THE HIGH COURT

PROBATE

Record No. 2020/968 PO

[2024] IEHC 13

IN THE MATTER OF THE ESTATE OF JAMES BROWNE, LATE OF 11 MARNE STREET, VAUCLUSE, NEW SOUTH WALES 2030, AUSTRALIA, COMPANY DIRECTOR, DECEASED AND

IN THE MATTER OF THE SUCCESSION ACT, 1965

AND IN THE MATTER OF AN APPLICATION BY MARGARET McHALE, THE SOLE EXECUTRIX NAMED IN A TESTAMENTRY DOCUMENT EXECUTED BY THE DECEASED ON THE 27TH DAY OF OCTOBER, 2000

JUDGMENT of Ms. Justice Stack delivered the 15th day of January, 2024.

Introduction

1. This is an application to admit to probate a Will made by the late James Browne, deceased, ("the Testator") on 27 October, 2000, in Ballina, County Mayo, ("the Irish Will"). The applicant is the Testator's sister and the sole executrix named in the Irish Will.

2. The Testator died in New South Wales, Australia, on 7 September, 2015, at the age of 75. He left a widow, Diane Amante Browne, and four children: Anthony, Michelle, Laura and Deirdre.

3. At the date of his death, the Testator was domiciled in the domiciliary unit of New South Wales, Australia, and had extensive property and assets in Australia. It is accepted that these pass to Diane, who, in the events which have occurred, is the sole beneficiary named in a Will executed by the Testator in New South Wales on 5 August, 2015, ("the Australian Will") just a few weeks before his death. The Australian Will was drafted by the Testator's Australian solicitor but it seems to have been executed in a hospital, as it is witnessed by a doctor and another individual who is described as a *"medical receptionist"*. The Testator's Australian solicitor was not present when the Australian Will was executed and the Testator's precise state of health on the date of execution of the Australian Will is unclear.

4. In addition to his assets in Australia, the Testator had also during his lifetime acquired by a series of purchases 320 acres of mountain land in Ballycastle, County Mayo, which had been owned by earlier generations of his family. By virtue of the Irish Will, the Testator gave devised and bequeathed *"all the property in the Republic of Ireland of which I die possessed both realty and personally (sic) of whatever nature and wheresoever situate to my son Anthony James Brown."*

5. The bequest to Anthony ("Tony") in the Irish Will was subject to and charged with the right of the Testator's daughter Deirdre, to be supported, clothed and maintained out of *"the said property"* for and during her lifetime. It also directed that Tony would be fully responsible for the welfare of Deirdre for her lifetime.

6. Deirdre has certain special needs which are not relevant to this application, but explain the charging provision in the Irish Will. While she was of full age on the date of death of the Testator, and while her condition is not in and of itself indicative of a lack of capacity, the terms of the Australian Will seem to suggest that she is not capable of managing her own affairs. Nevertheless, in light of the conclusions which I have reached, I do not need to consider

whether she should have been separately represented as my conclusions have not adversely affected her interests.

7. The Irish Will is very clear in restricting itself to Irish property. It purports to revoke only all former wills and testamentary dispositions made in the Republic of Ireland. It declares that it is complementary to any wills made or to be made in the future in Australia, and that it is for the purpose of dealing with the Testator's assets in Ireland only.

8. This application arises because the Australian Will contains a general revocation clause which, on its face, appears to revoke the Irish Will. If the Irish Will has been revoked, Diane succeeds to the Irish estate as well as the Australian one and Tony does not inherit the Mayo lands (or any other Irish assets). Notwithstanding her entitlement to succeed if the application fails, Diane supports the application to admit the Irish Will to probate and has sworn a very clear affidavit to the effect that her husband intended her son to succeed to the Irish lands. Affidavits in support of this position have also been filed by Tony, Michelle (who avers that she speaks for both herself and Laura), and the applicant's son, who is also called Tony after his grandfather (that is, the father of the applicant and the Testator). Written consents signed by Laura and Deirdre have also been exhibited.

9. As will I hope will be evident from the discussion below of the relevant caselaw, it is not unusual for a general revocation clause to be included in a will in circumstances where the testator does not in fact intend to revoke all previous wills and testamentary dispositions. In particular, this issue seems to arise relatively frequently where a testator intended one or more wills to deal exclusively with assets in a particular jurisdiction.

10. Although the modern Irish cases seem to approach the resolution of the issues which arise in differing ways, the law in England and Wales on this point appears to be well settled and has been of considerable assistance in ascertaining the correct position at common law.

Factual Background

11. The Testator and the applicant, together with at least one other sibling, grew up together in Ballycastle, County Mayo, and appear to have remained close throughout the Testator's lifetime. This is notwithstanding that the Testator emigrated to England at the age of eighteen, and spent more than ten years there before moving to Australia at around the age of 30. He originally worked as a machine driver, but subsequently developed a very successful plant and machinery hire business. However, he later became involved in farming, as that was his first love.

12. His sister, wife, son and his daughter, Michelle, have all confirmed on affidavit that the Testator had a very strong and specific connection to the lands in Ballycastle, Co. Mayo, where he grew up. His grandfather had been reared there and the family connection with the lands went back many generations.

13. The Testator always kept in contact with his family in Mayo and while he could not visit for some years after moving to Australia, once travel became easier, he visited Mayo as much as possible, usually every year, though he would occasionally miss a visit if family or business reasons prevented him from travelling.

14. He set about buying the family lands from various owners, but this was a protracted process over a number of years. Each of the family members has confirmed that the Testator took a somewhat old-fashioned view of the "*home place*" in County Mayo, and always intended that it would go to Tony as his eldest son. It turned out that Tony was to be his only son but, in any event, he involved Tony from a young age in farmwork. Tony also got involved in rounding up cattle for testing, making silage, and from time to time spent the traditional *"day on the bog"* cutting turf with his cousin, the applicant's son, Tony McHale. Even more significantly,

he was present from a young age when the Testator was negotiating for the purchase of the lands the subject of this application.

15. Although the entire family appear to have visited the Mayo lands regularly, staying in a cottage on the lands after the Testator had renovated and extended it, Tony McHale has averred that the Testator and Tony visited Mayo more frequently than the other members of the family. Tony McHale said that the Testator had a detailed knowledge of the lands – for example of its history and placenames - and during those visits, he passed on that knowledge to his son.

16. Although the Testator was entitled to Australian citizenship, he never took it up and instead travelled on his Irish passport. He has also been buried in Mayo, in accordance with his long-expressed wishes.

17. The unequivocal evidence from the Testator's immediate family is that the "*home place*" was to be a resource if anything went wrong with the business in Australia. It was always treated completely differently from any assets in Australia and was to be dealt with separately and specifically through his Irish Will.

18. It appears that from an early stage, the Testator treated the Mayo lands differently from his Australian assets in his testamentary dispositions. This is evident from the earliest will in evidence, which was executed in Australia on 1 November, 1985. On that date, the Testator had been married for a little over two years, and he had one child, Tony, who was then just fifteen months old.

19. While he left all of the lands, Irish and Australian, in the first instance to his wife and child and any other child he might have, the lands were treated very differently for the purposes of the gift over. In default of the Testator being survived by any child who had attained the age of 21 years, the Mayo lands were left to the Testator's sister, the applicant, who lives in Mayo, while the Australian lands were left to his brother, Michael, who lived in New York City.

20. In 2000, he made the Irish Will. This was made in the offices of the executrix's solicitors, Messrs. John J. Gordon & Son in Ballina, County Mayo, and is witnessed by Mr. Gordon and a secretary who presumably was working in Mr. Gordon's office. Mr. Gordon has confirmed on affidavit that the will was duly executed and that it was first read over to the Testator and he expressed satisfaction with same.

21. In 2004, the Testator made a will in Australia. Clause 1 of this Will stated:

> "*I REVOKE all Wills and Testamentary dispositions previously made by me. I note however this will is intended to deal only with my estate in Australia and shall not effect (sic) any will made by me in respect of my Irish assets."*

That will was executed on 9 August, 2004, and was drafted by the Testator's Australian solicitor, Mr. Kenneth John Sorrenson, on instructions reflected in a written attendance drawn up on 11 August, 2004, two days after the actual consultation with the Testator and the execution of the will. This shows that the Testator read over a draft will which had been prepared and the only change that he made to it was to specifically exclude his Irish assets in respect of which he had already made the Irish Will with the effect that his Irish assets were to go to Tony. This is clear evidence of his intention that the 2004 Will would not apply to his Irish estate and also of his intention that his Irish estate would be dealt with separately from his Australian estate.

22. If matters had rested there, then there would be no difficulty admitting the Irish Will to probate as I think it would have been quite clear that it was not intended that the general revocation clause in the 2004 Australian Will would revoke the Irish Will: *Re Estate of Wayland* [1951] 2 All E.R. 1041.

Execution and terms of the Australian Will

23. However, the execution of the Australian Will has removed the certainty which had been achieved by the clear terms of the Irish Will and the 2004 Australian Will. Clause 1 of the Australian Will simply states:

"*I REVOKE all wills and other testamentary dispositions previously made by me."*

It does not include the additional statement found in the 2004 Australian Will that it is not intended to affect any will made in respect of the Irish estate.

24. The Australian Will makes no specific mention of any property, whether in Ireland or Australia, or indeed anywhere else. It nevertheless runs to 21 pages in total as it also established trusts in favour of each of the Testator's children in the event that Diane did not survive the Testator by 30 days. Although those terms do not now take effect, they are potentially relevant to the interpretation of the Will as the lengthy provisions relating to those trusts contain two provisions which suggest that it was not envisaged that the Will would apply to assets outside Australia.

25. First, clause 8 of the Will confers powers on the trustees of the Will to partition and/or appropriate "*any real or personal property forming part of my Estate"* in or towards the satisfaction of the share of any person in the estate. For that purpose, the trustees were empowered conclusively to determine the value of any real or personal property so partitioned and/or appropriated in such manner as the trustee should think fit. This clause incudes a proviso that, in the case of an appropriation to the trustees, the value of the property appropriated should be as determined, in the case of real property, *"by a qualified Valuer who is a member of the Australian Property Institute NSW Division or any body which replaces the same."*

26. This is material to the interpretation of the Will because a New South Wales valuer would have no expertise in valuing Irish lands (nor would a valuer qualified and practising in

Ireland have the expertise to value Australian land). This suggests that it was not envisaged that the Irish estate would be subject to the Australian Will as, otherwise, it would presumably have provided in the alternative for an appropriately qualified Irish valuer to value the lands in Mayo.

27. Secondly, in the Schedule to the Will there is also reference to the *"Income Tax Assessment Act, 1936 (as amended) or any legislation and substitution therefore (sic)*". This is Australian legislation and there is no act of this name in Ireland.

28. Short of those two references, the Australian Will is in entirely generic terms which, on the face of it, could be easily applied to property in either Ireland or Australia. Nevertheless, these provisions appear to demonstrate that the draftsman thought that the terms of the Australian Will would apply only to Australian property.

29. Diane extracted a Grant of Probate in the Supreme Court of New South Wales on 13 May, 2016. The Grant of Probate has attached to it an inventory listing property disclosed to the Probate Court in New South Wales under s. 81A of the Probate and Administration Act, 1898. Under the heading *"Property outside of New South Wales owned by deceased"*, there is listed: *"farm property situated at Kincon Ballina in the County of Mayo Republic of Ireland"* the value of which is said to be unknown. This does not appear to be the address of the Mayo lands but is in fact the applicant's address. However, nothing turns on this apparent error for the purposes of this application.

30. The issue which arises for determination in this application is the effect of the general revocation clause in clause 1 of the Australian Will and, in particular, whether it revokes the Irish Will which had remained in place since 2000.

The drafting of the Australian Will

31. Details as to the events leading up to the execution of the Australian Will are set out in the affidavits of Mr. Sorrenson, one of which, though it was undated, was apparently sworn on 31 May, 2019.

32. I digress here to say that affidavits for the purposes of proceedings in the Superior Courts of this jurisdiction are governed by O. 40 of the Rules of the Superior Courts, and O. 40, r.11 deals with the swearing of affidavits outside the State. Affidavits which are sworn for proceedings in this jurisdiction should be sworn in compliance with O. 40 and not in the format which might be familiar in the jurisdiction where the affidavit is sworn. Applications which require affidavits to be sworn abroad are reasonably common in the probate list and it sometimes happens that those affidavits are sworn in the format applicable in the jurisdiction where they are made. I refer to this issue merely to reiterate that the Irish lawyers acting in an application before the courts in this jurisdiction should be aware of the need to ensure compliance with O. 40, rather than leaving it to lawyers in another jurisdiction who may not be aware of the requirements of the Irish Rules of Court.

33. Insofar as this application is concerned, the format of Australian affidavits does not seem to be so different from those sworn in this jurisdiction and O. 40 is substantially complied so far as the first, undated, affidavit is concerned as it was clearly sworn before a notary public in Tamworth, New South Wales, Australia. The only difficulty is that it should have been dated in compliance with O. 40, rule 10. In the circumstances, I think it is appropriate to admit the affidavit. The affidavit of Mr. Sorrenson of 7 September, 2023, is in compliance with Order 40.

34. In any event, to return to the circumstances giving rise to the execution of the Australian Will, the first family meeting apparently took place in late 2014. Mr. Sorrenson has exhibited

his file note of 18 November, 2014, and it is quite brief, consisting, insofar as it refers to the Testator's draft will, as four short bullet points. In relation to the Testator's Will, it simply provides for the release of a debt owed by Tony, and that Diane was to be the sole beneficiary and sole trustee in the first instance. There is a reference to a Power of Attorney which is not material to the execution of the Will. There is nothing in this file note to show that any consideration, one way or the other, was given to the Irish assets or the Irish Will, or whether the proposed new will was to relate to the Irish estate or revoke the Irish Will.

35. There was apparently a delay in preparing and sending the draft wills to the Testator and his wife, and they were ultimately not sent until 13 May, 2015, though there is some doubt as to whether the draft documents referred to in the letter were in fact enclosed with it. There is again no mention of the Irish estate or the Irish Will at any point in this letter.

36. Mr. Sorrenson says that he met with the Testator and Tony on 24 June, 2015. Mr. Sorrenson met the Testator on two occasions on that day, first for a general consultation, and secondly for execution of the codicil to his 2004 Australian Will ("the 2015 Codicil"). These meetings were arranged only that morning as the Testator happened to be in Tamworth for the day.

37. An attendance dated 25 June, 2015 has been exhibited and, from this, it is apparent that for some reason the Testator had not seen the draft will which Mr. Sorrenson believed had been sent to him by letter dated 13 May, 2015, so it was printed out and given to him. Although Mr. Sorrenson did not witness the 2015 Codicil, it is clear that he was present and the reason he did not witness it was that it was his practice not to witness a will or codicil under which he was named as an executor or trustee.

38. The only alterations to the 2004 Will were, first, to amend clause 2 so as to provide for a different substitute executor, to delete clause 3, and to substitute therefore a clause forgiving

and releasing a debt owed by Tony which was apparently secured by a mortgage, and to amend clause 4 of the 2004 Will.

39. As is apparent from this, the 2015 Codicil did not in any way interfere with the provision in the 2004 Will to the effect that it related only to the Testator's Australian assets and did not affect any will made by him in respect of his Irish assets.

40. The next meeting between the solicitor and the Testator or his family was when Mr. Sorrenson met with Diane on 28 August, 2015. Diane signed her will in Mr. Sorrenson's presence and she also gave him the Testator's executed will. Mr. Sorrenson states at para. 18 of his undated affidavit:-

> *"In relation to Jim's signed Will I told her that I had anticipated that I'd have the opportunity of meeting personally with Jim to discuss the draft before he signed it as I particularly wished to have sight of his Irish Will to confirm that it dealt with the Irish assets in a way which would not be affected by updating the Australian Will."*

41. In support of that averment, he has exhibited an email dated 1 September, 2015, attaching PDF copies of her executed will and the Testator's Will which had been executed on 5 August, 2015, together with other legal documents which are not material to this judgment. It is clear from that email that Mr. Sorrenson had expected to meet Jim again in his office in Tamworth, New South Wales, which is apparently approximately 350 kilometres from Sydney. This email states:

> *"I note you are seeking to locate a copy of Jim's Irish Will and will provide it to me when you do. It is important that I review that Will."*

42. It is not clear why that review was not undertaken prior to drafting of the Will, or indeed why the 2015 Will did not limit itself to the Testator's Australian assets, as did the 2004 Will which it was revoking. Furthermore, there is no evidence as to whether there was any

communication between the Testator and Mr. Sorrenson prior to his death, either directly or through Diane or anyone else.

43. Mr. Sorrenson gave more detail about the drafting of the 2015 Will in his affidavit of 7 September, 2023. This affidavit confirms what was already stated in the first, undated, affidavit, that is, that Mr. Sorrenson was aware from his dealings with the Testator over the years that the Testator had executed a will in Ireland dealing with the Irish part of his estate only.

44. This affidavit also confirms that, at the meeting of 24 June, 2015, there was no discussion regarding the Irish estate of the Testator, but Mr. Sorrenson confirms in this affidavit that he had anticipated, when he met Diane on 28 August, 2015, that he would be meeting the Testator to review the draft will before the Testator executed it. He quite plainly, and fairly, states that he did not consider the Testator's Irish property in the preparation of the draft will nor did the Testator instruct him to include the Irish property in the draft will. He says he believes that had the Testator intended to exclude the Irish estate from the provisions of his Australian Will, and had he questioned him on this point, he would have given him instructions to that effect.

45. At para. 4 of the affidavit of 7 September, 2023, Mr. Sorrenson says that he believes that *"the inclusion of a general revocation clause in the draft will and the failure to expressly exclude the Irish estate from the provisions of the draft will was a drafting error made in my office which would have come to light if, as I intended, I had further discussions with the Deceased prior to him executing the will"*.

46. Very importantly, Mr. Sorrenson says that the Testator did not sign the Australian Will in his presence and that he did not have the opportunity to read over the Will to him prior to signing. The Will appears to have been executed in a hospital or medical clinic of some kind as it was witnessed by a doctor and a medical receptionist, and I assume that in fact the Testator

was an in-patient in hospital as otherwise he would presumably have executed it at home, but I have no direct evidence of this.

47. Mr. Sorrenson states that he has no doubt that had the Testator understood that the Australian Will would potentially have the effect of revoking the terms of his Irish Will, he would not have signed it. He does not, however, give any evidence of any statement to this effect by the Testator. This is, in reality, Mr. Sorrenson's belief which is not evidence of the Testator's intention.

48. Another feature of the affidavit evidence is that the 1985 Will, the 2004 Australian Will, and the 2015 Codicil are all endorsed to indicate that they have been revoked on a particular date. The 1985 Will is endorsed with the word "Revoke 9/8/04", indicating that it was revoked on the signing of the 2004 Australian Will. The 2004 Will and 2015 Codicil are endorsed *"Revoked 5/8/2015"*. There is no evidence from Mr. Sorrenson or anyone in his office as to how this came about, but I presume it was done in light of the subsequent execution of the Australian Will. I further infer, since the Australian Will was not executed in Mr. Sorrenson's presence and was only given to Mr. Sorrenson by Diane on 28 August, 2015, that Mr. Sorrenson or someone in his office endorsed the 2004 Australian Will and the 2015 Codicil as having been revoked on 28 August, 2015, or at some time afterwards.

49. The 2000 Will is not endorsed as having been revoked on 5 August, 2015. This is consistent, I think, with the fact that the Testator dealt with his Irish and Australian solicitors separately and that they did not correspond with each other, as evidenced by the fact that the 2000 Will implicitly revoked that part of the 1985 Will which dealt with the Testator's Irish lands, but no steps were taken to put a new Australian will in place until 2004. This suggests to me that the Testator simply gave the instructions directly himself and the respective solicitors did not concern themselves with what had been done by the other.

50. I should add that, although Mr. Sorrenson says that he prepared the application for the grant of probate in Australia, and that he is of the view that it did not apply to the Mayo lands, there is no explanation as to why lands in Mayo were referred to in the application for Grant of Probate in New South Wales. (A different address is given for those lands and that also appears to be the address of the applicant, who is identified by reference to her address in the Irish Will. However, if this is so, it is a simple error which does not affect this application.) But the listing of these lands in the application for the Grant of Probate could only be probative of an understanding by Mr. Sorrenson that they were material in some way to the administration of the estate in New South Wales. I have no evidence as to why they were included and it may be required as a matter of Australian law.

51. Nothing turns on that, however, as the only intention which is material to this judgment is the intention of the Testator, and clearly the actions of others in dealing with probate after his death cannot be evidence of his intention. I therefore do not think that the inclusion of lands in Mayo in the application for probate in New South Wales is material to the issues I have to decide.

Whether the Irish Will has been revoked

52. It is clear that the Irish Will was a valid will, executed in compliance with s. 78 of the Succession Act, 1965. As such, it can only be revoked by one of the methods recognised by section 85. Section 85(1) deals with the subsequent marriage of the testator, which is not relevant here, and the Irish Will could therefore only be revoked by one of the methods recognised by subs. (2), which provides:

> *"Subject to subsection (1), no will, or any part thereof, shall be revoked except by another will or codicil duly executed, or by some writing declaring an intention to*

revoke it and executed in the manner in which a will is required to be executed, or by the burning, tearing, or destruction of it by the testator, or by some person in his presence and by his direction, with the intention of revoking it."

53. The Australian Will could, therefore, operate to revoke the Irish Will. It has, on its face, been executed in a manner which would comply with s. 78 of our 1965 Act, and it is also clearly valid under the law of New South Wales as it has been admitted to probate there. Section 102(1) of the 1965 Act, which is designed to give effect to Articles 1 and 2 of the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions, drawn up in October, 1961, provides that a will shall be *"valid as regards form"* if it complies with any one of the subparas. in that subsection. In this case, the Australian Will is recognised in this jurisdiction as being formally valid as it complies with subparas. (a), (c) and (d) of section 102(1). Indeed, compliance with any one of these subparagraphs would be sufficient to render the Australian Will *"valid as to form"*, and therefore capable of revoking the Irish Will.

54. Formal validity is not sufficient for any will, however, as questions of substantive validity may also arise. This includes questions of substantive validity, such as *animus testandi*, that is, whether the testator knew and approved the contents of the will, and, critically for this application as the Australian Will is a later will which purports to revoke an earlier one, whether there was *animus revocandi*.

55. Three recent Irish cases have been cited to me, two of which, *McCormack v. Duff* [2012] IEHC 285 and *Re Courtney, deceased* [2016] IEHC 318 are relied upon as authority for the proposition that I should admit the Irish Will to probate on the basis that the Testator never intended to revoke it. I was asked not to apply the most recent authority, *Re Turnham Jones, deceased* [2022] IEHC 417 in which this Court (Butler J.) refused an application to admit to probate an Irish Will notwithstanding the inclusion of a general revocation clause in a later English will as the evidence of the testator's intention was wholly inadequate, there being no

evidence from the solicitor who drafted the later English will as to the intention of the Testator when giving instructions.

56. However, I cannot accept *McCormack v. Duff* and *Re Courtney, deceased* as governing this application on the simple basis that they should be preferred to a later judgment with a different outcome. This is not a legitimate way to approach the authorities and the matter has to be approached by reference to the relevant legal principles.

57. In this respect, it must be noted that the reasoning in *McCormack v. Duff* differs in some significant respects from that in *Re Courtney, deceased*. In *McCormack v. Duff,* the issue was treated as one of interpretation of the later will containing the general revocation clause (see pp. 21-22), and this approach leads to two significant consequences which would not flow from the reasoning in *Re Courtney, deceased.*

58. First, the finding that the question was one of interpretation led to the conclusion that the interpretation of the later Italian will should be determined by reference to the *lex domicilii*. I deal further below with the conflicts of laws issues but I note that, were the interpretation of the Australian Will critical to the outcome of this application, it would, on the authority of *McCormack v. Duff*, fail for lack of any evidence as to the *lex domicilii*. (This is subject to my comments below on the possibility that the *lex situs* is applicable to the interpretation of a will dealing with real property situate in Ireland.)

59. Secondly, if the issue is regarded as one of interpretation of a will, then extrinsic evidence as to the testator's intention would only be admissible in accordance with s. 90 of the Succession Act, 1965. In *Re Turnham Jones,* Butler J. expressed some reluctance to endorse the manner in which s. 90 was applied in *McCormack v. Duff,* though, in view of the absence of any such evidence in that case, she left over any detailed consideration of the legal issues involved in the admission of evidence of the testator's intention as to the effect of a revocation clause.

60. *Re Courtney, deceased* took a different approach which did not require analysis by reference to the law of domicile of the testator. In that case, Baker J. approached the matter as one in which she was entitled to look at the intention of the testator as regards the effect of the general revocation clause in the later will (that is, the *animus revocandi*) and, while she did briefly consider s. 90, the fundamental thrust of the judgment is that the main enquiry in which the court is engaged is to ascertain the intention of the testator.

61. It is necessary for the determination of this application, in my view, to decide which of the analyses in *McCormack v. Duff* and in *Re Courtney, deceased*, is to be preferred and, consequently, it is necessary to consider these authorities in more detail.

62. In *McCormack v. Duff*, Herbert J. had to consider the effect of a later Italian will which contained a general revocation clause in an earlier Irish will. The later Italian will contained a general revocation clause but only dealt with real property in Italy, where the deceased had a holiday home. The testator had a large and complex estate in Ireland and had provided for it in a detailed Irish will, executed approximately a year before the Italian one, and which would fall to be dealt with under intestacy if the Irish will were found to have been revoked.

63. This is the only of the three cases to determine any issue of conflicts of laws and it was held (at p. 21) that the admissibility of evidence as to the intention to revoke fell to be considered by reference to the *lex domicilii*, which in that case was Ireland. It is in my view critical to an understanding of that case that Herbert J. approached the question of whether a general revocation clause in a later will is intended to revoke an earlier will as a question of interpretation of the later will.

64. It has to be said that it is perhaps not surprising that the effect of a clause in a written document would be regarded as one of interpretation, but I think the correct analysis is that of Tagdell J. in *Re Barker: Nemes v. Baker* [1995] 2 V.R. 439 where he distinguished between the interpretation of the revocation clauses, which he said was a question of substantive law to

be determined by reference to the *lex domicilii*, and the question of *animus revocandi*, which he said was a question of evidence or procedure to be determined by reference to the *lex fori.*

65. In that case, although Tagdell J. had evidence of the *lex domicilii*, which was German law, the German will was nevertheless ambiguous and difficult to determine. He therefore assumed, rather than decided, that it should be interpreted as displaying an intention to revoke the earlier Australian will, but also held that the question of whether the testatrix had in fact intended to revoke the earlier Australian will was one of procedure or evidence and therefore to be determined in accordance with the *lex fori,* that is, Victorian law.

66. This distinction is, in my view, broadly consistent with the distinction drawn in Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed., (Sweet & Maxwell, 2012) at para. 27-095 where it is stated that an express revocation clause should be determined by the intrinsic validity of the later will, which in turn depended on both capacity and formal validity, whereas an implicit revocation was a question of interpretation to be governed *prima facie* by the *lex domicilii* at the time of the making of the later will. It is of course the case that even an express revocation clause may require interpretation but, as the facts of this case demonstrate, very often an express revocation clause will be quite unambiguous in its terms and the initial step of interpreting its apparent effect will be straightforward.

67. The common law position, however, which is set out more fully below, is that, while the effect of the revocation clause may involve issues of interpretation, as acknowledged in *McCormack v. Duff*, this is just one element of establishing the intention of the testator.

68. In *Re Courtney, deceased*, the testator was an Irish man who had moved to the United Kingdom and had become domiciled in England and Wales at the date of his death. However, he had substantial property in Ireland and had executed a will in 2007. He subsequently executed four codicils to that will, two in 2008 and one each in 2010 and 2011. All of these were executed in the office of his solicitor in Ireland and complied with s.78 of the 1965 Act.

69. Shortly before his death in London in 2013, he executed a homemade will on pre-printed stationary, the pre-printed portion of which contained a general revocation clause purporting to revoke all previous wills and codicils. The will contained no residuary clause and the only named assets were situate within England and Wales. As a result, his Irish assets would fall to be dealt with by way of intestacy if the general revocation clause applied to the Irish testamentary dispositions. The affidavit of the Testator's wife, who would have succeeded to a large portion of the Irish assets under intestacy but would not obtain anything under the Irish Will, was in similar terms to that of the Testator's wife in this case. First, it averred to an intention on the part of the testator that she would not succeed, and secondly it testified that the deceased considered his Irish and UK assets to be separate and that was why he had separate wills. In addition, there was evidence that the deceased in that case intended that his Irish assets should pass to his relatives in Ireland.

70. Baker J. approved the following statement of McDermott J. in *Re Keenan, deceased* (1946) 80 ILTR 1 (at 3):

> *"[W]here … a will contains a clear revocatory clause couched in comprehensive terms and having the knowledge and approval of the testator, there is no room for such an inquiry [as to the true intention of the testator] and no ground for discriminating between different kinds of earlier testamentary dispositions which are fairly sought by the language of the clause."* [Emphasis added.]

71. She also cited *Re Phelan* [1971] 3 W.L.R. 888 and *Re Morris* [1970] 2 W.L.R. 865, in both of which the High Court of England and Wales admitted wills to probate having omitted certain words from them as being inconsistent with the intentions of the testator. In both cases, the omitted words were contained in revocatory clauses. In *Re Phelan*, the question was whether the testator had truly intended to revoke earlier wills when executing a will with a general revocation clause and in *Re Morris, deceased,* it was clear that the solicitor had made

a mistake in drafting a codicil designed to revoke a particular bequest and the codicil as executed purported on its face to revoke a whole series of bequests in the testatrix's will. It was clear that this had never been intended by the testatrix.

72. Based on those authorities, Baker J. in *Re Courtney, deceased* stated (at para. 15):

> "*A clear revocation clause, while it might raise a presumption that a testator intended to revoke all previous testamentary documents, could not of itself, absent the knowledge and approval of the testator, do so if the necessary animus revocandi was not present. Also implicit is that the onus of establishing that the testator did not have an intention to revoke is on the person who so asserts."*

73. As such, Baker J., while she also subsequently referred to s. 90, squarely based her judgment on the proposition that extrinsic evidence of the intention of the testator is generally admissible where the issue before the court is which testamentary dispositions should be admitted to probate. She came to this view having accepted the persuasive authorities from Northern Ireland and England and Wales already referred to as good law in this jurisdiction.

74. As a result, the Irish authorities dealing with this issue engage in two quite different analyses: in *McCormack v. Duff*, it was treated solely as an issue of interpretation of the will with the consequence that extrinsic evidence could only be admissible pursuant to s. 90 of the 1965 Act; whereas in *Re Courtney, deceased*, it was treated as an issue of fact as to what had been the intention of the testator.

75. The implications of the varying approaches, particularly for the admissibility of extrinsic evidence as to the intention of the testator, has the result that it is necessary to come to a conclusion on whether I am engaged in a process of interpreting the 2015 Australian Will or whether I am seeking to establish as a fact whether the Testator, in executing it, intended to revoke his Irish Will.

Extrinsic evidence as to animus revocandi

76. It appears to have been well established at common law, prior to independence, that extrinsic evidence as to the fact of the testator's intention to revoke was always admissible before a court of probate as opposed to a court of construction. In other words, when the question is which will or wills, or parts thereof, to admit to probate, a court can always look at the intention of the testator and whether it was intended by the later will to revoke the earlier one. This older authority cited for this proposition is the *dictum* of Sir John Nicholl in *Methuen v. Methuen* (1817) 2 Phil. Ecc. 416: 161 E.R. 1186, subsequently restated by Sir Herbert Jenner in *Gladstone v. Tempest* (1840) 2 Curt. 650; 163 E.R. 538 (at 654) when he said:

> "*Generally speaking, there is no doubt that by such a general clause there is a revocation of all prior testamentary acts. But it has been over and over again laid down that probate of a paper may be granted of a date prior to a will with a revocatory clause, provided the court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit."*

77. Where the question then is whether a testator intended to revoke all or part of a will by a later will or other testamentary disposition, the common law recognised no bar to the admission of extrinsic evidence. An early example is *In the Goods of Oswald* (1874) L.R. 3. & D. 162, where the evidence established that the testatrix never read nor did she have read over to her, the will containing the general revocation clause. Neither had she given instructions to the draftsman to insert such a clause. As a result, both wills were admitted to probate with the revocation clause omitted from the second will.

78. This principle was accepted and applied by the High Court of the Irish Free State in *In re Brennan* [1932] I.R. 633 and has been restated by the Privy Council (on appeal from the

Supreme Court of New South Wales) in *Re Resch's Will Trusts* [1969] 1 A.C. 514, at 527, where Lord Wilberforce (at p. 547) specifically approved the *dictum* in *Metheun v. Metheun.*

79. In *Re Courtney, deceased,* Baker J. referred to a modern authority for this proposition, *Re Phelan,* which concerned an Irish man living in a boarding house in England, and with no known relatives, who decided to leave everything to his landlady and her husband as he had become attached to them. He made four separate wills, three of them being executed on a date subsequent to the first, apparently being under the impression that each bequest required a separate will. Each will contained a general revocation clause and the witnesses could not identify the order in which the later three wills had been executed. In addition, should any of the later ones be held to have revoked the first will, the bulk of his estate would go to the Crown as only the first will had a residuary clause. It was clear from the evidence that he wanted everything to go to the two named beneficiaries.

80. In *Re Morris, deceased,* which was also referred to by Baker J. in *Re Courtney, deceased*, the exercise of the jurisdiction of a court of probate to omit words included in a will by mistake, resulted in the court removing reference to clause 7 of the will, leaving a blank to be filled in later by a court of construction.

81. I do not have to grapple with the jurisdiction to rectify a will for mistake as I am not asked to omit words from any will, but simply to admit the Irish Will to probate. The precise extent of that jurisdiction and how it should be exercised remains for consideration in a case in which it arises. Should such a case arise in the future, it may be necessary to consider the English authorities, both prior to and after the enactment of s. 20 of the Administration of Justice Act, 1982, and the judgments in *Marley v. Rawlings* [2014] UKSC 2.

82. However, it is not necessary to consider that jurisdiction for the purposes of this application. The critical point here is that it appears to have been very well established that

when considering the effect of a general revocation clause, a court of probate has power to look at all of the evidence of the testator's intention, including extrinsic evidence.

83. This area of the law was recently reviewed and restated by the Court of Appeal of England and Wales in *Sangha v. Sangha* [2023] 4 W.L.R. 60, where the Court set out three principles, as material to a consideration of *animus revocandi*.

84. First, the Court referred to the judgment of Lord Wilberforce in *Re Resch's Will Trusts* [1969] 1 A.C. 514 at 547D:

> *"In the court of probate the whole question is one of intention: the animus testandi and the animus revocandi are completely open to investigation."*

85. On that basis, the Court of Appeal specifically approved the approach of Robert Wyand QC, sitting as a Deputy High Court Judge in *Lamothe v. Lamothe* [2006] EWHC 1387 (Ch.) which contains a review of the authorities and in which it was said that it was the duty of the judge to consider all of the evidence as to the surrounding circumstances of the drafting and execution of the will in order to ascertain the intention of the testator.

86. Secondly, it follows that even where a will contains a general revocation clause purporting to revoke all previous wills, there can in any particular case be evidence which establishes that this was not the testator's intention. The Court specifically cited *In the Goods of Oswald*, referred to above.

87. Thirdly, it is established in English law that if a will, duly executed, does contain a general revocation clause, that in itself is powerful evidence that that was the testator's intention and a *"heavy burden"* lies on those seeking to establish otherwise: *Lowthorpe-Lutwidge v. Lowthorpe-Lutwidge* [1935] P. 151 at 156. As a matter of English law, there appears to be no presumption as such, but that there is a question of law to be decided on the evidence and that particularly cogent evidence would be required to persuade a court that a

testator did not intend to do what would be effected by the clear words of a will which he or she had read over and executed.

88. The law as stated in *Re Courtney, deceased*, (approving *Re Keenan, deceased*) is not materially different. Although *Re Courtney, deceased* speaks of a presumption, and the law in England and Wales emphasises the *"heavy burden"* on the person asserting an intention contrary to that expressed in a general revocation clause, the essential position is the same. Where a will has been prepared on instructions, and has been read over to the testator and approved, cogent evidence will be required to show that the testator's intention was different from that apparently stated in the will. The terms of the will itself are evidence of intention which will not lightly be departed from, though the normal civil standard of the balance of probabilities applies: *Lamothe v. Lamothe.*

89. Finally, I would add that it has not been necessary, in light of the recent restatement of the law in England and Wales, to conduct a full review of the authorities in other various common law jurisdictions — it would seem that a similar approach has been taken in Australia, Canada, New Zealand and Jersey over the years.

90. In *Re Barker: Nemes v. Baker*, the judgment of the Supreme Court of Victoria referred to in *McCormack v. Duff* and already discussed above, is to the same effect. It seems clear from his judgment that Victorian law had inherited the common law principle that a court of probate should look at all available evidence in order to determine whether or not there was *animus revocandi* and, indeed, he cited *Methuen v. Methuen, Gladstone v. Tempest*, and *In Re Resch's Will Trusts,* which, as seen from the discussion above, form the basis of the common law approach.

91. Furthermore, in the course of his judgment, Tagdell J. refers to *Guardian Trust Co Ltd. v. Darroch* [1973] 2 N.Z.L.R. 143, a judgment of the Supreme Court of New Zealand where a later will made in Queensland contained a general revocation clause which, on its face,

appeared to revoke an earlier New Zealand will, which also treated the matter as one of intention and considered all of the surrounding circumstances, before concluding that the New Zealand will had not in fact been revoke. In so finding, the court referred, *inter alia,* to *Gladstone v. Tempest, Re Morris, deceased,* and *Re Phelan*.

92. Tagdell J. also referred to *Re Page* [1969] 1 NSWR 471, at 474, where the Supreme Court of New South Wales (*per* Helsham J.) stated that the question was the intention of the testator as to what documents were intended to constitute the whole of the testator's testamentary dispositions and this was not necessarily to be found from the document itself. (There, the later will contained a general revocation clause and a clause for payment of debts and expenses in its pre-printed portion, the will dealt only with specific bequests and would have left a partial intestacy, and the declarations of the deceased were to the effect that he intended the second will only to deal with those specific bequests to a particular individual and that he did not intend to deal with his entire estate. The evidence was admitted to show this intention and both wills were admitted to probate with the general revocation clause in the second will excluded.)

93. *In re Vickers* [2001] J.L.R. 712, a judgment of the Royal Court of Jersey, is one of the cases cited by Dicey at para. 27-095, for the proposition that: *"[I]f one will deals only with property in a foreign country and is made in foreign form, and the other deals only with property in England, the later will does not necessarily revoke the earlier one even if it contains a revocation clause."*

94. In that case, a testatrix died leaving personal estate in England and in Jersey. She also left property in Portugal and New Zealand. In 1990, she made a will dealing with her worldwide estate, but excluding her estate in Portugal and New Zealand. The following year she made a will dealing with her New Zealand estate but containing a general revocation clause which purported to deal with all previous wills and testamentary documents. She subsequently made

a will dealing with her Portuguese estate, but that purported to revoke only those prior wills dealing with her property in Portugal.

95. The question was whether the 1990 will should be admitted to probate in Jersey, or whether it had been revoked by the New Zealand will. Applying *Re Phelan, deceased,* the probate judge in the Royal Court of Jersey admitted the 1990 will to probate, saying that the three wills were intended to operate separately. It is clear that the court regarded the question as one turning on *animus revocandi* rather than interpretation, and, moreover, it cited *Bégin v. Bilodeau* [1951] S.C.R. 699, where the Supreme Court of Canada held that a will made in Québec and dealing with the testator's Canadian estate had not been revoked by a later will executed in the United States. The American will dealt explicitly only with the testator's American estate but also included a residuary clause, capable of applying to the Canadian estate. Notwithstanding the inclusion of a general revocation clause, the Supreme Court of Canada held that the two wills were not incompatible and that the Canadian will had not been revoked.

96. While, as I have said, it has not been necessary to undertake any comprehensive review of common law authorities given the recent authoritative statement of the Court of Appeal of England and Wales as to the relevant law in that jurisdiction, it does appear that the law in this area can be traced back to *Methuen v. Methuen* and can therefore be regarded as well-settled. Even an apparently unambiguous and comprehensive revocation clause will not have the effect of revoking all previous wills if it can be shown by clear evidence that that was not in fact the intention of the testator.

97. I therefore respectfully disagree agree with the analysis in *McCormack v. Duff* insofar as it treats the issue as one which should be resolved solely by reference to the principles relevant to the interpretation of wills, as the established common law position is that this is not a question of interpreting a will but one of identifying which testamentary documents should

be admitted to probate. The interpretation of the revocation clause forms just one part of the determination of the issue of fact as to what the intention of the testator had been.

98. I can only speculate that the relevant authorities were not cited in that case and that the parties proceeded on the assumption that this was a question of interpretation of the Italian will such that the focus of argument became the identification of the law by reference to which the later Italian will was to be interpreted. Obviously I cannot be sure of this but, if that were the case, it is somewhat understandable because, as pointed out above, the effect of a revocation clause contained in a later will or other testamentary disposition is first addressed by interpreting the revocation clause in question.

99. However, once interpreted, or if — as is the case here — the clause is sufficiently unambiguous to permit an assumption that should be interpreted as displaying an intention to revoke the earlier will, there remains the question of fact as to whether the testator intended to revoke the earlier will.

100. I therefore prefer the reasoning in *Re Courtney, deceased*, which is more consistent with the older common law authorities and the recent restatement of the law in England and Wales (and which appears to have been shared — at least at one time — in New South Wales, Victoria, New Zealand, and Canada). The extrinsic evidence submitted on affidavit in this application is therefore admissible in its entirety.

Conflicts of laws issues

101. It is also necessary in my view to refer to the potential conflicts of laws issues which arise, as the interpretation of a general revocation clause contained in an Australian will which has already been admitted to probate in New South Wales, and which was executed in New

South Wales by a testator who was domiciled there, is not necessarily a question to be resolved by reference to Irish law.

102. One of the striking features of the caselaw which considers whether a later will was intended to revoke a will executed in a different jurisdiction is that the judgments often do not deal at all with conflicts of laws issues. Notable exceptions are *McCormack v. Duff* and *Re Barker*.

103. In the latter case, Tagdell J. dealt with this issue in some detail and indeed considered some of the caselaw from other jurisdictions, such as *Guardian Trust Co. Ltd. v. Darroch*, to have *"lurking"* conflicts of law issues, that is, where it appeared to be necessary to deal with the question of which law was applicable to the issues which arose, but where the judgments did not deal expressly with the issue. *Darroch*, it will be recalled, involved a court in New Zealand considering whether a later Queensland will had revoked an earlier New Zealand will, an issue which might be thought to give rise to questions as to the law applicable to the determination of the effect of the Queensland will. Tagdell J. treated it as having decided, albeit *sub silentio*, that the questions for determination were ones of procedure and evidence to be determined by reference to the *lex fori*.

104. A similar view could be taken of *Re Courtney, deceased,* where the question was the effect of a later English will on an earlier Irish one and where the deceased was domiciled in England and Wales. It should also be recalled that the application in *Re Courtney, deceased*, was, like this application, unopposed. (Perhaps more significantly, there appears to be no difference in the applicable laws in any event, the common law principles having been well settled prior to independence.)

105. In *McCormack v. Duff*, Herbert J. referred to the decision in *Re Barker*, as expressing a contrary view to the one he had reached, that a will should be interpreted by reference to the *lex domicilii*. However, Tagdell J. determined that as the *animus revocandi* was not merely a

question of interpretation, but involved a larger issue of fact requiring consideration of the evidence of the intention of the testator, a matter to be determined by reference to the *lex fori*. This seems to be consistent with the approach of this Court (Budd J.) in *In re Adams* [1967] I.R. 424, where the evidence as to the domicile of the deceased was considered by reference to the *lex fori*.

106. In both *McCormack v. Duff* and *Re Barker*, it was accepted that a will should be interpreted in accordance with the *lex domicilii*. It was only because Tagdell J. was satisfied that interpretation of the German will was not determinative and that extrinsic evidence was fully admissible on the issue of the *animus revocandi* that there is a material difference between the two judgments on the applicable law.

107. If questions of interpretation of the Australian Will arose, then the issue of which law was applicable to its interpretation as a foreign will dealing with immovable property in this jurisdiction would require to be decided. This is an issue which arose in *Re Bonnet, deceased* [1983] I.L.R.M. 359, but which O'Hanlon J. did not have to determine as he was satisfied that there was no material difference between German law (the *lex domicilii*) and Irish law (the *lex situs*) as regards the correct approach to the interpretation of the will in that case, which contained an ambiguous bequest of lands in Ireland.

108. However, the question of which law would apply to the interpretation of the Australian Will issues does not need to be determined in this application either as there is no issue as to the language or meaning of the general revocation clause. As I understand it, it is conceded that the will on its face purports to revoke the Irish Will and is not ambiguous. If it were, I would have to determine the applicable law and, if this were the *lex domicilii*, the application would fail as I have no evidence of New South Wales law. (While it seems likely that the principles of interpretation are similar to Irish law, it is possible, for example, that extrinsic evidence as to intention is permitted for the purposes of construction on a wider basis that is the case in this

jurisdiction.) However, for the purposes of this application, I will assume that that is the correct interpretation of the Australian Will.

109. However, I am prepared to assume for the purposes of this application that the revocation clause should properly be interpreted as purporting to revoke the Irish Will.

110. That leaves the question of whether the extrinsic evidence on affidavit is sufficient to outweigh the evidence provided by the terms of the will itself. In considering that evidence, I am of the view that I should apply the *lex fori*, that is, the law of this jurisdiction as to the admissibility of the extrinsic evidence. That was expressly found by Tagdell J. in *Re Barker* and seems to have been assumed to have been the correct approach in *Re Courtney, deceased*. It has also been assumed by the Supreme Court of New Zealand in *Darroch.* On that basis, I can consider all of the extrinsic evidence as to the intention of the Testator as contained in the affidavits.

111. Before doing so, I think, given the references to s. 90 of the 1965 Act in both *McCormack v. Duff* and *Re Courtney, deceased*, and the concerns expressed in *Re Turnham Jones*, I think it is appropriate to say something about the applicability of that provision and its implications (if any) for the consideration of the *animus revocandi*.

Whether s. 90 of the 1965 Act is relevant

112. Section 90, as is well known, deals with the question of when extrinsic evidence of the intention of the deceased will be admissible. It provides:

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

113. There is no doubt that the correct approach to the consideration of the effect of a revocation clause involves a consideration of extrinsic evidence as to the intention of the testator. At first blush, this would appear to be a matter which might attract the provisions of

s. 90 – and in this case, given the admitted lack of ambiguity in the revocation clause, it would be difficult to see how such evidence could be admitted.

114. However, I think it is clear that s. 90 only deals with the admissibility of extrinsic evidence as to the intention of the testator which is tendered for the purposes of construing a will, and not for any other purpose. In particular, s. 90 has no application where the purpose for which the extrinsic evidence of the intention of the testator is for the purpose of determining which wills or testamentary dispositions should be admitted to probate.

115. All three of the judges in the Supreme Court in *Rowe v. Law* [1978] I.R. 55 referred, as a starting point for their judgments, to the law as it had stood prior to the enactment of the 1965 Act, and discussed the common law rule that extrinsic evidence as to intention of the testator was inadmissible for the purpose of construing a will. However, none of them suggested that such evidence had ever been inadmissible where the issue was one of *animus revocandi.*

116. This is particularly clear from the judgments of the majority. For example, Henchy J. stated (at p.71):

> *"At the time of the enactment of s.90, extrinsic evidence was admissible in a variety of circumstances – depending on whether the court was sitting as a court of probate or a court of construction – to show the intention of the testator; the one important qualification being that such evidence could not be received by a court of construction for the purpose of varying, adding to, or contradicting the intention expressed in the will."* [Emphasis added.]

117. Similarly, Griffin J. stated (at p. 75):

> *"Prior to the passing of the Act of 1965, the general principle was that in a court of construction, where the* factum *of the instrument has been previously established in the court of probate, the inquiry was pretty closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator."* [Emphasis added.]

118. The distinction drawn between the approach of a court of construction and a court of probate is familiar from the older common law authorities already referred to above and it is therefore clear that the Supreme Court in *Rowe v.* Law, in interpreting s. 90, did not regard it as disturbing the common law on the admissibility of extrinsic evidence of the intention of a testator on issues other than the interpretation of the will. The language of the passages cited and, in particular, the distinction between a court of probate and a court of construction leave no doubt, in my view, that the majority did not consider s. 90 to have any applicability to the question I am considering.

119. O'Higgins C.J. did not make any such explicit references to the role of a court of probate, but addressed the pre-existing law only from the point of view of the admissibility of extrinsic evidence of intention for the purposes of interpreting the will. In my view, though less explicit, his judgment does not suggest that s. 90 is applicable to the ascertainment of the *animus revocandi.*

120. Of course, if s. 90 were somehow applicable, the extrinsic evidence in the affidavits in this application would not be admissible as it is accepted that the revocation clause is unambiguous. However, as s. 90 is applicable only to questions of interpretation of the language of the will but not as to the testamentary (or revocatory) intention, which is relevant here, this issue does not arise.

Consideration of the evidence

121. Before proceeding to consider the evidence and whether it is sufficient to discharge the onus on the applicant, it is important to identify what is meant by evidence of the testator's intention. Evidence of the testator's intentions usually consists of his or her declarations as to his intentions, and instructions to the solicitor who drafts the will. It is clear that it does not

include, for example, the opinions or beliefs of others as to what those intentions were: see *Thornton v. Timlin* [2012] IEHC 239 at para. 22 (*per* Laffoy J.). There often appears to be misunderstanding about that.

122. Secondly, the inclusion of a revocation clause is itself weighty evidence of an intention to revoke. It is well-settled, as set out above, that clear evidence is required to outweigh it.

123. It should also be noted that the Court of Appeal of England and Wales in *Sangha v. Sangha* stressed that there is no presumption or *"starting point"* of any kind that, where a will is made in a particular jurisdiction and makes specific reference only to assets located in that jurisdiction, that it is intended to deal only with the estate in that jurisdiction. To succeed in this application, it must be shown that the testator did not intend the 2015 Will to deal with his Irish estate and that evidence must be cogent.

124. Nevertheless, the caselaw demonstrates that the circumstance that at least one of the wills in issue deals only with property in a particular jurisdiction that tends to suggest — even if it does not raise any presumption — that the testator did not intend that a subsequent will in more general terms would deal with the estate in a particular jurisdiction which had previously been dealt with in a separate will. However, this is just a factor to be considered and every case will turn on the available evidence.

125. Turning to the facts as they appear from the affidavits, there is actually no positive evidence as to the Testator's intentions in relation to the Australian Will. The file note prepared after the consultation in 2014 in which the Testator gave instructions for the Will says nothing whatsoever about the Irish Will, the Irish estate, or what testamentary dispositions the Testator intended to revoke. There is no evidence of any particular statement by the Testator to any family member about the Australian Will itself.

126. However, there is very strong evidence of his intentions in relation to the land, dating back to when Tony was still very young. I think it is clear from all of the affidavits filed that,

insofar as the testator ever expressed an intention as to what was to happen to the lands in Mayo, his family are unanimous that he repeatedly expressed the intention over the years that they should go to his son, Tony.

127. Very significantly, Diane, his wife of many years and (in the events which have occurred) the sole beneficiary under the Australian Will, has stated on affidavit:

> "*James and I were married in 1983. When I met James, he was living in Australia after having moved from Ireland shortly after his father passed away. We had our first child Anthony in 1984. I can directly state with complete certainty after 32 years of marriage, that it was always my husband's intention to pass his Irish lands onto our first born and only son Anthony. Almost from the time of Anthony's birth, I knew and understood my husband's wishes in this regard. James was a traditional man and it was his objective to directly hand down his homeland property from father to son, as had been done for generations before him. James made a separate Irish will to his Australian will to that effect to ensure that this would be the case."*

128. She states that the Testator felt the most effective way to ensure his wishes were carried out was to have an Irish will dealing only with Ireland and an Australian will dealing only with Australia. She said he kept his lands in Ireland separate to everything in Australia and he did this as his property in Australia, some of which she co-owned with him, did not have the emotional connection or feeling of intergenerational tradition that his home place in Ireland had to him.

129. That is borne out by the terms of the Testator's wills from 1985 onwards. The 1985 Will made quite different provision, insofar as the gift over was concerned, as to what would happen to the estate in the two jurisdictions, with the Irish lands to go to the Testator's sister who was living in Mayo, and not his brother, who was living in New York. The 1985 Will, in my view, expresses that intention that, after his family had been provided for, the Irish lands

were to be treated separately from the Australian estate and were to go to a family member who would appreciate their significance.

130. From 2000, the Irish lands were the subject of an entirely separate will. The attendance of the Testator's Irish solicitor, taken in connection with the drafting and execution of the Irish Will, makes it very clear that the Testator had a will in Australia and that the Irish Will was to deal only with Irish assets. In 2004, the Testator changed the draft prepared by his Australian solicitor to ensure that it did not affect his Irish Will or apply to his Irish assets. These matters are all evidence of a long-standing intention to deal separate with the Irish estate for the purposes of succession.

131. The facts of the matter are plain: since at least 2000, it had been the Testator's intention that the lands in Mayo were to go to his son, Tony. Furthermore, from the earliest days of his marriage, he had expressed an intention that his Irish estate could be dealt with quite separately from his Australian estate.

132. The nub of the issue then is whether the evidence shows that the Testator's long-standing intention had altered by the time he executed the Australian Will. Put more simply, does the evidence show that he had changed his mind?

133. I am satisfied on the balance of probabilities that the Testator did not give any instructions one way or another to his Australian solicitor at any time in connection with his Irish estate or his Irish Will. It was never mentioned by the Testator and it was never raised by Mr. Sorrenson. I am satisfied that this is because Mr. Sorrenson addressed his mind only to the Australian estate and the Testator assumed that the Australian Will would reflect his longstanding intention that his Irish estate would be dealt with separately under his Irish Will.

134. This appears from the terms of the will itself as, while it does not refer to any specific property, it assumes that any real property which requires to be valued would be situate in

Australia and it assumes that any charge to tax would arise only pursuant to Australian legislation.

135. As a result, I really have no doubt in my mind that the words of general revocation were included by mistake in the Australian Will by the Testator's solicitor who inserted a general revocation clause as a matter of course and without taking any specific instructions. I am satisfied that Mr. Sorrenson did this because this is standard practice and where a client instructs that they wish to replace their existing will in its entirety, as opposed to executing a codicil, it is usually appropriate to include such a clause.

136. In *Re Morris, deceased.,* cited by Baker J. in *Re Courtney, deceased*, Latey J. considered the extent to which a court of probate should omit words of a codicil from probate as not reflecting the intention of the testatrix. He approved (at p. 80) the principles extracted from *Mortimer's Probate Practice* 2nd ed., (1927):-

> "First. *Where the mind of the draftsman has really been applied to the particular clause, then, whether the error has arisen from that fact that he misunderstood the instructions of the testator, or, having understood the instructions, has used inappropriate language in seeking to give effect to them, the testator who executes the will is — in the absence of fraud — bound by the error so made as if it were his own, even if the mistake were not directly brough to his notice; and the court will not omit from the probate the words so introduced into the will.*
>
> Secondly. *Where the mind of the draftsman has never really been applied to the words in a particular clause, and the words are introduced into the will* per incuriam, *without advertence to their significance and effect, by a mere clerical error on the part of the draftsman or engrosser, the testator is not bound by the mistake unless the introduction of such words was directly brough to his notice.*"

137. In this case, I think it was quite clear that the draftsman never applied his mind to the effect of the revocation clause on the Irish estate, in respect of which he simply had no instructions. Furthermore, due to the Testator's ill-health, Mr. Sorrenson never met the Testator prior to execution and therefore never read over the Australian Will to the Testator or advised him of its effect. He certainly never advised him that the revocation clause was drafted in terms which meant it would not apply to the Irish estate. If he had, then even though he would have been wrong, *Re Morris, deceased,* would suggest that the Testator would be taken to have known and approved the contents of the Will, including clause 1, and the evidence would be insufficient to overcome the probative effect of the Will itself.

138. However, it is quite clear here, in my view, that the revocation clause was inserted by mistake, without thinking about the Irish estate, and not only did the Testator not appreciate its significance for his Irish estate, but Mr. Sorrenson never advised him about the effect of it because Mr. Sorrenson did not address his mind to the potential effect on the Irish estate at all. Indeed, it is probable that the only reason that the Testator did not appreciate its significance is that, by the time he came to execute the Will, his health had declined. Furthermore, his execution of a codicil less than two months previously, when he knew that a fresh will had been drafted, suggests that he regarded the execution of the Will as an urgent matter. This also explains why he did not wait to recover before discussing the draft will with his solicitor, but proceeded to execute it in hospital without seeking a further consultation.

139. I am also satisfied that Mr. Sorrenson did not address his mind to the Irish estate or the Irish Will because he had only ever dealt with the Testator's Australian estate and a period of over ten years had passed since he had last drawn up a will for the Testator. It is notable that, in 2004, it was the Testator who pointed out that the 2004 Australian Will should specifically exclude his Irish estate. He had also been careful to say to Mr. Gordon in 2000, when his Irish Will was being drawn up, that it was only to deal with his Irish assets. It therefore appears that

it was the Testator himself who separately instructed his solicitors in Ireland and Australia, respectively, and who took it upon himself to ensure that his Irish and Australian estates would remain separate.

140. Furthermore, there is the unanimous evidence of all of the Testator's family members, including his wife, who would, if my decision were otherwise, stand to inherit the Irish lands, that her husband always intended that the Irish lands would go to her son and, equally importantly, always intended that his Irish estate would be kept entirely separate and distinct from his Australian estate.

141. While there will be many other cases where the absence of direct evidence of intention in relation to the later testamentary disposition will mean that the testator will be taken to have changed his mind and accurately expressed that in the later testamentary disposition, each case will of course turn on its own facts. In this case, it seems highly improbable that the Testator would suddenly alter his views having approached his Irish estate as being separate from his Australian estate and being the subject of differing testamentary dispositions, from as early as his 1985 Will.

142. One would expect some explanation in the surrounding circumstances for such a significant change. The evidence is that the Testator had very significant assets in Australia with which to provide for his wife and adult children. There was no change in his financial fortunes that would have led him to alter his view as to who should succeed to the Mayo lands after his death. He was therefore free, having ensured his family could be provided for from the Australian estate, to give effect to his long-standing intention based on both romantic attachment to the *"home place"* in Mayo and a traditional view that his grandfather's lands should go to his eldest son, albeit with special provision for Deirdre in light of her special needs.

143. If the Testator's intentions had changed, one would expect to see some outward expression of this change of heart, either by way of statements to his family, or at the very least in the instructions for his will. There is no such evidence and I am satisfied that it would be contrary to the Testator's intentions to find that the Irish will had been revoked.

144. In my view, therefore, it is clear that the Testator did not intend to revoke his Irish Will and I will admit the Irish Will to probate.