cox actively contributed to the conversation. On Day 2 of the hearing, Ms. Corrigan was asked, in the course of cross-examination, whether anything she had seen or heard made her suspicious that Mrs. Cox had been overbearing

towards Mr. Cox or that she was influencing his decisions during the discussions that took place on 17th August. Mr. Corrigan responded that she did not get any sense of that. Based on what she was told by Mr. and Mrs. Cox, she understood that the property had a significant value and that they felt it was worth at least €30 million or perhaps more. Under cross-examination, Ms. Corrigan accepted that there was no discussion of any liabilities owed by Mr. Cox or in relation to banking.

75. Ms. Corrigan was very clear that Mr. Cox instructed her that he wanted each of his children to have a share of the farm. She said that Mr. Cox *"seemed to be very satisfied and said he wanted them all to have a share in the farm and that all of them were interested in farming"*. That said, Ms. Corrigan's attendance noted that Mrs. Cox said that *"the kids haven't grown up yet, though they're not as bad as they were"*. However, Ms. Corrigan took that as a jocular reference. Ms. Corrigan stressed that, at no point, did Mr. Cox suggest to her that the 2005 will had not been made with his full consent. To the contrary, Ms. Corrigan said that he had told her that he wanted his daughters to have 10% each of the farm and that he wanted his son to have 20% of the farm with the remaining 50% going to his wife. Ms. Corrigan explained that, if she had been asked for advice around that, she would have supported what he had *"already decided"*. She explained this in the following terms on Day 2 of the hearing: -

> *"If he had asked for advice around that, then we would have basically supported what he had already decided, because, you know, this was a farm that was worth, we were told, 30 million and upwards. So Mrs. Cox was going to be very well provided for by 50% of that, being a figure of 15,000,000, and his daughters would each have a share.*

For example, we would have advised that Mrs. Cox at 55 could have decided to remarry. There might be no certainty that his children would achieve shares of the property afterwards. So we had felt it was a very fair division, but he hadn't asked us about the split because he had already decided upon that. And he confirmed at the meeting that he was happy with that and that's what he wanted his daughters and his son to have.

So it was never suggested to us that he had changed his mind about the June 2005 Will, and that he had now wanted to bequeath everything to his wife. That was never suggested at the meeting in August."

76. Ms. Corrigan was cross-examined on this issue but she did not accept what was put to her by counsel for Mrs. Cox. Her evidence was: -

"A. Well, to be honest, Mr. Hogan, I just don't agree with you, because if Mr. Cox had decided to bequeath his entire property to his wife he would have been completely free to do that. And as you know --

Q. He did decide that, Ms. Corrigan.

A. -- under the Succession Act his children could not have disturbed a bequest that was made to their mother. So there was no reason that I'm aware of why he couldn't have done that had he chosen to do so, but he didn't make a will in that format. He deliberately made a Will that was in a different format and he told us at the meeting in August that that was the Will that he wanted, and that was the shares that he wanted his children to have.

Q. Well, unbeknownst to you, Ms. Corrigan, Mr. Cox made a Will in 1991 in which he gave all of his property to his wife --

A. No, that was known to me. That was known to me from the 28th June.

Q. No, no, if you let me finish. Unbeknownst to you he did make a Will, but he was forced to then change his Will to benefit his children, and he did that against his will?

A. He didn't give any indication at the meeting in August that that was the case. He spoke very fondly of his children and he said, not only in terms of the discussion we had on his Will, but he also asked us about what -- he wanted to make gifts to his daughters and he asked us what the threshold exemptions were for each of his daughters in terms of gifts that he might make to them. So he never made any suggestion or inclination at the meeting that there was any issue with his children, and nor incidentally did Mrs. Cox.

So apart from the fact of her having said that the Will had been made at the instigation of his daughters with the assistance of Mr. Callan, that was the only reference, but then Mrs. Cox did not express dissatisfaction to me with the fact that the children were being given shares. She only expressed the concern that this would trigger a tax problem."

77. This evidence is very important in the context of the case made by Mrs. Cox that the 2005 will was dictated by Mr. Callan or procured through the undue influence of her daughters. It shows that in August 2005, a little over two months since the execution of the 2005 will, Mr. Cox was reaffirming the intention expressed in the text of the 2005 will to benefit his daughters to the extent of 10% each and to benefit his son to the extent of 20% of his estate. Had it been the case that Mr. Cox had any difficulty with the terms of the 2005 will, he had the opportunity in August 2005 to

raise any issues with a new firm of solicitors. Crucially, that firm never had any contact with Mr. Callan or with the daughters of Mr. and Mrs Cox. Furthermore, if Mrs. Cox had any concern about the influence of Mr. Callan or her daughters on her husband, she also had the opportunity to raise those concerns with Ms. Corrigan (with whom she spoke on a number of occasions) or Ms. Hargaden. While she mentioned that the will was made at the instigation of Mr. Callan and her daughters, it is clear from Ms. Corrigan's evidence that she raised no complaint about it. This is further confirmed by the fact that nothing was put to Ms. Corrigan on cross-examination to suggest that Mrs. Cox had expressed concern about undue pressure being put on her husband to execute the 2005 will. Nor was any evidence given by Mrs. Cox to suggest that she had raised a concern about the validity of the 2005 will or the circumstances of its drafting or execution.

78. It should also be noted that, in the course of Ms. Corrigan's and Ms. Hargaden's interaction with Mr. Cox on that day, there was specific discussion of the structure of the gift to Mr. Cox's daughters and whether the gift to them should be subject to a discretionary trust. While there is a difference of recollection as between Ms. Hargaden and Ms. Corrigan as to whether this was raised by Mr. or Mrs. Cox, Ms. Corrigan confirmed that there was a roundtable discussion with all present and that she and Ms. Hargaden explained that, if a protective trust arrangement was not necessary for the three daughters, the creation of such a trust would trigger discretionary trust tax. There was also discussion about the proposed gift to Mrs. Cox. Ms. Corrigan explained in her evidence that: -

> *"...Sally would be inheriting 50% of the property which would be let's say an inheritance of, approximately, €15,000,000 or so, so she had mentioned in her letter to me some trust arrangements which we hadn't previously gone into in*

any detail on the telephone of having a trust for the family in case of emergencies or for medical expenses or so on and I'd suggested that this was something in the context of her own will that, perhaps, she might want to consider a trust arrangement. Sometimes client might feel that if they have given children a very large inheritance that they might keep something back in a trust just in case the first inheritance isn't used wisely, that if something is held back in trust as there is a reserve for later so that was something we would discuss in the context of her own will."

79. Ms Corrigan also confirmed that, at that meeting, she also discussed the execution of an enduring power of attorney. She explained that this was an aspect that she initiated herself that she wanted to bring the utility of such an arrangement to the attention of Mr. Cox. Ms. Corrigan is a barrister by profession and was not, therefore, in a position to complete the necessary solicitor's certificate which has to be signed when a person executes an enduring power of attorney. It was partly for that reason that Ms. Hargaden attended the Cox family home with Ms. Corrigan. Ms. Hargaden is a very experienced solicitor and tax consultant at Arthur Cox. In addition, having regard to Mr. Cox's age, it was considered prudent that two lawyers should attend. In her evidence, Ms. Hargaden explained that this was considered desirable in circumstances where Mr. Cox was elderly and neither Ms. Corrigan nor Ms. Hargaden had previously met him.

80. The codicil was duly executed by Mr. Cox in the presence of Ms. Corrigan and Ms. Hargaden. The codicil did not make any significant changes to the will of June 2005 other than the inclusion of a number of specific powers to be given to his trustees and also the inclusion of a mechanism in the event that any member of the family wished to realise their share in the property prior to any unanimous family decision to

dispose of the entire property. Insofar as relevant, clause 2.2 of the codicil dealt with the mechanism as follows: -

> *"It would be my wish that my wife and children (in* [my son's] *case, via his trustees) retain my house and lands at …, Dundalk, Co. Louth … the subject of my bequest to them at clause 2.1 of my Will until such time as the family unanimously decides that it should be disposed of on what are agreed by them to be the best possible terms and in such manner that the proceeds can be easily divided between them in the proportions specified in clause 2.1. If any of my family wish to realise their share in* [the lands] *prior to such unanimous family decision on a disposal, then the other beneficiaries having an interest in the property and wishing to retain it shall have the right to acquire such share, if more than one in equal shares, subject to and charged with the payment by them, proportionately if more than one, of a sum equal to the relevant percentage of the market value of* [the lands] *at the date my will becomes operative to which such family member who wishes to realize his/her interest in it is entitled pursuant to clause 2.1 hereof. The market value of* [the lands] *shall be determined for such purposes by such professional valuers as shall be selected by my Trustees."*

81. Ms. Corrigan also left the enduring power of attorney with Mr. Cox for execution. It was subsequently executed by Mr. Cox together with his proposed attorneys, namely Chetwin Cox and James Smith. It was sent back to Ms. Corrigan on 26th August 2005. However, when she reviewed the document, she noticed an issue with the signature of the witness to the execution of the document by the attorneys. She duly wrote to Mr. Cox on 6th September 2005 raising this issue with him.

82. Ms. Corrigan did not receive a response from Mr. Cox to that letter. However, on 10th September 2005, Mrs. Cox wrote to her enclosing a copy of the Deed of Transfer of 18th March 2003. In the covering letter, Mrs. Cox merely said: -

> *"I enclose the following which I presume shows the place in joint names. Probably ordered by the bank as I am now a joint signatory as Bunny unable to sign. However, I've got one brother to sign the deed of covenant and he's sent it onto my other one, so you should have it next week, all going well."*

83. It should be noted that, when Mrs. Cox subsequently came to give evidence on Day 8 of the hearing, she was asked to explain the reference to *"Probably ordered by the bank"*. In particular, she was asked whether somebody from the bank ordered herself and Mr. Cox to execute the Deed of Transfer. Mrs. Cox responded to say: -

> *"No - well, maybe they did. I wasn't aware of that. All I know is that we had to sign a document, a form from the bank for there to be joint signatories on the account."*

It was subsequently clarified, in the course of the exchange between counsel for the plaintiff and Mrs. Cox, that this relates to Mrs. Cox becoming a joint account holder with Mr. Cox in respect of his overdraft facility with Bank of Ireland. An application for a joint account was made by Mr. Cox and Mrs. Cox to Bank of Ireland for this purpose. The relevant form is dated 27th January 2005. It appears to be clear that this step was taken in order to procure the agreement of the bank to the registration of the property in joint names. It is clear from the evidence of Mr. Sheehan that the bank was only prepared to release the land certificate in respect of the property (which was held as security for Mr. Cox's indebtedness on foot of the overdraft facility) on the basis that the overdraft facility should become a joint account in both of their names.

84. Ms. Corrigan explained that she was extremely surprised to receive the letter of 10th September 2005. She said that she was baffled by it. She said that it did not make sense to bring her and Ms. Hargaden down to Dundalk to talk about property passing under a will if, in fact, it was not going to pass under the will. She could not understand why no reference was made at the meeting in August 2005 to the Deed of Transfer. On Day 2 of the hearing, she described her response to Mrs. Cox's letter in the following terms: -

> *"I had spoken to my colleague, Edel Hargaden, when the letter from Sally arrived because I was most taken aback by the letter. I was extremely surprised by the contents of it given the discussions we had had at the house in August. So, I think, immediately that I received the letter I would have called into Edel's office, which is adjacent to mine, to show it to her, and, I think, she was equally surprised by it and we had a discussion as to what we should do because we felt it was quite a serious letter that quite changed what our understanding of the position had been at the meeting in August. And we decided the appropriate thing to do was to write to both Sally and Bunny separately to clearly outline in the letter the implications of this document that we had received and how it changed the planned Will that we had discussed with them at the house, and that's what I did, I sent a letter to both of them on the 5th October."*

85. On Day 2 of the hearing, Ms. Corrigan elaborated on her reaction to the letter in the following terms: -

> *"I was very surprised to receive that letter because, you know, we had had several detailed discussions, as mentioned in my attendance notes, of questions being put to me about the difference between holding property in one sole name and what the difference was if it was on a joint tenancy. And when I had outlined*

those discussions I had felt as if I was explaining something to somebody that was really new to them, they seemed to understand it and we had a very fulsome discussion on it. And when I received the letter it appeared to me that these discussions must have been going on almost in tandem, or certainly a few short months before, in connection with the property. And because of the dynamic that I was involved in whereby Sally was very much involved on her husband's behalf in conveying messages to me and arranging for me to come to the house, I felt that she must have been involved in these discussions in relation to the transfer, and I found it very surprising that she or Bunny had not mentioned it to us at the house."

86. As noted by Ms. Corrigan in the course of her evidence on Day 2, Ms. Corrigan wrote separately to Mr. Cox and Mrs. Cox on 5th October 2005. In her letter addressed to Mr. Cox, she explained the legal effect of the Deed of Transfer. In particular, she explained that, irrespective of the provisions of the 2005 will, the house and lands would pass to Mrs. Cox under the Deed of Transfer in the event that he was to die before her. The position was explained very clearly in Ms. Corrigan's letter as follows: -

"You will recall that when we met in August in relation to your will of 11th June 2005 which had been prepared on your behalf by William Fry, we discussed your intentions were to give a 50% interest in your house and lands to Sally, 10% each to each of your three daughters and 20% on a discretionary trust for your son .... You may recall we had queried whether the property was in your sole name, as the will seemed to be drawn on this basis.

Sally recently forwarded me a copy of a transfer which appears to be dated either 18th March 2003 or 2005 (the hand written date is a little difficult to read

accurately, but the document was stamped by Revenue on 11th April 2005 so I assume it was made in 2005). The effect of this transfer is to transfer all the property comprised in folios … and … from your sole name into the joint names of yourself and Sally. I am assuming that the two folios mentioned relate to your house and lands at …. If that is so, it is important that you appreciate that in the event that you were to pre-decease Sally, the house and lands would automatically pass to Sally as the surviving joint tenant under what is known as the right of survivorship. Conversely if Sally pre-deceased you, all of the property in question would pass to you automatically by law. This is because where property is held in joint names, as the house and lands at … now are, they pass by operation of law under the principle of the right of survivorship mentioned. They do not pass under the will of a deceased co-owner.

Thus irrespective of the provisions of your current will, if you were to predecease Sally, then the house and lands would automatically pass to Sally. No share of it would pass to your children. As your will provides that the residue of your estate is to pass to Sally, this means that any other property you may own (such as cash or investments) will also pass to Sally absolutely.

I know that when we met in August, we had discussed the provisions of Sally's will, and obviously it is all the more important that she and you be clear on the current arrangements, and that Sally gives urgent attention to her own will. I am of course writing to her separately advising her of this…

I look forward to hearing from you and of course be sure to contact me at any time to discuss any of these matters with me further. My direct phone line is…"

87. Ms. Corrigan did not get a response to that letter. By way of follow-up, she telephoned the Cox family home on 23rd November 2005. Mr. Cox answered the telephone. She asked him if he had received her letter of 5th October. His response was to say that he was sure it was *"around here somewhere"*. Ms. Corrigan said that her reaction to both his voice and demeanour was such that she felt it was not appropriate to pursue the call. He sounded vague and not as well as he had been in August when she visited him for the purposes of executing the codicil to the will. She ended the call by saying that she would send him a further copy of her letter. She did this under cover of a letter of the same day.

88. Ms. Corrigan was entirely unsure as to the extent to which Mr. Cox ever considered her letter of 5th October. Ms. Corrigan had no further contact with Mr. Cox prior to his death on 9th January 2006. Subsequent to his death, Ms. Corrigan telephoned Mrs. Cox on 20th January 2006 to sympathise with her on her bereavement and to mention that she intended copying her on a letter that she had sent to Mr. Chetwin Cox, in his capacity as executor under the 2005 will. During the course of that telephone conversation, Mrs. Cox observed that the transfer to her took precedence over the will and that the executors would not have much to deal with in terms of the estate. Ms. Corrigan agreed with this assessment. She also said to Mrs. Cox that she had explained this to Mr. Chetwin Cox and that he had been very surprised to hear of the Deed of Transfer and that he had not been aware of it when he visited in August 2005. Mrs. Cox responded to say that she and her husband had decided to keep it quiet.

89. There is one further aspect of Ms. Corrigan's evidence that should be noted. She was asked both in the course of her direct examination and also in the course of cross-

examination about the tax implications that might arise in the context of a transfer of the property, during his lifetime, from Mr. Cox in his sole name to himself and Mrs. Cox in joint names. In response, Ms. Corrigan referred to the advice she had given Mrs. Cox in her letter of advice of 29th June 2005 that, if Mr. Cox was to leave his entire estate to her by will, she would inherit it entirely free of tax and at its current market value at the date of his death. If she were to sell the property within a short period of time after inheriting it but before there were any further substantial appreciation in value, then the result would be that there would be little or no capital gains tax to be paid. If there were any capital appreciation in the period between the date of inheritance and the date of sale, the capital gains tax liability of 20% would be restricted to the increase in value from the time of the inheritance to the date of sale. Ms. Corrigan explained that, had she been consulted by Mr. Cox in relation to it, she would have: -

> *"...pointed out that by making a lifetime transfer that Sally would be regarded as acquiring 50% of the property at April 1974 at its market value on that date. And then she would acquire the other 50% at its market value at the date of her husband's death. And it is probably likely that the market value in 1974, even as indexed, would be substantially less than the open market value at the date of her husband's death. So it would have been disadvantageous from a CGT point of view to make a lifetime transfer. If Mr. Cox had wished her to have the entire farm it would have been preferable in my opinion that he would have changed his Will and left it to her outright so that she would have the uplift in base cost...*
>
> *...Mr. Cox had obviously indicated at our meeting that as the farm had a large value he wanted his wife to have a share of it and he wanted his children to have*

a share of it. If he had said that he wanted to pass everything to his wife and entrust her with the responsibility of passing it to the children then we would have advised that the better way to do that would have been to bequeath it outright in his Will.

Sometimes people actually -- it has been my experience in the past with clients that if they have a terminal illness they sometimes think it can ease life for their spouse if they put property into joint names so that their spouse won't have to go through probate, and dealing with probate and the expense of probate. And what we have pointed out in the past when people have suggested that that if the property is put in joint names they do not get the uplift in base cost which can tend to be much more valuable to them. I have seen previous cases where it was suggested and we decided not to proceed because the uplift in base cost would be so valuable, and it certainly appeared to be the case in this case because the property seemed to be of exceptional value."

90. Ms. Corrigan was cross-examined in relation to this issue by counsel for Mrs. Cox. She confirmed that the effect of her evidence was that the advantage of a gift by will to the spouse would be that the time for calculating the base cost for capital gains tax purposes would be the date of death of Mr. Cox as opposed to 1974 for 50% of it. It was put to her that, if a couple transferred property into their joint names by deed during the lifetime of the transferor, any capital gains tax could have been offset by seeking agricultural relief. Ms. Corrigan did not agree with this proposition. Instead, she said: -

"No, because agricultural relief is the relief that applies for inheritance tax purposes not for capital gains tax purposes. So in terms of an inheritance of

property you can claim agricultural relief which meansthat the value of property is discounted by 90% of the value, and inheritance tax is only imposed on 10% of the value. And on that 10% you can set any tax free

threshold you have against that 10%, so that can work for inheritance tax, but agricultural relief does not apply for capital gains tax purposes."

91. It was then put to Ms. Corrigan that Mr. Sean Sheehan, solicitor, had advised that the most cost effective and simple way for Mr. and Mrs. Cox to regularise their affairs, having regard to Mr. Cox's ill health, was simply to transfer the property into their joint names. It was suggested that: -

"That was the easiest. It wasn't going to have any adverse tax consequences or it wasn't going to give rise to any tax liability. There was no stamp duty payable on the transaction. And ultimately there would be no costs associated with probate ultimately if Mr. Cox died, because they were advised that they were the benefits of transferring the property into the joint names to regularise their affairs?"

92. However, in response, Ms. Corrigan explained why she would not recommend such a transaction. She said: -

"I would agree that a transfer of property from one spouse into the joint names of two spouses is a tax neutral event, there is no tax payable on that. But in the circumstances where the Coxs' had discussed with me that their farm was worth 30 million euro and upwards, and that they were considering selling it because they were going to be built all around and a sale was possible soon, then I would not recommend somebody to put the property into joint names on an inter-vivos transfer, because what happens is that the non-owning spouse is deemed to

acquire her 50% share at the historic base cost at 1974, and she would have indexation then available on that.

But that would be unlikely, I don't know what the market would be of the land at … at April 1974, but I very much doubt that the value as indexed could come up to 15,000,000… so as a result of that transfer she would acquire 50% of the land at the 1974 valuation of it. And on her husband's death she would acquire the other 50% at its then market value, 50% of the value, so she would have a split of base costs.

If the land was then worth 30 million and she sold it her base cost might be, you know, 15,000,000 for what was acquired at the date of death, plus some indeterminate figure that I don't know for April 1974 value, but I am suspecting would have been a lot less.

So if she had sold it she would be liable to capital gains tax on that figure…"

93. It is clear from Ms. Corrigan's evidence that, in the context of very valuable property such as that owned by Mr. Cox, a transfer into joint names was capable of having adverse tax consequences for Mrs. Cox in terms of capital gains tax in the event that the property was subsequently sold. In this context, it should be kept in mind that, at the time the Deed of Transfer was executed, the intention was to realise the value of the property at some point in the near term. The potential tax consequences are significant given the obvious concerns of Mr. and Mrs. Cox (as exemplified by their approach to Mr. Neil McCann) in respect of the possible tax consequences arising from the 2005 will for those who would inherit under it. As previously noted, the warning as

to potential tax consequences given by Mr. Neville O'Byrne caused them to seek further advice. In taking this course, Mr. Cox plainly wished to minimise any potential liability to tax on the part of the members of his family arising from the way in which he provided for them under his will.

The independent evidence of Mr. Barry Lysaght solicitor

94. The evidence of Mr. Barry Lysaght, solicitor, is also relevant in the context of the ramifications of the Deed of Transfer. Mr. Lysaght gave evidence on behalf of the plaintiff as an expert conveyancer. He examined the available file of Mr. Sean Sheehan, the solicitor who acted for Mr. and Mrs. Cox in relation to the Deed of Transfer. In particular, he addressed the kind of advice that should be available to a transferor of property and whether it is advisable that the parties should be separately represented. In light of the guidance given by Budd J. in *Gregg v. Kidd* and by Barron J. in *Carroll v. Carroll*, the issues of advice and representation are relevant in circumstances where a transfer is challenged on the grounds of presumed undue influence. In cases where the presumption arises, the nature of the advice available to the transferor and the independence of that advice become critically important if the transferee is to be in a position to rebut the presumption.

95. Mr. Lysaght drew attention to the provisions of the 2002 Law Society Guide on Professional Conduct of Solicitors in Ireland (*"the Law Society Guide"*) which addressed, in para. 3.3, a situation where a solicitor acts for both parties to a voluntary transfer of property. Paragraph 3.3 provides as follows: -

> *"Where a solicitor acts for both parties to a voluntary transfer of property, the transferor should be advised in appropriate cases, preferably in writing, to obtain independent advice as to the implications of the transaction before any documentation is executed and in these situations the execution of any such*

documents by the transferor or transferee should be witnessed by an independent adviser."

96. Mr Lysaght was of the view that, irrespective of the length of a relationship between a solicitor and a client, the client should be advised to take independent advice where the client was about to execute a transfer which was to his detriment. It was suggested to Mr. Lysaght, in the course of cross-examination, that, if the transferor is an existing client of the solicitor, then it would be more appropriate for the transferee to be the person to get independent advice. Mr. Lysaght agreed with that proposition. However, at an earlier point in his evidence, Mr. Lysaght had said that the Law Society Guide suggests that it is the transferor who should be advised to take independent advice. Moreover, at the conclusion of his evidence, I asked Mr. Lysaght whether, in accordance with the guidelines, he believed it is the transferor who should be advised to get independent advice and he confirmed that this is so. I then asked Mr. Lysaght what advice he would expect should be given to the transferor in relation to the transaction. Mr. Lysaght expressed the view that the transferor should first be advised of the loss of autonomy once the transfer takes effect. Earlier, Mr. Lysaght had explained what was involved in the loss of autonomy and control as a consequence of the transfer of property into joint names. He said: -

"There would be the surrender of control, full autonomy to deal with the property as the registered owner saw fit. That would be the first and primary element. Secondly, it would involve with that loss of control the importance that no decision could afterwards be taken by the registered owner on his own, he would have to consult jointly."

97. Secondly, in the context of a family farm, Mr. Lysaght expressed the view that succession issues should be addressed; in particular, consideration should be given to

the position of the children. Thirdly, advice should be given in relation to the taxation implications. In addition, Mr. Lysaght explained that, were he acting on behalf of the transferor, he would always be keen to have a cooling-off period built into the transaction.

98. Mr. Lysaght also expressed the view that, on his reading of Mr. Sheehan's file, Mr. Sheehan had clearly acted on behalf of both Mr. and Mrs. Cox. In this context, he highlighted that, in the relevant Form 17 (in which Mr. Sheehan sought registration of the Deed of Transfer in the Land Registry), the applicants are described as Mr. Cox and Mrs. Cox. It should be noted that, when Mr. Sheehan subsequently gave evidence, he did not dispute that there was no other solicitor involved.

99. Mr. Lysaght accepted that, in looking at the Law Society Guide, it is necessary to have regard to the particular circumstances of an individual case in order to evaluate whether or not independent advice might be required in those circumstances. Counsel for Mrs. Cox drew attention to the use of the words *"should be advised in appropriate cases"* in the language used in the Guide. It was put to Mr. Lysaght that the most common way in which husbands and wives in the farming community have managed their affairs is to put property into joint names. It was suggested that this is the *"traditional way"* in which farming couples manage their affairs. Mr. Lysaght responded to say that this was not his experience. He nonetheless acknowledged that he was once involved in such a transaction where a farmer in his mid-50s had been diagnosed with very aggressive cancer. The farmer had a very short life expectancy and he consulted Mr. Lysaght about making joint wills with his wife where he was intending to benefit her entirely. Mr. Lysaght recommended to him that he should consider creating a joint tenancy because, if, as it appeared, he was to pre-decease his wife, the property, instead of being left to his wife by his will, would pass to her under the joint

deed and this would be exempt from stamp duty and, in addition, probate fees would be avoided. That was the only case that Mr. Lysaght could think of in his experience. In response, it was suggested to Mr. Lysaght that his experience was on *"all fours"* with the advice that Mr. Sheehan gave to Mr. and Mrs. Cox in relation to the transfer. Counsel described the advice given by Mr. Sheehan in the following terms: -

> *"Mr. Cox in 2004 was very unwell with cancer coincidentally and he was advised, he and his wife were advised to discuss their affairs with Mr. Sheehan. And Mr. Sheehan suggested to them that they should transfer the property into their joint names and were… Mr. Cox… to die that everything would simply transfer into his wife's name and vice versa.*
>
> *He advised that there would be no probate costs in relation to this. That there would be no tax implications on the transfer. There would be no stamp duty and that there would be no taxes consequences as a result of the transaction at all, that simply the lands would transfer…"*

100. Mr. Lysaght was asked whether he would agree that this was good advice in the circumstances. Mr. Lysaght's response was that: - *"In those circumstances I would, yes."* At one point, it was also put to Mr. Lysaght that, in fact, there was consideration for the transfer to Mrs. Cox in circumstances where she agreed to become a joint account holder with Mr. Cox in respect of the overdraft facility of €130,000 owed to Bank of Ireland (described earlier). It was suggested to Mr. Lysaght that, accordingly, there was consideration for the transfer by Mrs. Cox becoming responsible for the overdraft of up to €130,000. Mr. Lysaght agreed with this proposition. However, counsel for Mrs. Cox subsequently confirmed that he did not intend to suggest that the setting up of a joint account was the consideration for the transaction. He acknowledged

that the consideration was natural love and affection which is consistent, of course, with the terms of the Deed of Transfer itself.

101. Mr. Lysaght was very critical of the lack of information on Mr. Sheehan's file in relation to any advice given by him to Mr. and Mrs. Cox in relation to the Deed of Transfer. Mr. Lysaght noted that Mr. Cox was aged approximately 80 years at the time of the transfer. He did not know whether Mr. Cox was aware of his state of health at the time of the transfer but, given that the property was very valuable and that one of the children had special needs, his view was that he would have expected to find detailed and careful attendances on the file as to the extent of the instructions given to him and as to the advice which he, in turn, gave to his clients.

102. During the course of his cross-examination of Mr. Lysaght, counsel for Mr. Sheehan accepted that Mr. Sheehan's file is *"hopelessly inadequate when it comes to attendances and correspondence"*. He also said that Mr. Sheehan would confirm in his evidence that he did not advise either Mr. Cox or Mrs. Cox to obtain independent legal advice. It was put to Mr. Lysaght that it did not matter that there were no attendances and that the lack of attendances did not call the validity of the Deed of Transfer into question. Mr. Lysaght did not accept this and he continued to stress the importance of attendances both as to the instructions given by the client and the advice given by the solicitor. Mr. Lysaght highlighted that the transaction was a considerable benefit to Mrs. Cox and that this was something that should be considered by a solicitor under the heading of *"conflict of interest"*, although Mr. Lysaght also clarified that he was not suggesting that there was any conflict between Mr. Cox and Mrs. Cox. Nonetheless, he said that the parties to the transaction should, when executing a deed of this kind, be made aware of the matters discussed in paras. 96 to 97 above and there should be attendances to confirm that such advice was in fact given. That said, it should also be

borne in mind that, at the conclusion of his evidence, I asked Mr. Lysaght whether, in the context of the Law Society Guide, a different approach can be taken where the transaction is between spouses. Mr. Lysaght responded to say: -

> *"I think there would be; whilst there would always be a requirement for vigilance there would always be something a little bit less of a requirement for vigilance between spouses."*

103. In the course of cross-examination, it was also put to Mr. Lysaght that, at any time prior to his death, Mr. Cox could have severed the joint tenancy by serving a notice. Mr. Lysaght conceded that this was so. However, on re-examination, Mr. Lysaght confirmed that there was no record on Mr. Sheehan's file that Mr. Cox was ever advised of the ability to serve such a notice. I should make clear that there is no evidence that Mr. Cox received legal advice of any kind in relation to the potential to sever the joint tenancy. In the circumstances, I do not believe that it is necessary to address this issue any further in this judgment.

The evidence of Mr. Sean Sheehan, solicitor

104. Mr. Sean Sheehan, solicitor, gave evidence on behalf of Mrs. Cox on Day 7 of the hearing. Mr. Sheehan explained that, largely through Mr. Cox's accountant, Mr. Patrick Monahan, he had received instructions in relation to a number of matters relating to the affairs of the Cox family over the years. These included a transfer of the gate lodge on the property to the son of Mr. and Mrs. Cox, a dispute with Bank of Ireland in relation to a wrongly debited charge to Mr. Cox's credit card, and also a personal injury case on behalf of Michelle Cox. Mr. Sheehan said that he had not known the Cox family before this, although he understood that they had been patients of his father, a local dentist. At one point, he was also asked to become involved in a case

relating to Dundalk Racecourse, but it involved significant issues of company law and he explained to Mr. and Mrs. Cox that he did not wish to get involved.

105. At some point in late 2004, Mr. Sheehan was asked by Mr. Monahan to attend Mr. and Mrs. Cox at their home in order to take instructions for the making of a will. Mr. Sheehan said that he called to the home and spoke to Mr. Cox. Mr. Sheehan explained that Mr. Cox intimated a desire to establish a trust for the benefit of his children but Mr. Sheehan responded that he was not in that area of the law and he proposed a different option – namely, the putting of the title to the property into joint names. In his direct evidence on Day 7, Mr. Sheehan said: -

> *"Eventually Patrick* [Monahan] *asked me after a number of years to go up, that Bunny wanted to do a will. I went up, discussed it with him and he had proposals about trusts and shares and I explained to him I wasn't in that area*
> *of law. I did have a friend who was an expert in that type of planning, whose father was a racehorse trainer and vet like Bunny, and I mentioned that I could ask him to help me. He was working in a big firm in London at the time and he indicated he would need about 10,000 to do something like that. So it wasn't really an option, he wasn't going to get paid.*
>
> *I mentioned to Bunny that there was another option and solicitors are generally advised to encourage people at later stages of life to put property into joint names. I said this was an option and he should discuss it with Mr. Monahan, who was his accountant. It went around for a bit and I explained that if he did this after his death the property would pass without tax and without a will and it would essentially vest in Mrs. Cox, or if she died first it would revert to him and that this wouldn't involve much cost. He was agreeable to it. There was a*

couple of visits to the house. He eventually said to me, and it is just came back to me very strongly after the last witness, I explained that it could be left to Sally to decide what to do and he looked and he just paused and said: 'I trust Sally.' On that basis we executed that document."

106. In answer to a question from me, Mr. Sheehan said that he visited the house on a number of occasions before the execution of the Deed of Transfer. On occasion, he spoke to Mr. Cox on his own and, on other occasions, he spoke to him in the company of Mrs. Cox. His evidence was that, although he was elderly, Mr. Cox was: -

"...a very alert man and he was totally in the moment. The first time I went up I thought we would be talking about great races in the 50s and the 60s but he was talking about the budget. He was a totally current person."

107. Mr. Sheehan was cross-examined in relation to a number of matters. In the first place, he was cross-examined in relation to his evidence that Mr. Cox had said that he trusted Mrs. Cox. Mr. Sheehan said that he remembered very clearly that Mr. Cox had said: *"Yes, I trust Sally"*. He said that this trust was *"enduring trust that was manifest to me over the course of my many dealings with the family"*. However, he stressed that Mr. Cox was, at the same time: -

"wholly compos mentis and a highly intelligent man. He understood exactly what we were doing."

Mr. Sheehan confirmed that, while he met with Mr. Cox on a number of occasions between late 2004 and the date of execution of the deed, the words *"I trust Sally"* were uttered on the day the transfer was executed. Mr. Sheehan confirmed that the words were said before the Deed of Transfer was executed.

108. Mr. Sheehan was also cross-examined in relation to his evidence that Mr. Cox had spoken of a desire to create a trust. It was put to him that he had received outline

instructions from Mr. Cox with regard to the drafting of a will in which provision would be made for the children and a trust would also be created. Mr. Sheehan said that he would not characterise what Mr. Cox said as instructions so much as *"an expression of an intention"*. Mr. Sheehan conceded that the Deed of Transfer did not reflect Mr. Cox's initial intentions. Mr. Sheehan characterised what happened as *"a change of direction"* and an *"alternative approach"*. Mr. Sheehan maintained that Mr. Cox opted for this alternative approach after he had been advised of its legal effect and that he was *"happy"* to proceed in that way. He said that he advised Mr. Cox that the Deed of Transfer *"would provide, by survivorship the property would vest solely in either he or Sally whomsoever was the surviving party"*.

109. Counsel for the plaintiff also cross-examined Mr. Sheehan in relation to the lack of written attendances. Mr. Sheehan said that his general practice in personal injury litigation was to take detailed notes and attendances which he said were very critical in that context. However, in the area of property law, he said that he was not as *"thorough in my note taking"*. That said, he suggested that there were occasions when he took notes in notebooks but did not always create typed attendances from such notes. He confirmed that he did not create an attendance in relation to any of the interactions with Mr. and Mrs. Cox. He maintained, however, that he had a clear recollection of what happened.

110. Mr. Sheehan maintained that there was no necessity for him to advise Mr. Cox to obtain independent legal advice. He contended that the Law Society Guide does not apply in the case of transfers between husband and wife. He characterised the transaction as: -

> *"the most innocuous transaction you could undertake in the conveyancing*

world. It was recommended by the Law Society. It cuts solicitors out of future probate work and sometimes solicitors don't to it, I always do it."

111. He also suggested that: -

"The husband and wife transaction is uniquely privileged in the Land Registry and in the Stamp Duty rules. It is a completely separate transaction to an under value or, you know, gift transfer. It is privileged entirely differently."

Mr. Sheehan also maintained that the fact that the deed did not attract stamp duty showed that, as a matter of public policy, people were encouraged to enter into transactions of this kind. He also characterised the transaction as: -

"a fairly straightforward, simple and highly recommended step for a couple in the stage of life that they were in, yeah, I would see it as such, yeah, it is recommend (sic)*."*

112. It was put to him by counsel for the plaintiff that the value of the underlying assets was very significant in this context. Mr. Sheehan acknowledged that he had understood that the value was of the order of €30 million. He was also cross-examined in relation to whether he enquired as to the respective ages of Mr. and Mrs. Cox at the time of execution of the Deed of Transfer and whether he was concerned about Mr. Cox's health. The relevant exchange between counsel for the plaintiff and Mr. Sheehan was as follows: -

"Q. Okay. What age was Mr. Cox on that day can you recall?

A. I think he says at the start he was 80. I don't know, 80/81.

Q. Did you enquire as to his age?

A. I didn't need to enquire, I knew roughly what age he was, do you know what I mean?

Q. Did you know what age Mrs. Cox was?

A. I knew there was about 15 or 17 years between them.

Q. Well did you know what age she was?

A. You don't ask a lady her age. I am not going to go down that road.

Q. So you didn't know what age he was and you didn't know what age she was?

A. I new (sic) *roughly what age they were, I didn't require birth certificates, let us put it that way.*

Q. Did you know what his state of health was?

A. I knew he wasn't in great shape. I think he had a long period of illness. When I went up the first time he looked, when he first came in I was in the front room at the fire and he came in from the adjoining room and he was like the ghost of Christmas past, a long grey face. I didn't know what to make. He was very intelligent, cogent and I rapidly got over my shock at his appearance and I got on fine with him.

Q. So he looked awful?

A. Yeah, yeah. I think the thinness of being a jockey and the tough years of being a jockey.

Q. That could have been part of it, is that right?

A. I think that does characterise the elder years of jockeys, yes.

Q. Am I correct in taking it from your answer that you deduced his State of health from your appraisal of his appearance, is that how you came to a conclusion about his health?

A. I didn't have any medical reports or records."

113. In the course of cross-examination, Mr. Sheehan was also probed in relation to whether he had obtained any information in relation to valuation or taxation. Insofar as

a valuation is concerned, he said that there was no need for a valuation. He characterised a valuation as a *"needless expense"* for a transaction of this kind. Insofar as taxation is concerned, his approach is to tell clients that they should consult their own accountants. He said that this is what he did in the case of Mr. and Mrs. Cox. His position was that he had discharged his responsibility to Mr. and Mrs. Cox by telling them to check it out with their accountant. He was then asked whether they obtained advice from their accountant. Mr. Sheehan confirmed that he did not know whether they did or not. In response to that concession by Mr. Sheehan, the following exchange took place between counsel for the plaintiff and him: -

> *"Q. You don't know. It follows that you don't know the tenor of any advice that would have been given had they gotten advice, that follows, doesn't it?*
>
> *A. I am not a mind reader*
>
> *Q. Okay. So how were you going to find out given that it was material, given that you advised them to take tax advice how did you propose to in fact find out what the tax advice was?*
>
> *A. That was a matter for the clients themselves, the people involved. I advised them there were no stamp duties and no capital taxes as between spouses. That was the limit of my knowledge. Any further payments that they were getting on the land were a matter to deal with their own accountant, it didn't affect my transaction."*

114. Mr. Sheehan was then asked whether he knew at this time that Mr. Cox intended to sell the land. Mr. Sheehan responded to say that he understood that Mr. Cox was *"flirting with the sale"* but that he got the impression that Mr. Cox was happy to keep the property together and that transferring the property into the name of Mrs. Cox would

give effect to that wish. It was put to him, however, that the issue as to whether the land was to be sold was relevant to tax treatment. In response, Mr. Sheehan continued to maintain the position that this was a matter for discussion by the Coxs with their accountant, Mr. Monahan. He said: -

> *"A. I just told them to speak to their accountant and I presumed all was done and I went up a couple of weeks or a week whenever after I had done all that we went up and concluded matters by completing the transfer.*
>
> *Q. Okay.*
>
> *A. I didn't enquire into what further analysis they had made of the situation."*

115. In light of those answers by Mr. Sheehan, it was put to him by counsel for the plaintiff that he was not in a position to say that Mr. Cox, on the date of execution of the Deed of Transfer, had any understanding of the implications of the transaction insofar as tax was concerned. Mr. Sheehan responded that he was happy that Mr. Cox had consulted with Patrick and *"he was as aware as he could of the situation"*. However, it is clear from the exchange quoted in paras. 113 to 114 above, that Mr. Sheehan was not, in fact aware, whether any taxation advice had been given and that, accordingly, he was unaware of the potential capital gains tax implications for Mrs. Cox described by Ms. Corrigan. This is important in light of the emphasis placed by Barron J. in *Carroll v. Carroll* on the need for the advisor to be aware of all relevant circumstances so that fully informed advice will be available to the transferor. It is clear from his evidence (quoted in para. 105 above) that Mr. Sheehan thought that there would be no adverse tax consequences arising from the Deed of Transfer. He was right that there would be no tax at the moment of Mr. Cox's death but, as Ms. Corrigan made clear, that did not mean that there would never be any tax consequences.

The evidence of Mrs. Cox

116. Mrs. Cox prepared a written statement which counsel for the plaintiff accepted could be treated as part of her direct evidence. She also gave oral evidence on Days 7 and 8 of the hearing and she was cross-examined by counsel for the plaintiff. Much of Mrs. Cox's written statement contains complaints in relation to the execution of the 2005 will prepared by William Fry. It also contains complaints about the way in which the settlement agreement of May 2018 was executed. The latter issue is no longer relevant in circumstances where, by agreement of both sides, the settlement agreement was set aside and the hearing of the case resumed as though it had never been entered into.

117. In her direct evidence, Mrs. Cox said that Mr. Sheehan had been retained on the recommendation of Paul Callan SC and Patrick Monahan, the accountant. She said that Mr. Sheehan recommended a Deed of Transfer. She did not have an objection to this course because *"the outcome would be the same with the Fry's will basically, when we left everything to each other"*. This was a reference to the 1991 will (which had been drafted by William Fry).

118. Insofar as the 2005 will is concerned, Mrs. Cox said that this will had been executed on the instructions of Paul Callan SC. She said that Mr. Callan had told her that he noted a quite remarkable disimprovement in Mr. Cox's health and that it was up to her as his wife to take responsibility to make quite sure that his affairs were in order. He insisted that William Fry should be retained and that Mr. Cox (who was then in hospital) should be taken out of hospital in order that a new will could be signed under Mr. Callan's supervision. Prior to this, she said that Mr. Callan had produced some photocopies of s. 117 of the Succession Act 1965 to herself and to Mr. Cox which he maintained would be relevant on the death of Mr. Cox.

119. During the course of her cross-examination by counsel for the plaintiff, Mrs. Cox was asked whether, after executing the Deed of Transfer, she had forgotten that she had entered into that transaction. This question was asked against the backdrop that the 2005 will was executed not long after the Deed of Transfer was put in place. Mrs. Cox maintained that she did not forget about the execution of the Deed of Transfer. Mrs. Cox was then asked whether she understood the effect of the 2005 will. Her response is important because it strongly supports the conclusion that neither she nor her husband understood that the Deed of Transfer would take priority over any subsequent will. She said: -

> *"A. …our understanding was that that was the most recent Will. We didn't understand the point of law that a deed of transferring property to joint names that that was held ahead of any Wills.*
>
> *Q. Sorry, can you just repeat what you have just said to the Court. You didn't understand?*
>
> *A. We didn't understand that the Deed of Transfer that we had made in March 2005.*
>
> *Q. Yes.*
>
> *A. That we didn't expect that - we didn't expect that we were going to have this hassle and to have to make another Will. We didn't expect that.*
>
> *Q. But what precisely did you not understand?*
>
> *A. We didn't understand that that was held supreme over Wills.*
>
> *Q. Oh.*
>
> *A. Over all Wills."*

120. Mrs. Cox was asked about the state of Mr. Cox's health in late 2004 and 2005. Mrs. Cox confirmed that, within days after her mother's funeral in February 2005, Mr.

Cox became ill. She estimated that, between then and his death in January 2006, Mr. Cox was admitted to hospital on approximately twelve occasions. Mrs. Cox could not say for precisely how long Mr. Cox was in hospital during this period, but she estimated that it was more than twelve weeks. She confirmed that, during this period, Mr. Cox placed great reliance on her in helping him with his day-to-day living and that she was the principal person upon whom he placed reliance. Mrs. Cox accepted that it was fair to say that, as his illness increased in severity, her involvement in his affairs increased to a corresponding extent. She explained that she did not like to worry him about matters that she could deal with herself. This included banking matters. However, she did not accept that this extended to legal matters. Ms. Corrigan's evidence was drawn to her attention in this context and it was put to her that Ms. Corrigan had said that, prior to the meeting at the Cox homestead on 17th August 2005, all of her interaction had been with Mrs. Cox. This was not disputed by Mrs. Cox who said: -

"A. Well, yes, I was sort of the mediator, if you like, between my husband, who was in and out of hospital, and the situation.

Q. So is it fair to say, therefore, because of that modus operandi, that your husband would have been relying on you entirely to derive an understanding as to what was going on in terms of Arthur Cox's involvement in his affairs?

A. He was well aware of Arthur Cox and the situation. So it wasn't that I took the lead and bullied him into it in any shape or form.

Q. No, I'm not asking you that. Of course I'm not asking you that, Ms. Cox.

A. I was nervous of that.

Q. I am asking you simply isn't it clear that he had to rely on you?

A. He did, yes.

Q. In terms of all of the information passing back and forward and the prices (sic) *and instructions?*

A. Yes, well that's true.

Q. Isn't it fair that it was up to you to tell him precisely what was going on?

A. Correct.

Q. If he was to know?

A. Oh, yes, certainly."

121. Mrs. Cox was cross-examined about the events which occurred on 18th March 2005 when the Deed of Transfer was executed. She was unable to recall much of the detail of that day. She could not recall who was present in the room at the time the Deed was executed, but she thought it was herself, Mr. Cox and Mr. Sheehan. She was also asked about the advice given by Mr. Sheehan on that occasion. Mrs. Cox said that Mr. Sheehan advised that: -

> *"it was a prudent way of looking after our affairs basically. He said he recommended it to many families basically in our position and that it would save probates and, you know, a smooth transit, he lead me to believe that it* [was] *about a smooth transition basically after one of us passed."*

Mrs. Cox also said that her husband was *"very alert"* at the time.

122. Mrs. Cox was cross-examined in relation to Ms. Corrigan's letter of 29th June 2005 which she received not much more than three months after the Deed of Transfer had been executed. On Day 8 of the hearing, an important exchange took place between counsel for the plaintiff and Mrs. Cox in relation to this letter. This exchange reinforces the conclusion that Mrs. Cox was not aware that the Deed of Transfer took priority over the will insofar as Mr. Cox's estate is concerned: -

"Q. This letter was written to you about three months after you had executed the Deed of Transfer?

A. Correct.

Q. To be clear about it, you were still aware on the day you received this letter of your entry into the Deed of Transfer. Is that correct?

A. Yes. But we weren't explained - we didn't, when we signed the Deed of Transfer, we didn't know that we were going to have to make another Will; that didn't arise at all. We weren't aware of the legal implications."

123. Mrs. Cox was then asked to explain why she and Mr. Cox made contact with Mr. Neil McCann. Mrs. Cox responded to say that she and Mr. Cox were worried about s. 117 of the Succession Act 1965. However, I believe she is mistaken in suggesting that the concern was in relation to s. 117. That may well have been the concern which prompted the preparation of the 2005 will. In light of the contemporaneous correspondence by Ms. Corrigan in 2005 and from her evidence, the concern which prompted the approach to Mr. McCann related to taxation. This should be seen in light of the advice given by Mr. Neville O'Byrne of William Fry that the arrangements put in place under the 2005 will had the potential to give rise to unwelcome tax consequences. It is quite clear from Ms. Corrigan's evidence that the reason she was approached was because of concerns about taxation issues. In particular, Ms. Corrigan recounted the telephone conversation she had with Mrs. Cox on 29th June 2005 (summarised in para. 60 above) in which Mrs. Cox told Ms. Corrigan that both she and Mr. Cox were very concerned that the will that had been made two weeks beforehand could have adverse tax implications.

124. It is also important to note that, during the course of her cross-examination, Mrs. Cox accepted that she did not say anything to Ms. Corrigan about her current concern

that the 2005 will was procured by interference from Mr. Callan or her daughters. As I have previously observed, this is significant. Mrs. Cox had at least three one-to-one telephone conversations with Ms. Corrigan prior to the execution of the codicil. The first conversation was on 29th June 2005, the second was on 6th July 2005 and the third was on 28th July 2005. In truth, had she wished to do so, Mrs. Cox could have called Ms. Corrigan at any time if she had a genuine concern that the will had been procured by the exercise of any third-party influence. Mrs. Cox, therefore, had ample opportunity to raise with Ms. Corrigan any concerns she might have about the circumstances surrounding the drafting and execution of the 2005 will. The fact that she did not do so is telling. It is also significant that there is no evidence of any opportunity being available to any third party (whether Mr. Callan or anyone else) to exercise influence over Mr. Cox in the period of Ms. Corrigan's involvement. There is accordingly nothing to suggest that the 2005 codicil (which effectively affirms the existing 2005 will) was procured by the undue influence of anyone.

125. Mrs. Cox was also asked about Ms. Corrigan's letter of advice of 29th June 2005. In particular, she was asked whether she understood, at the time of receipt of Ms. Corrigan's letter, that Mr. Cox was the sole owner of the farm. Mrs. Cox responded to say that she was not sure because a new will had been executed since the Deed of Transfer. Again, this illustrates that Mrs. Cox did not understand that the Deed of Transfer took priority over any will. She was then asked whether, subsequent to the execution of the Deed of Transfer, she understood that she owned half of the land. She confirmed that this was her understanding. She was then pressed as to whether this was something she knew at the time. Mrs. Cox answered as follows: -

> *"It wasn't my priority at that time, I'll have to tell you, to be thinking: 'I own half of this land. He only has authority to make a new Will on half it.'...*

I can honestly swear that that was not my priority at that stage and I did not address that issue as such. It was only - and you say why didn't I, because I didn't. I apologise I'm not legally minded to know the fine tuning of the situation."

126. While that answer suggests some confusion on Mrs. Cox's part, her answer should be read alongside a further exchange between her and counsel for the plaintiff which shows no level of confusion on her part. The exchange is in the following terms: -

"Q. You are fully au fait with the difference, I take it, between a Deed of Transfer and a Will, or are you not?

A. I am now.

Q. You are now?

A. I was not at the time."

It should, however, also be noted that Mrs. Cox stressed that she and Mr. Cox did not anticipate having to put a further will in place. She said that, at the time the Deed of Transfer was executed, they had no intention of putting in place any will. But that does not seem to me to undermine the conclusion that neither she nor her husband understood that any subsequent will could not override the terms of the Deed of Transfer (assuming it is valid).

127. Mrs. Cox was also asked about the advice given to her by Ms. Corrigan of Arthur Cox over the telephone on 28th July 2005 (addressed in para. 66 above). As part of that advice, Ms. Corrigan explained that, if property was held in joint names, the lands would pass to the survivor on the death of the co-owner. She was asked whether

that was the first time that this was explained to her. Her answer is somewhat contradictory. This is what she said: -

> *"Yes, it was. Yes, but I am preempting that by saying that it was explained by Seán Sheehan that our previous Wills, previous to doing the Deed of Transfer, signing the Deed of Transfer, that it would take priority. But it didn't sink in because it was the same as the Deed of Transfer, the outcome…*
>
> *So, therefore, I never connected - we definitely did not anticipate this situation."*

128. A further exchange between counsel for the plaintiff and Mrs. Cox is also relevant in this context. The relevant exchange is in the following terms: -

> *"Q. Ms. Corrigan has generally indicated through her evidence that she understood that Mr. Cox believed that there was a full disposing power with regard to the lands --*
>
> *A. Yes.*
>
> *Q. --at that point in time. Do you agree with that that he had that power?*
>
> *A. Oh, I can't disagree with her. Certainly, that was her belief.*
>
> *Q. In fact, is it fair to say that was your belief at that time?*
>
> *A. I didn't anticipate this happening. So I didn't think any different."*

129. That exchange again suggests that Mrs. Cox did not appreciate at the time that the Deed of Transfer prevented Mr. Cox from dealing with the property by will. That was an issue that was specifically addressed in Ms. Corrigan's letters of advice of 5th October 2005 to each of Mr. Cox and Mrs. Cox following the disclosure to her of the existence of the Deed of Transfer. Mrs. Cox confirmed that she received the letter addressed to her. She could not, however, recall whether she discussed it with Mr. Cox. She did recall that Mr. Cox told her that he had received the letter addressed to him and

that they both compared them and saw that it was the same letter. Her evidence was that the letter of advice covered the original will (by which I understood her to mean the 1991 will). But she said that it did not make any reference to the later will (by which I understood her to mean the 2005 will). It is therefore not clear that, even after receipt of this very direct letter of advice (which expressly said that *"irrespective of the provisions of Bunny's current will, if he were to predecease you, … the lands would pass automatically to you"*) Mrs. Cox fully understood the effect of the Deed of Transfer in so far as the 2005 will is concerned.

130. Mrs. Cox was also cross-examined about Ms. Corrigan's evidence in relation to the telephone call she had with Mrs. Cox following Mr. Cox's death. In particular, she was asked about the statement she made to Ms. Corrigan that she and Mr. Cox had decided to keep the Deed of Transfer quiet. Mrs. Cox was asked what Mr. Cox's reaction was when she discussed the matter with him and they arrived at a decision to keep it quiet. Mrs. Cox said that he simply shrugged his shoulders and that there was no big issue about it. She was then asked whether the idea to keep it quiet came from her or Mr. Cox but she could not recall.

131. During the course of her cross-examination, Mrs. Cox was also asked about the case she makes about the 2005 will. In particular, she was questioned in relation to her allegation that Mr. Cox was coerced and unduly influenced by his daughters and by Mr. Callan to execute that will and her allegation that Mr. Cox lacked the necessary capacity to make that will because of *"potent medication he was receiving prior to his… death"*. Mrs. Cox was asked whether she was suggesting that Mr. Cox suffered a similar incapacity at the time he entered into the Deed of Transfer. Mrs. Cox responded to say that he was *"quite clear"* on the occasion of the execution of the Deed of Transfer but that he was *"not happy about the Will"*. She also said that he had been on a lot of

medication since the time of her mother's funeral in February 2005. However, Mrs. Cox did not provide any detail as to the nature of the medication or as to the effect of that medication on Mr. Cox. Notably, her mother's funeral took place in February 2005, some weeks before the execution of the Deed of Transfer, so that, if the medication affected Mr. Cox's mental faculties, there would be no reason to think that Mr. Cox would be any clearer on 18th March 2005 than on the date of execution of his 2005 will or of the codicil. Moreover, Mrs. Cox's evidence in relation to the medication is lacking in detail. She did not describe the medication in question or provide any significant detail as to the impact which the medication had on Mr. Cox.

132. Insofar as the allegations of coercion and undue influence are concerned, the evidence given by Mrs. Cox was similarly lacking in detail. While she repeated the allegation that undue influence had been *"used"* by Mr. Callan, she said it was not the fault of her daughters and that she did not: -

"blame them in the least. We were being advised by a Senior Counsel."

She confirmed that it was *"all down"* to Mr. Callan.

133. It is also difficult to reconcile Mrs. Cox's complaints in relation to the 2005 will with the fact that, subsequent to the death of Mr. Cox, Mrs. Cox retained William Fry as her solicitor. It is difficult to understand how she would have retained the solicitors who drafted the 2005 will if she believed that the 2005 will was procured through the undue influence or coercion of anyone. In the course of the hearing, she was cross-examined as to why she retained William Fry. In the first place, her attention was drawn to the fact that she had sworn an affidavit in 2006 in relation to an application for the appointment of administrators to Mr. Cox's estate, at a time when she was represented by William Fry, in which she said: -

"I confirm that subject to the original Will being located and proved, I have been appointed as executor and trustee of the estate of my late husband John Richard Cox under his last Will executed on 11th June 2005."

Her attention was also drawn to a letter written by William Fry on her behalf on 12th April 2006 addressed to Catherine Fee, solicitors (who now act for the plaintiff in these proceedings), in which William Fry refer to their client as *"Sally Cox"* and say: -

"Dear Sirs

Our client Sally Cox was appointed as executor of her husband the late John William Cox's estate together with Chetwin Cox and James Smith. We have advised our clients not to renounce her rights to act as executrix and that insofar as it is necessary for his estate to be administered, she should act as executrix. Our client has indicated to us that she is not and does not intend to instruct your firm to administer her husband's estate. Any decisions in relation to such an appointment should be made jointly by our client and her co-executors."

134. Having been referred to that affidavit and letter, Mrs. Cox was then asked whether she raised with William Fry her concerns in relation to the 2005 will. Her response was to say that, at this time, she was *"at sea"*. She also claimed that she could not remember all of the details. Her attention was then drawn to an averment made by her in an affidavit in which she justified the entry of a caveat in the Probate Office. In that affidavit, she said: -

"In circumstances where the basis for seeking to exclude me from the administration of the estate was not at all clear to me, it was my firm view that I should act as executor of my late husband's estate in accordance with his Will. I was advised that it would be prudent to enter a caveat in circumstances where, in the absence of a caveat, the other executors could have moved without notice

to me to extract probate. I also needed the time to consider my position on the issue of the proposed investigation. An appearance to a warning entered by the applicants was also put in for this purpose. I have no desire to delay the extraction of a grant or the proper administration of my late husband's estate, but I do believe that I was entitled to take the step to protect my interest given the gravity of the allegations made and of the issues raised."

135. Mrs. Cox was pressed as to why, notwithstanding that William Fry were then acting for her, she did not advise either them or the court that she had *"grave difficulties"* with the 2005 will being acted upon. Mrs. Cox was unable to explain why she had not done so.

136. Mrs. Cox's attention was also drawn to a further averment made by her in her affidavit in which, contrary to the evidence given by Mr. Sheehan at the hearing, she did not accept that her husband did not have the benefit of any independent legal advice in relation to the execution of the Deed of Transfer. In particular, her attention was drawn to the following extract from her affidavit: -

"I do not accept the assertion that my late husband did not have the benefit of any independent legal advice in relation to the execution of the deed of transfer. Furthermore, I do not accept the suggestion implied or otherwise there was anything inappropriate or improper in the transfer. It was most upsetting that such a suggestion would be made and I refute it vigorously."

137. When she was pressed on this issue, her response was to say that they were offered independent advice on taxation by Mr. Sheehan and that they had had advice *"through the years from William Fry"*. She said that they considered that was *"adequate"*. The nature of Mr. Sheehan's legal advice has already been described. I heard no evidence as to the nature of any legal advice given by William Fry other than

as recorded in the memorandum prepared by Mr. Neville O'Byrne following the execution of the 2005 will. In so far as taxation advice is concerned, it is clear from Mr. Sheehan's evidence that he did not claim to be a tax expert and that the only advice he gave Mr. and Mrs. Cox in relation to the tax implications of the Deed of Transfer, was that, on the death of Mr. Cox, there would be no tax on Mrs. Cox's acquisition of his interest in the lands by virtue of the right of survivorship. Mr. Sheehan did not consider what I might call the downstream taxation implications in the event of a subsequent sale of the lands (as explained by Ms. Corrigan). In so far as Willian Fry are concerned, there is no evidence that they were asked to advise in relation to the tax implications of the Deed of Transfer or that they were even told of its existence. It is true that they, very properly, raised the issue that there might be unfavourable tax implications arising from the 2005 will. In turn, that prompted Mr. and Mrs. Cox to seek specific taxation advice from Ms. Corrigan and, as outlined previously, her advice was that the 2005 will should not give rise to any unwelcome tax consequences

Determination of the issues

138. In broad terms, the case falls into two parts. The first part relates to the validity of the Deed of Trust. If the plaintiff succeeds in relation to that part of the case, then Mrs. Cox's challenge to the 2005 will and codicil will also require to be determined because if she is successful in that challenge, Mr. Cox's estate will be governed by the 1991 will under which Mrs. Cox is the principal beneficiary. On the other hand, if the plaintiff's claim in relation to the Deed of Transfer fails, the challenge to the 2005 will and codicil would become academic because the entire estate would vest in Mrs. Cox under the Deed of Transfer. It follows logically that I should deal first with the plaintiff's challenge to the Deed of Transfer which, as previously noted, is based both on presumed undue influence and unconscionability.

Does a presumption of undue influence arise?

139. For the reasons outlined by *Keane* (in the extract quoted in para. 21 above), the plaintiff will not succeed in his case based on presumed undue influence unless he can establish by evidence that Mr. Cox reposed a special degree of trust and confidence in Mrs. Cox and that the nature of the Deed of Transfer is such as to justify a presumption that it was procured by undue influence. As noted in para. 24 above, *Keane* suggests that, in order to show that the Deed is of such a nature, the plaintiff will have to demonstrate that it was to Mr. Cox's manifest disadvantage. In addition, the case law shows that, in proceedings of this kind, the court looks not only at the nature of the gift but at all of the relevant circumstances in which the gift was made. Thus, for example, in *Carroll v. Carroll*, the court took into account the fact that the donor did not fully appreciate the nature of the transaction. In this context, Barron J., at p. 265, highlighted the way in which the donor continued to tell his daughters that there would always be a home for them in the property which he had transferred to his son. Given the evidence of Mrs. Cox discussed in paras. 119, 126 and 128 above, that aspect of *Carroll v. Carroll* strongly resonates here.

140. It therefore seems to me that, in addressing the issue of presumed undue influence, I should proceed on the basis of a slightly modified version of the test proposed by *Keane* and consider whether the evidence establishes (a) that Mr. Cox reposed a special degree of trust and confidence in Mrs. Cox and (b) whether the nature and circumstances of the gift are such as justify a presumption of undue influence.

141. In so far as the first of those criteria is concerned, it must be acknowledged that mutual trust and confidence are corner stones of a happy marital relationship. Of itself, that kind of trust and confidence could not be a basis for a presumption of undue influence. The decision in *McCormack v. McCormack* (addressed in para. 23 above)

underscores that conclusion. What must be shown is that there was a *"special"* degree of trust and confidence reposed by Mr. Cox in Mrs. Cox. That seems to me to involve something more than what might be considered to be the ordinary or expected degree of trust and confidence between spouses. The case law shows that a special degree of trust and confidence can arise where there is a significant imbalance between the positions of the donor and donee, for example, where the donor is vulnerable and is dependent on the assistance of the donee.

142. In this case, a number of factors are relevant. In the first place, Mr. Cox was significantly older than Mrs. Cox. However, he was described by everyone who encountered him as mentally alert. For that reason, I do not believe that the disparity in age is a particularly weighty factor. Nonetheless, it is one factor to bear in mind. Secondly, and more importantly, it is clear that Mr. Cox was already quite ill by the time the Deed of Transfer came to be executed on 18th March 2005. There was no dispute that he had become ill shortly after the funeral of his mother-in-law in February 2005 and his condition was so bad that, very soon after the execution of the Deed of Transfer, he was admitted to hospital. As noted in para. 42 above, his daughter, Michelle Cox, on her return to the family home on 20th March 2005 described his breathing as *"very bad"* and she said that she was very worried about him. The fact that he was so ill made him very dependent on Mrs. Cox. Mrs. Cox was plainly his principal carer from the outset of his illness. This created an obvious disparity between their respective positions. But that is not all. Mrs. Cox was also more than his carer. She took an active role in the management of his affairs at least in so far as the disposition of his estate or property is concerned. That is clear, for example, from the way in which Mrs. Cox acted as a *"go-between"* in their interaction with Ms. Corrigan, albeit that this occurred at a slightly later period running from 29th June 2005 to August 2005. Her role

is also clear from an internal William Fry email of 3rd June 2005 which records that the approach to execute a new will in that month came via Mrs. Cox. The email records that Mrs. Cox had telephoned and said that *"**they** need to change their will… **She** has made some amendments and will be faxing those through to you".* (emphasis added). Again, while this occurred a little over two and a half months after the execution of the Deed of Transfer, it is indicative of the extent of the trust and confidence which Mr. Cox reposed in Mrs. Cox. Notwithstanding that he was then said by everyone who met him to be mentally alert, he was nonetheless entrusting her with a very active role in relation to how his estate would be dealt with. It is clear from the evidence of several witnesses that he was capable of using the telephone himself but, yet, he chose to entrust the task of dealing with these very important matters to his wife.

143. It is also significant that, when his daughters Michelle Cox and Jennifer Coleman went to see him in the hospital on 30 May 2005 to confront him about the terms of the 1991 will, his immediate reaction was to ask Mrs. Cox (to whom he was then speaking on the telephone) to *"come quick".* He was plainly unable to deal with the highly charged situation on his own. While this occurred after the execution of the Deed of Transfer, it seems to me to be inherently unlikely that the position would have been any different if the confrontation had occurred on 17th or 18th March 2005 rather than 30th May 2005.

144. Even if one looks solely at the evidence given by the witnesses on behalf of the plaintiff, it seems to me that the combination of factors identified in paras. 142 to 143 above establishes at least a *prima facie* case that Mr. Cox reposed a special degree of trust and confidence in Mrs. Cox. In my view, the evidence given by Mrs. Cox and Mr. Sheehan strongly supports a conclusion that such a relationship existed between Mr. Cox and his wife. It is clear from the evidence of Mrs. Cox that she accepts that she

acted as a *"mediator"* in relation to the interactions between Mr. Cox and both William Fry and Ms. Corrigan of Arthur Cox. This reinforces the view expressed in para. 142 above.

145. The evidence of Mr. Sheehan is also important. In this context, having regard to the evidence of Michelle Cox as to how bad Mr. Cox's breathing was on her return to the family home on 20th March 2005, I believe that it is reasonable to infer that Mr. Cox must himself have been conscious of just how ill he had become and that he must have been concerned to put his affairs in order. It is in that context, that his words *"I trust Sally"* (as recounted by Mr. Sheehan) have particular resonance. Mr. Sheehan confirmed that the words were spoken on 18th March 2005 by which time Mr. Cox was already quite ill. In ordinary circumstances, those words might go no further than signifying the ordinary level of trust which one spouse should have in the other. However, given the very particular circumstances, this was a very strong statement which seems to me to have carried a more significant meaning. It should be recalled in this context that Mr. Sheehan had been retained by Mr. Cox not with a view to transferring the property into joint names but with the intention of creating a trust for the benefit (at least in part) of his children. Mr. Cox was only deflected from that course by Mr. Sheehan's suggestion that he should, instead, put his property in joint names. If that approach was to provide any intended benefit to his children, then the degree of trust and confidence placed by Mr. Cox in his wife was certainly a very strong one. He was trusting her to carry out his wishes after his death when he would no longer be around to ensure that those wishes were given full effect.

146. The evidence of Mrs. Cox and Mr Sheehan is also relevant for another reason. There is no suggestion made in the course of their evidence that Mr. Cox had any opportunity in advance of the execution of the Deed of Trust to discuss the proposed

arrangement with any party other than Mrs. Cox and Mr. Sheehan. Given that he acted for both parties, the latter could not be said to be independent. As a result, there was nothing to act as a brake on the trust and confidence which Mr. Cox had in Mrs. Cox. While this is a factor to be considered primarily in the context of rebuttal of any presumption of undue influence, the fact that there was nothing to act as a brake on the relationship of trust and confidence also seems to me to be relevant in considering whether the relationship is sufficiently *"special"* to satisfy the former of the two criteria identified by *Keane.* It seems to me that, it would be difficult to satisfy that criterion where the donor has the benefit of access to an independent voice with whom the donor can discuss his or her affairs.

147. In light of the combination of factors identified in paras. 142 to 146 above, it seems to me that the evidence establishes that Mr. Cox reposed a special degree of trust and confidence in Mrs. Cox. Next, I must consider whether the plaintiff has shown that the nature and circumstances of the Deed of Transfer are sufficient (in combination with the special degree of trust and confidence reposed in Mrs. Cox) to justify raising a presumption of undue influence.

148. In so far as the nature of the transaction is concerned, *Keane* (in the extract quoted in para. 21 above) suggests that, in cases of this kind, it must be shown that the transaction is to the manifest disadvantage of the donor. In normal circumstances, it would be difficult to establish that there is anything untoward about a transfer of property from one spouse into the joint names of both spouses. Transactions of that kind are not unusual and often serve an entirely laudable purpose ensuring that there is a relationship of equality between spouses. It is also clear from the evidence of Mr. Lysaght that a transfer into joint names may be an entirely sensible solution where it is known that the donor spouse is terminally ill. As noted earlier, counsel for Mrs. Cox,

in the course of cross-examining Mr. Lysaght, suggested that this is precisely what happened in this case.

149. In many cases, it would be difficult to demonstrate that a transfer into joint names by a terminally ill spouse puts such a spouse at a disadvantage. Such a scenario is quite different to cases where a donor (who is not terminally ill) transfers a home or other property essential to the donor's wellbeing or care to a third party. In cases of that kind, the disadvantage to the donor is obvious. *Carroll v. Carroll* is a good example of such a case. However, the individual circumstances of each case must be carefully examined. In the context of potential disadvantage to Mr. Cox, it seems to me that two factors are very relevant. In the first place, by the time the Deed of Transfer came to be executed, the property had become extremely valuable. It could no longer be considered to be purely farmland but had acquired substantial development potential and was known by Mr. Cox to be very valuable. On several occasions, he had remarked on its value to his daughters. He had also observed that its development would generate sufficient value to allow each of his wife and his children to acquire land for themselves. The children were all adults. While a disposition such as the Deed of Transfer might make perfect sense where a property owner wished to keep the property intact (or where the owner's children were not old enough to manage property themselves), it was a lot less apposite in the particular circumstances of the property owned by Mr. Cox.

150. Secondly, Mr. Cox, at the time of execution of the Deed of Transfer, was clearly intent on making provision for his children. Given the value of the property, that is unsurprising. Unlike many married couples, the value of the property meant that Mr. Cox had the wherewithal to provide not only for the needs of his wife following his death but also for the needs of his adult children. There was enough value in his estate to allow each of his wife and children to acquire significant holdings for themselves out

of the proceeds. The fact that he had the intention to benefit both his wife and his children emerges not only from the evidence of his daughters as to what was said to them by Mr. Cox but also from the evidence of Mr. Sheehan. It will be recalled that Mr. Sheehan gave evidence that Mr. Cox had expressed an intention to set up a trust. He was only deflected from that course by Mr. Sheehan's advice to pursue the Deed of Transfer. That advice was, at least partially, driven by Mr. Sheehan's lack of familiarity with trust structures. Mr. Cox's intention to benefit his children is also evidenced by the fact that, in June 2005, Mr. Cox executed the 2005 will and, in August 2005, he reaffirmed that will by executing the codicil. It is also evident from the events in hospital (described in para. 45 above) just days before his death when Mrs. Cox asked Mr. James Smith, one of the executors under the 2005 will, to assure Mr. Cox that he would look after everything. This was plainly done in order to reassure Mr. Cox on his deathbed that effect would be given to the terms of his 2005 will. Mr. Smith could only look after everything if he, as executor, had control of Mr. Cox's estate. The evidence of Ms. Corrigan also reinforces this conclusion. As previously outlined, Ms. Corrigan (who was an entirely objective and disinterested witness) was very clear that Mr. Cox wished to benefit his children to the extent provided for in his 2005 will. Crucially, the Deed of Transfer entirely undermined that objective. As Mr. Lysaght observed, it led to a loss of autonomy on the part of Mr. Cox. That loss of autonomy is a feature of any transfer into joint names but, in Mr. Cox's case, it had a particularly unwelcome (and it appears an unintended) result for him. It prevented him from making provision for his children notwithstanding that he clearly wished to do so. This seems to me to demonstrate that the Deed of Transfer created a very clear disadvantage to Mr. Cox's interests and completely undermined his intention.

151. This disadvantage is compounded by the fact that Mr. Cox clearly did not realise that the Deed had that effect. This is evident from the fact that he executed the 2005 will in June of that year. In light of the legal effect of the Deed of Transfer (if valid), that the execution of that will was a wholly futile exercise. So too was the execution of the 2005 codicil and the entire process of going to the trouble of securing the advice and input of Ms. Corrigan. The only rational explanation for taking these steps is that Mr. Cox did not understand the legal effect of the Deed of Transfer. In particular, he did not understand that the Deed of Transfer would take priority over any will and that its effect could not be reversed or overridden by any subsequent will. This conclusion is strongly reinforced by the evidence of Mrs. Cox. As noted in para. 119 above, she said that she and Mr. Cox did not understand that the Deed of Transfer *"was held supreme over Wills".* As further noted in para. 126 above, she also said that, at the time of the Deed of Transfer, she was not fully *au fait* with the difference between such a transaction and a will. It is logical to infer that Mr. Cox was in the same boat. This is the only logical explanation for the fact that Mr. Cox plainly thought that he was still in a position to make his 2005 will and the subsequent codicil. There is nothing to suggest that he understood that these steps were utterly futile in light of the Deed of Transfer.

152. In light of the considerations outlined in paras. 149 to 151 above, I am satisfied that, in the very particular circumstances of this case, the Deed of Transfer very seriously disadvantaged Mr. Cox's interests in that, contrary to his understanding of the transaction, the Deed robbed him of the ability to provide for his children out of his very valuable estate. This was so, notwithstanding the clear evidence that he wished to provide for his children. In my view, this disadvantage, taken together with the relationship of trust and confidence reposed by him in Mrs. Cox is sufficient to give

rise to a presumption that the Deed of Transfer was procured through the presumed undue influence of Mrs. Cox. In saying that, I stress that this does not mean that Mrs. Cox has actually exerted some sinister influence over her late husband or that she has otherwise behaved in a deliberately wrongful way towards him. The raising of a presumption of this kind arises by virtue of the application of longstanding equitable principles which are designed to protect vulnerable people against misplaced largesse. The effect of raising the presumption is to cast the onus on the donee to prove that the transaction was not procured by undue influence.

Has the presumption of undue influence been rebutted?

153. This brings me to the next issue that requires consideration: has Mrs. Cox demonstrated that the Deed of Transfer was executed without any undue influence on her part? In this context, I should make clear that this is not a case where the court has a complete picture from the evidence of the events of 18th March 2005 when the Deed of Transfer was executed or of the lead up to its execution. As noted in para. 25 above, the presumption of undue influence will not arise where the full facts are known and where, on the basis of those facts, the court is able to conclude (as Lowry L.C.J. did in *Reg (Proctor) v. Hutton*) that there was no undue influence. In *Hutton,* the donee gave clear and comprehensive evidence at the hearing of the circumstances in which the gift was made. In contrast, in this case, Mrs. Cox was given the opportunity in the course of her cross-examination to recount the events that occurred in relation to the execution of the Deed of Transfer. As noted in para. 121 above, she was unable to recall much of what happened on that day. Her evidence fell far short of that available from the donee in *Hutton.* The lack of detail in Mrs. Cox's evidence was compounded by the fact that there was no letter of advice from Mr. Sheehan and, even more surprisingly, there was no contemporaneous attendance produced by him of his interactions with Mr. and Mrs.

Cox on that day or on any of the previous occasions on which he may have had discussions with them or with Mr. Cox on his own. The fact that there is neither a letter of advice nor an attendance is particularly significant in circumstances where Mr. Cox was advised by Mr. Sheehan to deal with his estate through the mechanism of the Deed of Transfer in lieu of the trust which Mr. Cox had originally intended. It is also very relevant that, as in *Carroll v. Carroll*, Mr. Cox appears not to have realised the true legal effect of the Deed of Transfer. As noted at para. 25 above, Barron J. in *Carroll v. Carroll* distinguished *Hutton* on the basis of the doubt that existed that the donee in that case understood the legal effect of what he had done. Like this case, the donee in *Carroll v. Carroll* continued to act in the aftermath of the gift as though he still had disposing power over the property in question. For all of these reasons, I cannot be satisfied that all the facts are known. It follows that, in light of the conclusion reached in para. 152 above, the presumption of undue influence arises and the burden therefore falls on Mrs. Cox to rebut it.

154. As the case law makes clear, the most usual way to rebut the presumption of undue influence is to show that the donor had independent advice in relation to the transaction. In Mr. Cox's case, there is no evidence that he received any such advice. It is, of course, true that he had the benefit of advice from Mr. Sheehan. However, Mr. Sheehan could not be said to be independent. He acted for both Mr. Cox and Mrs. Cox. That means that Mrs. Cox cannot rely on Mr. Sheehan's involvement to rebut the presumption of undue influence. Even if the lack of independence did not, of itself, create a problem, the advice given by Mr. Sheehan could not be said to have satisfied the criteria approved by the Supreme Court in *Carroll v. Carroll.* In that case, Barron J. emphasised that the advice must be comprehensive and given with knowledge of all relevant circumstances.

155. While I believe that Mr. Sheehan acted at all times in the *bona fide* belief that he was acting in the interests of Mr. and Mrs. Cox, it is clear that the advice given by him did not satisfy either of these criteria. In the first place, Mr. Sheehan proceeded without fully addressing the ramifications of the transaction from a taxation perspective. Mr. Sheehan's evidence in relation to this issue is addressed in paras. 113 to 115 above. As noted in para. 115, Mr. Sheehan proceeded with the transaction without checking whether Mr. Cox had, in fact, obtained any taxation advice from his accountant. In addition, there is no evidence that he adequately addressed the position of Mr. Cox's children. As the case law makes clear, it is the duty of the independent advisor to consider whether it is right and proper, in all of the circumstances, for the donor to make the gift in issue. Notwithstanding the value of the property, there is nothing to suggest that Mr. Sheehan was aware of the individual circumstances of each of the children of Mr. and Mrs. Cox or of their needs. Without that information, it was impossible for Mr. Sheehan to know that the Deed of Transfer was the most appropriate way for Mr. Cox to proceed. This meant that it was also not possible for Mr. Sheehan to give comprehensive advice to Mr. Cox. I accept that Mr. Sheehan advised Mr. and Mrs. Cox that the Deed of Transfer would have the effect that, upon the death of the first of them, the property would pass to the survivor. However, there is no evidence that he advised them that the transaction was irreversible and that it would take priority over any will, even where the will was executed after the Deed. Subsequent events demonstrate that Mr. and Mrs. Cox did not realise that the Deed had that effect. It is also unsatisfactory that Mr. Sheehan did not give any written advice to Mr. Cox. This is particularly so given the value of the property in issue.

156. In the circumstances described in para. 154 to 155 above, I do not believe that the involvement of Mr. Sheehan is sufficient to rebut the presumption of undue

influence. I have also carefully considered the evidence of Mrs. Cox herself but I cannot see anything in her evidence which demonstrates that the Deed of Transfer is the result of the free and independent exercise of intention on the part of Mr. Cox. As a result, I am constrained to conclude that Mrs. Cox has failed to rebut the presumption that the Deed of Transfer was procured by the exercise of undue influence of Mrs. Cox over her husband. It follows that the Deed of Transfer must be set aside.

The plaintiff's alternative case based on alleged unconscionability

157. It will be recalled that the validity of the Deed of Transfer is also challenged by the plaintiff on the ground that it is alleged to constitute an improvident or unconscionable transaction. The relevant principles in relation to this issue have previously been outlined in paras. 33 to 37 above. However, in light of the conclusion which I have reached in relation to presumed undue influence, it is unnecessary to address this element of the plaintiff's case. Given that it is unnecessary to address it, I believe that it would be inappropriate to embark on a consideration of that issue in the particular circumstances of this case. I am concerned that there may well be scope for argument about the applicability of the unconscionability principle in the context of transactions between spouses and, for that reason, I believe it would be preferable to leave that issue to be determined in a case where it is strictly necessary to do so.

Mrs. Cox's challenge to the 2005 will and codicil

158. The remaining issue to be determined is Mrs. Cox's contention that the 2005 will and codicil are vitiated as a consequence of undue influence or duress on the part of Mr. Callan or on the part of her own daughters. As explained in para. 30 above, the principles which apply in the context of an allegation of undue influence in respect of the execution of a will are different to those that apply in the context of a gift of property made by a living donor. No presumption of undue influence arises. Accordingly, the

person asserting undue influence (here, Mrs. Cox) must prove as a fact that the will was procured by the actual undue influence exerted by a third party over the testator. The relevant principles have been summarised by Norris J. in *Wharton v. Bancroft* (quoted in para. 31 above). What must be shown is the actual exercise of influence by some other party in relation to the will sufficient to override the expression of the testator's own wishes such that the testator felt compelled to follow the wishes of the party in question.

159. In this case, Mrs. Cox ultimately opted to blame Mr. Callan rather than her daughters for the terms of the 2005 will. As noted in para. 132 above, she said that she did not *"blame them in the least. We were being advised by a Senior Counsel"* and that it was *"all down"* to Mr. Callan. However, given that Mrs. Cox was, by that point, acting in person, I believe that I should consider the position by reference to any case that could be made that the 2005 will was procured either by the undue influence of Mr. Cox's daughters or the undue influence of Mr. Callan or as a consequence of duress or dictation on their part.

160. In so far as the daughters are concerned, it will be recalled that Michelle Cox and Jennifer Coleman were very upset when the 1991 will came to light and they went to see their father in hospital to confront him about it. The evidence in relation to that confrontation is addressed in para. 43 above. It was obviously a highly emotional and upsetting encounter on both sides but, given his state of health, it must have been particularly so for Mr. Cox. An argument might be made that this encounter placed enormous moral pressure on Mr. Cox to alter his will in favour of his children. In that way, it could be argued that the court should infer that the execution of the 2005 will arose as a consequence of undue influence on the part of Mr. Cox's daughters. However, I do not believe that there is sufficient evidence to justify such a conclusion.

161. In the first place, that encounter occurred several weeks before the execution of the 2005 will. It is clear that, in the meantime, Mr. Cox had plenty of opportunity to reflect on the terms of any will that he wished to put in place. He also had the opportunity to speak to his own solicitors William Fry and, in particular, Mr. Neville O'Byrne of that firm. It is clear from Mr., O'Byrne's attendance note that he had a number of conversations with Mr. Cox over the course of 9th and 10th June 2005. Thus, Mr. Cox had ample opportunity to raise any concerns with Mr. O'Byrne. During the same period, he had even more opportunity to raise any concerns with Mrs. Cox. In fact, she appears to have played an active part in instructing William Fry. As noted in para. 142 above, it was she who first made contact with William Fry to relay Mr. Cox's desire to execute a new will saying that *"**they** needed to change their will"* (emphasis added). If Mrs. Cox considered that her husband was being unduly pressurised or influenced by their daughters or by Mr. Callan, there was plenty of scope for her to raise that with her husband or with William Fry. There is no evidence that she took either of those steps.

162. Secondly, there is no evidence at all that any of Mr. Cox's daughters demanded a division of his estate along the lines of the 2005 will. Thirdly, as outlined in para. 76 above, Ms. Corrigan was very clear in her evidence that, when she met Mr. Cox in August 2005, he told her that the 2005 will was what he wanted. She confirmed that neither he nor Mrs. Cox expressed any dissatisfaction with the fact that, under that will, his children were each set to inherit a share of his estate. Mr. Cox had every opportunity in August 2005 to change his will. He had access to Ms. Corrigan and Ms. Hargaden to whom he was free to give instructions. There is no evidence of any interference either by Mr. Callan or Mr. Cox's daughters in Mr. Cox's dealings with Ms. Corrigan and Ms. Hargaden. Furthermore, Mrs. Cox had several conversations herself with Ms. Corrigan

over the telephone. Accordingly, if Mrs. Cox had any genuine concern that her husband's will did not represent the free and independent exercise of Mr. Cox's intentions, there was ample scope for her to raise those concerns with Ms. Corrigan or Ms. Hargaden. The fact that she did not do so is telling.

163. Fourthly, quite apart from the evidence of Ms. Corrigan, there is also the fact that, by executing the codicil to the 2005 will, Mr. Cox was, in substance, reaffirming the intentions expressed in that will. In this regard, the codicil did not make any substantive changes to the 2005 will. It merely enhanced the powers given to the trustees of the trust in favour of Mr. Cox's son and provided for a mechanism for any of the beneficiaries to realise the value of their individual gift in advance of a decision by the beneficiaries as a whole to sell the property. In all other respects, the gifts to his children remained in place. In my view, that represents a very strong reaffirmation of Mr. Cox's intention to benefit his children made at a time when there is no evidence of any interference or pressure by any other party.

164. Fifthly, there is the evidence (described in para. 45 above) given by Michelle Cox in relation to the visit to see her father in hospital just days before he died. On that occasion, Mrs. Cox asked Mr. James Smith (who was then also visiting Mr. Cox) to say to Mr. Cox that he could rest assured that everything would be okay and that he would look after everything. Those words only make sense in the context that Mr. Smith would have some role in giving effect to Mr. Cox's intentions after his death. Of course, Mr. Smith had that role under the 2005 will in that he was one of the executors appointed under that will. Mrs. Cox's request to Mr. Smith therefore suggests that, at this very solemn time when Mr. Cox's death was imminent, both she and Mr. Cox regarded the 2005 will as expressing Mr. Cox's final wishes in relation to the disposition of his estate.

165. Given each of the factors outlined in paras. 161 to 164 above, I do not believe that there is any proper basis on which to find, on the balance of probabilities that the 2005 will or the subsequent codicil were procured through the undue influence or duress of Mr. Cox's daughters.

166. For similar reasons, I believe that a similar conclusion must be reached in so far as Mrs. Cox contends that the 2005 will and codicil were procured through the undue influence of Mr. Callan over Mr. Cox or as a consequence of duress or dictation on his part. Firstly, there is, as I have already noted, no evidence at all of any interaction between Mr. Callan and Mr. Cox in relation to the execution of the codicil. There is accordingly no proper basis to attack the execution of the codicil on this ground.

167. Secondly, the first, third, fourth and fifth factors outlined in paras. 161 to 164 above apply equally in the context of the case made in respect of Mr. Callan as they do in the case of Mr. Cox's daughters. Those factors demonstrate that Mr. Cox had many opportunities to take a different course to that outlined in his 2005 will. They also demonstrate that he plainly had an intention to benefit his children in his will and that this intention was reaffirmed on a number of separate occasions at a time when there is absolutely no evidence of interference either by the daughters or by Mr. Callan.

168. It is true that Mr. Callan suggested that a court, on an application under s. 117 of the Succession Act 1965, might well divide the estate in a similar manner to that later directed by Mr. Cox in his 2005 will. It is also true that Mr. Callan actively intervened in relation to the choice of executors. However, in my view, neither of these actions on Mr. Callan's part are sufficient to amount to the exercise of undue influence, duress or dictation. In so far as the division of the estate is concerned, there is no evidence that Mr. Callan did anything more than offer a view as to the potential effect of s. 117 of the 1965 Act. The fact that Mr. Cox thereafter chose to divide his estate along similar lines

does not mean that this did not represent the free and independent exercise of his intention. While Mrs. Cox has made generalised complaints about Mr. Callan, no detailed evidence has been given which establishes that Mr. Cox's intentions were, as a matter of fact, subordinated to those of Mr. Callan. As noted in para. 54 above, given the value of the estate, the division was a logical and unsurprising one. It meant that substantial provision was made for each of the beneficiaries with proportionately greater provision made for Mrs. Cox (recognising her position as his wife) and also for his son (recognising that he had a greater need than his sisters). There is no evidence that Mr. Cox felt constrained by Mr. Callan's suggestion to divide his estate in this way. On the other hand, there is ample evidence that Mr. Cox was in a position to give his instructions to two sets of solicitors and it is clear from the available evidence that he maintained a consistent position between the date of execution of his 2005 will and his death that the division of the estate directed in that will was what he wanted to achieve.

169. Mr. Callan undoubtedly interfered in a very direct way in relation to the identity of the executors. But it was limited to that issue. There is no equivalent evidence that he interfered in relation to the division of the estate. Moreover, it is clear from Mr. O'Byrne's attendance that he made sure that he took instructions directly from Mr. Cox (who he saw on his own for that purpose) in relation to the persons to be appointed as executors. As a result of that interaction, the executors appointed were Mrs. Cox. Mr. James Smith and Mr. Chetwin Cox. Notably, these did not coincide fully with those proposed by Mr. Callan who had urged Mr. Cox to appoint Mrs. Cox, Mr. Smith and Ms. Jennifer Coleman. This clearly shows that Mr. Cox made his own decision on the issue.

170. I must accordingly reject the case made by Mrs. Cox that the 2005 will and codicil were procured through the undue influence of Mr. Callan or through the undue influence of her daughters.

The orders to be made

171. In light of the conclusions reached above, it seems to me that the following orders should be made in these proceedings:

(a) There should be a declaration that the Deed of Transfer made on 18th March 2005 was procured through the presumed undue influence of Mrs. Cox. It is again important to note that this declaration arises on the basis of the application of equitable principles and is not intended to suggest that Mrs. Cox behaved in some sinister way towards her late husband or that she has behaved in a deliberately wrongful way. There is no evidence that Mrs. Cox acted with sinister intent. It is equally important to note that the determination made by me in relation to the Deed of Transfer is made on the very particular facts of this case. The determination does not call into question, more generally, the validity of transfers of property by a spouse into joint names. For the reasons identified in paras. 148 and 149 above, such transactions are likely to be entirely appropriate in a great many cases;

(b) In light of the order proposed at sub-para. (a) above, there should be an order setting aside the Deed of Transfer;

(c) I will hear counsel and Mrs. Cox as to whether it is necessary or appropriate to make an order directing the Property Registration Authority (which is not a party to these proceedings) to amend the Register of Freeholders, County Louth to reflect the order to be made at (b) above;

(d) There should also be an order dismissing the case made by Mrs. Cox that the 2005 will and codicil were procured through the undue influence of Mr. Paul Callan, Ms. Jennifer Coleman, Ms. Suzanne Cox or Ms. Michelle Cox or any of them or any combination of them;

(e) Likewise, there should be an order dismissing the case made by Mrs. Cox that the 2005 will and codicil were executed as a result of duress on the part of any party or on the dictation of any party.

(f) I will hear counsel and Mrs. Cox in due course in relation to the issue outlined in sub-para. (c) above and in relation to costs and will fix a date for that purpose following the physical delivery of this judgment.