THE HIGH COURT

[2024] IEHC 48

2021 /5330 P

IN THE MATTER OF THE ESTATE OF WILLIAM DOYLE DECEASED, LATE OF BEALALAW, MYSHALL IN THE COUNTY OF CARLOW

BETWEEN

PETER MURPHY

PLAINTIFF

AND

MONICA BUTLER (OTHERWISE MONICA MURPHY), SEAN ROBERTS, P.J. ROBERTS, MARTIN ROBERTS, GRETTA ROBERTS AND MAURICE ROBERTS

DEFENDANTS

JUDGMENT of Ms. Justice Egan delivered on the 1st day of February, 2024.

Background

1. William Doyle ("the deceased"), a 77 year old bachelor without issue died on 12th November, 2019. This is a construction suit in respect of his last will and testament of 19th July, 2019, which appears to have been prepared with the assistance of his solicitor. The plaintiff, a nephew of the deceased is a beneficiary under the will. He seeks various reliefs as against the first named defendant, a niece of the deceased who is named as an executor in the deceased's last will ("the executor"). The other defendants, the deceased's sister and his remaining nieces and nephews are residuary legatees under the will (together "the Roberts defendants").

2. The plaintiff who was also initially named as an executor renounced his entitlement to extract a grant of representation when the present dispute became apparent. A grant of probate

issued to the executor on 17th May, 2021. No issue arises in relation to the valid execution of the will or the appointment of the executor.

3. At the date of his death, the deceased was the owner of registered lands situate at Bealalaw, Myshall in the County of Carlow as described in folio CW11156 ("the folio"). The folio contains four different parcels of land on four different plans as follows:

The Bealalaw lands

Plan No. 3 contains 8.013 hectares, *"situate in the Townland of Bealalaw in the Barony of FORTH, in the Electoral Division of Myshall".* The house where the deceased lived is on the Bealalaw lands.

The Myshall lands

A short distance to the north of the Bealalaw lands (and therefore not contiguous therewith) are two other parcels of lands shown on plans Nos. 11 and 29, containing 6.999 hectares and 6.804 hectares respectively. These lands are *"situate in the Townland of Myshall, in the Barony of FORTH, in the Electoral Division of Myshall".*

The Raheenleigh lands

A short distance to the south of the Bealalaw lands (and again not contiguous therewith), is a parcel of land shown on plan No. 48 containing 6.31 hectares. These lands are *"situate in the Townland of Raheenleigh in the Barony of FORTH in the Electoral Division of Myshall."*

It is common case that the lands are all agricultural lands. No evidence was put before the court that the lands were all farmed together as one farm. It appears that the total value of the lands comprised in the folio is approximately €465,000. In addition to the dwelling house and lands, the deceased's estate is also comprised of sheep and cattle, farm machinery and a car with a total value of €35,000 approximately and several bank accounts with a balance of just over €340,000.

4. The deceased's last will and testament is short and provides as follows:

> "***I William Doyle*** *of Belalaw [sic], Myshall in the County of Carlow MAKE this as and for my last Will and Testament* ***HEREBY REVOKING*** *all former Wills and testamentary dispositions created in the Republic of Ireland only heretofore made by me…*
>
> 2. ***I GIVE DEVISE AND BEQUEATH*** *my dwelling house, farm buildings and lands at Belalaw [sic], Myshall, in the County of Carlow, together with any Entitlements attaching to the said lands, together with all my farm machinery and livestock owned by me at the date of my death to my nephew Peter Murphy for his own use and benefit absolutely.*
>
> 3. ***I GIVE DEVISE AND BEQUEATH and APPOINT*** *all the rest residue and remainder of my property of whatsoever nature and kind and wheresoever situate both real and personal or over which I have a power of appointment as between* [the Roberts defendants] *as join [sic] tenants in equal shares for their own use and benefit absolutely.*

The plaintiff and the Roberts defendants are in dispute as to how clause 2 is to be construed. The plaintiff argues that it devises to him the entirety of the deceased's lands comprised in the folio. The Roberts defendants contend that the bequest to the plaintiff is limited to the Bealalaw lands and that the Myshall and Raheenleigh lands fall into residue.

The statement of claim

5. The plaintiff pleads that there is no ambiguity on the face of the will and that all of the lands in the folio have been devised to him. However, if this court finds that there is ambiguity on the face of the will, then the plaintiff pleads that it ought to be resolved by the admission of extrinsic evidence pursuant to s. 90 of the Succession Act, 1965 ("s. 90"). Section 90 provides that extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in a will. It is common case that there is no contradiction on the face of the deceased's will; the question is rather whether the will is ambiguous on its face requiring the admission of extrinsic evidence to assist in its construction.

6. The plaintiff pleads that the extrinsic evidence on which he wishes to rely is to the following effect: that the farm had been in the deceased's family for generations; that the deceased had wanted the farm to stay in his blood; that throughout his lifetime the deceased referred to his farm and all of his lands as "*Bealalaw"* and did not refer to the different townlands; that the deceased's instructions to the solicitor who drew up the will was that all of his farmlands were located at Bealalaw; that the sheds surrounding the dwelling on the Bealalaw lands are used to winter the livestock and hold it for sale and testing; and that without the full land-holding the farm would not be viable and would have to be sold. In addition to the above, the plaintiff also proposes to admit extrinsic evidence of an earlier will of the deceased of 24th April, 1998 ("the earlier will") pursuant to which the deceased bequeathed to him "*my farm and livestock, farm stock, farm machinery and implements and also my car and any other items on my said farm".*

7. In the alternative, the plaintiff advances a claim to the entirety of the lands in the folio based on proprietary estoppel. He pleads that the deceased promised him the farm, and that he therefore worked the lands for a lengthy period of time in the expectation that he would inherit on the deceased's demise.

<u>The defence of the Roberts defendants</u>

8. The Roberts defendants also plead that there is no ambiguity on the face of the will and that it is clear that the deceased intended to devise only the Bealalaw lands to the plaintiff. Alternatively, they plead that the specific bequest to the plaintiff at clause 2 of the will is void for uncertainty and falls to be included in the residue.

9. In response to the estoppel claim, the Roberts defendants plead that the plaintiff lives 30 miles away in Carlow and only assisted occasionally on the farm. They also plead that as the plaintiff evinced a clear intention not to pursue a farming life, the deceased had altered the

earlier will wherein the entire of his lands were bequeathed to the plaintiff in anticipation that he would show a commitment to the farm.

Progress of the proceedings

10. By motion dated 4th October, 2022, the executor sought an order setting down for trial the preliminary issue of whether extrinsic evidence would be admissible in the construction of the will pursuant to s. 90. When the matter came before this court on 21st April, 2023 it was agreed and directed that the trial would proceed on a modular basis as follows:

- Module 1 - the determination of whether an ambiguity exists in the will such that extrinsic evidence could be permitted pursuant to s. 90 in the construction suit;
- Module 2 - the balance of the construction suit; and
- Module 3 - the plaintiff's proprietary estoppel action.

11. If this court finds that there is no ambiguity on the face of the will and that the correct interpretation is that contended for by the plaintiff, then no question of extrinsic evidence would arise, the construction suit would be at an end and modules 2 and 3 would fall away. Alternatively, if the court were to decide that no ambiguity exists but that the correct interpretation is that contended for by the Roberts defendants, then although module 2 would fall away, the plaintiff would presumably advance his proprietary estoppel claim, requiring the court to hear and determine module 3. If the court determines that an ambiguity exists, then the construction suit at module 2 would proceed. Provided it meets the dual test set out by the courts in relation to the admission of extrinsic evidence, both parties would then have the opportunity to present appropriate extrinsic evidence to the court. Thereafter, depending upon the outcome of the construction suit, the plaintiff's proprietary estoppel action would be heard as module 3, if required.

12. The following is the court's judgment on foot of Module 1 which was heard on 10th October, 2023.

The Lowry principles

13. In *O'Connell v Bank of Ireland* [1998] 2 IR 596, Keane J. (as he then was) stated that the general principle is that, in construing a will, the object of the court is to ascertain the expressed intention of the testator. The law, he noted, was as stated by Simon L.C. in *Perrin v Morgan* [1943] A.C. 399 at p. 406:-

> *"... the fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case – what are the 'expressed intentions' of the testator."*

14. In *Curtin v O'Mahony* [1991] 2 IR 566, O'Flaherty J. very succinctly described the role of the court in cases such as this: "*a Judge is to tread cautiously so as not to offend against the judicial inheritance which is that one is entitled to construe a Will but not to make one".*

15. The general principles applying to the interpretation of wills were set out by McGovern J. in *Corrigan v Corrigan* [2007] IEHC 367 (and recently affirmed by MacGrath J. in *Shannon v Shannon* [2019] IEHC 400 and by Cregan J. in *MacNamara v. Horan* [2023] IEHC 475):

> *"(i) The Court will strive as far as it can to give effect to the intention of the testator insofar as this can be ascertained from the will. In limited circumstances the Court is permitted to rectify a will to save it from bad drafting. See* Curtin v O'Mahony [1991] 2 IR 566.
>
> *(ii) The Court considers the will by placing itself in the position of the testator sitting in his armchair shortly before his death to see what he was setting out to achieve.*
>
> *(iii) As a general rule the court will give legal or technical words used in a will their legal or technical meaning.*
>
> *(iv) The guidelines suggested by Lowry L.C.J in* Heron v. Ulster Bank Limited [1974] N.I. 44 at 52 *were approved and adopted by Carroll J. in* Howell v Howell [1992] 1 I.R. 290. *These are as follows:*

> *1. Read the immediate relevant portion of the will as a piece of English and decide, if possible, what it means.*
>
> *2. Look at the other material parts of the will and see whether they tend to confirm the apparently plain meaning of the immediately relevant portion or whether they suggest the need for modification in order to make harmonious sense of the whole, or alternatively, whether an ambiguity in the immediately relevant portion can be resolved.*
>
> *3. If ambiguity persists, have regard to the scheme of the will and consider what the testator was trying to do.*
>
> *4. One may at this stage have resort to rules of construction, where applicable, and aids, such as the presumption of early vesting and the presumption against intestacy and in favour of equality.*
>
> *5. Then see whether any rule of law prevents a particular interpretation from being adopted.*
>
> *6. Finally, and I suggest, not until the disputed passage has been exhaustively studied, one may get help from the opinions of other Courts and judges on similar words, rarely as binding precedents, since it has been well said that 'no will has a twin brother' (per Werner J. in Matter of King [1910] 200 N.Y. 189, 192) but more often as examples, sometimes of the highest authority) of how judicial minds nurtured in the same discipline have interpreted words in similar context."*

16. The *Lowry* principles have been conveniently distilled by Gilligan J. in *O'Donohue v. O'Donohue* [2011] IEHC 511 at [27], in a passage approved by Stack J. in *Goodwin & Ors v. Murphy* [2023] IEHC 383 as follows:

> *"Firstly, consider the relevant portion of the will as a piece of English in an effort to extract its meaning. Secondly, seek to compare that portion with other sections from the will in order to seek confirmation of the apparent meaning of that portion. If any ambiguity or contradiction remains then it is useful to consider the overall scheme or framework of the will for the purposes of discerning what the testator was trying to achieve by its terms. Thirdly, where any doubt remains, the court must then determine whether any modification is required to resolve that ambiguity or so as to provide harmonious sense to the meaning of the will. Fourthly, the court should examine whether the rules of construction or the provisions of the relevant legislation provide authority for the court to make the necessary modifications. Fifthly, consideration must be given to any rules of law which would prevent the particular course of*

action proposed to save a will. Finally, although 'no will has a twin brother' the court may have regard for precedent as a guide to how judicial minds have interpreted words in similar contexts."

The armchair principle

17. In considering whether to admit extrinsic evidence, it is first important to understand its meaning and to distinguish between that evidence which is and that which is not traditionally seen as extrinsic.

18. Although the *Lowry* principles are directed towards construing the will within its own four corners, the court nonetheless considers the will by placing itself in the position of the testator sitting in his armchair shortly before his death to see what he was setting out to achieve. As explained by James L. J. in *Boyes v. Cook* (1880) 14 Ch. d.53: "*You may place yourselves so to speak in the testator's armchair and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention."*

19. This passage from *Boyes v. Cook* was approved by the Supreme Court, per Keane J. in *O'Connell v. Bank of Ireland*. Keane J. observed that such evidence, although extrinsic may be admitted, not as direct evidence of the testator's intention, but rather as circumstantial evidence which assists the court in inferring what that intention was. Keane J. stated that under this rule evidence could be adduced as to the testator's knowledge of and relations with the different persons or institutions who claimed to be the object of a gift under his will.

20. In *Goodwin & Ors v. Murphy*, Stack J. observed that this "*armchair principle*" therefore permitted the admission of certain *viva voce* evidence which might otherwise be seen as extrinsic. In the case before her this meant that the following evidence was potentially admissible: evidence that the testator's house was adjacent to that of his niece (who contended that properly interpreted the estate passed to her); evidence that the testator's niece's daughter used part of the lands to ride her horse and evidence that the testator saw his niece nearly every other day and had a close relationship with her. On the other hand, Stack J. noted that an entirely

different approach applied to the admissibility of evidence as to the testator's instructions to his niece when he drew up the will. This was evidence of the testator's intention in making the will which is not ordinarily admissible in a construction suit.

21. In the present case, the parties have agreed that the court may receive the folio extract, the maps attached thereto and aerial photographs of the lands. However, no evidence was tendered by either party as to the manner in which the farm was worked by the deceased. The defendants submit that this is extrinsic evidence. I do not agree. Under the armchair principle, one needs to be informed of the character of the gift which in the present case includes not only the location of the lands and the configuration of the lands but also the use of the lands. The important distinction is that armchair evidence such as this is not sought to be admitted with a view to demonstrating the intention of the testator. In order for evidence of intention to be admissible, it must satisfy the requirements of s. 90 to which I now turn.

Section 90: admissibility of extrinsic evidence of intent

22. Extrinsic evidence is admissible under s. 90 (a) to show the intention of the testator and (b) to assist in the construction of, or to explain, any contradiction in a will. It is clear that both these pre-conditions must be satisfied before a court will entertain extrinsic evidence in a construction suit.

23. Such strict pre-conditions are necessary for public policy reasons as otherwise wills will be rendered uncertain or open to dispute. In *Rowe v. Law* [1978] IR 55, the Supreme Court, per Henchy J., stated as follows:

> *"S. 90 allows extrinsic evidence of the testator's intention to be used by a court of construction only when there is a legitimate dispute as to the meaning or effect of the language used in the will. In such a case (e.g. In re Julian) it allows the extrinsic evidence to be drawn on so as to give the unclear or contradictory words in the will a meaning which accords with the testator's intention as thus ascertained. The section does not empower the court to rewrite the will in whole or in part. Such a power would be*

repugnant to the will-making requirements of s. 78 and would need to be clearly and expressly conferred. The court must take the will as it has been admitted to probate. If it is clear, unambiguous, and without contradiction then s. 90 has no application. If otherwise, then s. 90 may be used for the purpose of giving the language of the will the meaning and effect which extrinsic evidence shows the testator intended it to have."

24. These principles were applied in *O'Connell v. Bank of Ireland*, a case in which the testatrix had bequeathed the contents of her house to the plaintiff but made no reference in the will to the house itself. The plaintiff contended that it was the intention of the testatrix to bequeath to her not only the contents but also the house and sought a declaration to that effect. However, although on the evidence Barron J. was satisfied that it had been the intention of the testatrix to leave the contents and the house to the plaintiff, he nevertheless held that because the terms of the will were clear, this evidence was inadmissible. The Supreme Court dismissed the appeal and held that, as the will did not disclose any contradiction or ambiguity on its face, extrinsic evidence could not be adduced as to the testator's intention.

25. The conditions requiring to be satisfied before extrinsic evidence may be admissible were helpfully clarified by Butler J. in *O'Connell v. O'Connell and Murphy* [2021] IEHC 127. Section 90 envisages that such evidence may be admitted to assist in the construction of the will where a legitimate dispute arises as to the construction of a will. A legitimate dispute as to the construction of a will may arise where any of the characteristics listed in *Rowe v. Law* are absent. In other words, if a will is not clear, unambiguous and without contradiction, extrinsic evidence may be admitted to assist in its construction. These are not cumulative requirements but rather illustrate the types of circumstances in which extrinsic evidence may be appropriate to assist a court in the construction of a will.

Hearing extrinsic evidence *de bene esse*

26. It is notable that, in the course of several construction suits, for example *O'Connell v. O'Connell and Murphy* (Butler J.), *Goodwin & Ors v. Murphy* (Stack J.) and *Shannon v. Shannon* (MacGrath J.) (as to which see further below), the courts have heard *viva voce* extrinsic evidence on a *de bene esse* basis, leaving over the question of the admissibility of that evidence.

27. For example, in *O'Connell v. O'Connell and Murphy* Butler J. heard the extrinsic evidence on a *de bene esse* basis and concluded that, even at its height, it was not sufficiently compelling to establish on the balance of probabilities what the testator's intention was. As the evidence offered was not sufficiently probative, it was not therefore necessary to rule on its admissibility.

28. In *Goodwin & Ors v. Murphy,* Stack J. concluded that the will was sufficiently clear to enable her to construe it within its own four corners. Although therefore, the extrinsic evidence of the deceased's instructions would have been admissible if required to construe the will and would have supported the construction reached, this was not ultimately necessary.

29. In the present case, neither party urged this court to hear their extrinsic evidence even on a *de bene esse* basis. Rather, the parties ask this court to construe the will within its own four corners and ascertain whether the deceased's intention can be ascertained therefrom or whether in the alternative the will is lacking in clarity, is ambiguous or contains a contradiction. In accordance with Butler J.'s observation in *O'Connell v O'Connell and Murphy,* it is common case that although there is no contradiction on the face of the present will, an ambiguity will suffice in order for extrinsic evidence to be admissible under s. 90.

30. Finally, it is worth echoing Butler J.'s observation in *O'Connell v O'Connell and Murphy* that in many of the authorities bearing on these issues either the beneficiary of the gift or the gift itself had been misdescribed. In each of those cases extrinsic evidence was admitted

to show what the testator actually intended by the language used in the will. Invariably the extrinsic evidence related to the description of the property or the identity of the persons in existence and known to the testator at the time the will was made - in other words to property or persons in respect of whom the testator clearly intended to express a testamentary intention.

31. The present case bears certain of these characteristics insofar as the extrinsic evidence which the plaintiff wishes to admit relates to the description of the deceased's property. On the other hand, unlike many of the authorities in which extrinsic evidence is admitted, the contended for misdescription does not make it impossible to give any effect to the gift at all. Rather, if the will is interpreted as contended for by the Roberts defendants, the plaintiff would still inherit the Bealalaw lands. Further, the presence of a residuary clause would ensure that under this interpretation, the Myshall and Raheenleigh lands would not fall into intestacy.

Cases relied upon by the plaintiff

32. Although strictly speaking one only looks for guidance from the cases after applying the other *Lowry* principles, it is convenient to now consider the three authorities relied upon by the plaintiff at this juncture as they will highlight some of the issues arising in the present case.

McGonigle v. McGonigle

33. In *McGonigle v. McGonigle* [1910] I IR 297, a testator by his will provided as follows:

> *"I dispose of my effects in the following manner: I bequeath to my brother Peter my house and farm, subject to the obligation that he is to pay my wife the sum of £50."*

34. The testator in fact had two holdings in different townlands, approximately a mile apart, held under different contracts of tenancy with the same landlord. Barton J. held that extrinsic evidence as to an oral statement made by the testator at the time of the execution of the will as to what he understood the word *"farm"* to mean was not admissible. Independently of that

evidence, Barton J. had arrived at the conclusion that the word *"farm"* included both holdings which he emphasised were worked together as one farm. Barton J. stated that the court must not allow itself to be misled by the technical definition of the word *"holding"* because the testator was dealing with *"facts and things, and not with technical definitions"*.

35. The plaintiff acknowledges the well-worn adage that no will has a sister or brother and that decisions in other cases may provide limited assistance. He nonetheless contends that there are similarities with the present case: namely that the two holdings in *McGonigle* were not adjoining but were a quarter of a mile apart and that the holdings were in different townlands and that they were held under different contracts of tenancy.

36. For the following reasons, I accept the submission of the Roberts defendants that the present case is not on all fours with *McGonigle*.

37. The deceased's will does not use the words *"my farm"* but rather refers to *"my dwelling house, farm buildings and lands at Belalaw, Myshall"*. This contrasts with the testator's language in *McGonigle* which referred to *"my farm"* collectively. A collective reference to *"my farm*" is far more likely to imply that the whole farm is being devised, than a reference to a house, buildings and lands located *"at"* one townland out of three townlands across which the farm is spread.

38. Further, the impression of an intention to devise the farm collectively in *McGonigle* was reinforced by evidence that the farm was worked together as one enterprise. There is no evidence in the present case that the separate parcels of land on the folio were worked together as one farm.

39. Finally, in *McGonigle*, the lands in dispute would otherwise have fallen into intestacy and Barton J. was therefore influenced by the assumption that the testator did not intend to die intestate as to any of his assets, in particular his farm. As indicated at para. 31 above, such assumption would not apply on the facts of this case.

In Re Bovill

40. In *Re Bovill* [1957] NI 58, the testator's will contained the following words – *"I leave devise and bequeath my farm on which I reside together with all stock, crop, farming implements and household furniture to my wife Eleanor absolutely."* The residue of the testator's estate was left to his four children in equal shares. The question for decision was whether the gift of the "*farm on which I reside*" applied only to the holding on which the dwelling-house was situate or whether it carried the three holdings which the testator had worked as one farm. The holdings were registered on separate folios and were contiguous except for a small portion of one which was separated from the rest of the land on the same folio.

41. McVeigh J. rejected the argument that the words "*on which I reside"* suggested a cutting down of the generality of the word *"farm*" to refer to only the holding on which the dwelling house was situate and stated:

> "*I have no doubt that when the testator made this will he clearly intended to give his wife the whole of the land, the several plots of which are contiguous (except for the small portions mentioned above) and all of which he carried on as one farm. The view that he intended to give the entirety as a going concern is reinforced when one considers the following words of the will 'with all stock, crop, farming implements.' He did not divide up those items and it is quite clear to my mind that he never considered carving up the land which he has always regarded as one unit. Accordingly, I hold that all these lands pass to the testator's wife under this bequest."*

42. In *Re Bovill*, McVeigh J. declined to admit evidence from the auctioneer who had drawn up the deceased's will and who deposed to the fact that the deceased had said that he had a farm of about 30 acres - which would of necessity included all of the relevant holdings. The auctioneer also averred that he had always understood the deceased to refer to his three holdings which he worked as one farm and on which he had always lived. As the court considered the will unambiguous, this evidence was inadmissible in any event. However, McVeigh J. stated

that such evidence would be inadmissible in any event because it related, not to the intention of the testator but to the auctioneer's understanding or opinion of those intentions.

43. In the present case, the plaintiff argues that the bequest to him of "*all my farm machinery and livestock owned by me at the date of my death"* is comparable to the *Re Bovill* bequest of *"all stock, crop, farming implements".* He argues that these words imply that the deceased intended to bequeath the farm to him as a going concern. However, this court does not presently have any evidence that the deceased's land holdings were operated together as a single unit or indeed that the farm would be non-viable if restricted to the Bealalaw lands.

44. In addition, there is a significant distinction between the words here used by the deceased "*farm buildings and lands at Belalaw, Myshall"* and the words used by the testator in *Re Boville "my farm".* At risk of repetition, the former words suggest the possibility of divisibility of the bequeathed lands from lands at another location whereas the latter strongly implies indivisibility.

Shannon v. Shannon

45. The plaintiff places the most reliance on *Shannon v. Shannon*. In *Shannon,* the testator by his last will and testament devised his "*dwelling house and farmlands at Moulamill with stock and contents and farm entitlements"* to the defendant, his friend, for his own use absolutely. The testator gifted *"all the rest, residue and remainder of my property, both real and personal and wheresoever situate"* to his nephew, the plaintiff, for his own use absolutely. At the date of his death, the testator was the registered owner of lands which were contiguous but albeit contained in two adjoining folios and a share in the adjoining commonage. The lands were all in the same townland, which was not called Moulamill. A dispute arose as to whether the bequest included the lands and the premises comprised in one folio or the other, or the lands and premises comprised in both folios.

46. MacGrath J. observed that the court could not be concerned with evidence of the intention of the testator, no matter how meritorious, if the will is unambiguous on its face. The court therefore first considered whether the will was ambiguous or contradictory on its face. MacGrath J. was not satisfied that on a proper construction of the will as *"a piece of English*", an ambiguity arose. The will did not purport to describe and dispose of two separate and distinct pieces of property in a different manner. It did not refer to or describe the folios but referred to the testator's "*farm…*". MacGrath J. also noted the use of the plural, *"farm of lands*" rather than "*farm of land"*.

47. As the evidence in *Shannon v Shannon* established that the testator farmed the lands in the two folios as one unit, the phrase "*farm of lands*" must mean all those lands. In addition, MacGrath J. noted the absence in the other material parts of the will of words suggesting a different interpretation to that which the court considered to be the plain meaning of the devise.

48. MacGrath J. held that because the will was unambiguous on its face, extrinsic evidence could not be adduced as to the testator's intention. Indeed, even if there had been ambiguity on the face of the will, the extrinsic evidence tendered was not sufficiently strong to support a finding that the testator intended to devise two separate farms. Rather, the extrinsic evidence contended for would have the effect of introducing ambiguity into the terms of a will that was otherwise clear on its face.

49. In *Shannon* there was a disconnect between the manner in which the testator's address was described in the will – Moulamill - and the name of the townland in which the lands in dispute were located - Glanlough. MacGrath J. therefore heard evidence regarding the correct name of the townland where the property was located. He concluded that whilst there was some discrepancy, it could not seriously be contended that the residential address referred to anything other than the deceased's "*dwelling house and farm of lands at Moulamill".*

50. The plaintiff before me therefore submits that MacGrath J. was not greatly influenced by the fact that the testator's address in the will appeared to place the farm in a different townland to that appearing on the folio. The plaintiff similarly urges this court to have little regard to the intricacies of the different townlands on which the lands are located.

51. Once again, however, the present case is distinguishable. The deceased's will specifically refers to lands *"at"* a particular townland in which only one of the four relevant parcels of lands are located. In contrast to *Shannon v. Shannon* which involved a potential misdescription of all of the relevant lands, this is potentially a case of specific delineation of only one of four relevant parcels of lands.

52. Further, at further risk of repetition, the will in *Shannon v. Shannon,* referred to the collective "*farm of lands"*. In the present case, the words "*farm"* or "*farm of lands"* do not appear in the bequest; nor is there evidence that the four parcels of land were worked together as one farm.

53. Overall, therefore, the present case is significantly weaker from the point of view of the party arguing for indivisibility than any of the three cases referred to above. It is now necessary to apply the *Lowry* principles to the deceased's will and determine whether it is possible to decide what it means.

"Read the immediately relevant portion of the will as a piece of English and decide, if possible, what it means"

54. I do not accept the plaintiff's argument that reading the immediately relevant portion of the will as a piece of English, one can determine that it devises to him all of the lands contained within the folio. Two aspects of the phrase "*lands at Belalaw, Myshall"* militate against such a unitary treatment. First, the clause does not refer to "farm at Belalaw Myshall" or "farm of lands at Belalaw Myshall", either of which would imply that the deceased viewed the farm as one farm, albeit located across four different parcels of land across three townlands.

Instead, the will refers to "*lands at Belalaw Myshall*". Second, the clause identifies the place at which the relevant lands are situate as "*at"* Bealalaw Myshall thereby potentially hiving off only one of the four parcels as being the subject matter of the specific bequest.

55. Nor does zooming slightly out and considering the whole phrase "*my dwelling house, farm buildings and lands at Belalaw, Myshall, in the County of Carlow*" clearly reveal the interpretation contended for by the plaintiff. The dwelling house in which the deceased resided is situate on the Bealalaw lands. It is common case that the only farm buildings on the overall property are also situated on the Bealalaw lands. As a piece of English, therefore, devising *"my dwelling house, farm buildings and lands at Belalaw, Myshall* " is consistent with a bequest of the dwelling house, farm buildings and that part of the lands situate at Bealalaw Myshall to the plaintiff with the Myshall and Raheenleigh lands falling into residue.

56. As in my view the whole of clause 2 comprises the immediately relevant portion of the will, a broader consideration is also necessary. Both parties argue that the manner in which the entitlements are bequeathed supports their interpretation.

57. By way of background, Irish farmers receive an allocation of what are described as "entitlements" under the basic payment scheme of income support for farmers. The deceased bequeathed to the plaintiff his "*dwelling house, farm buildings and lands at Belalaw, Myshall ... together with any entitlements attaching to the said lands".* By contrast, clause 2 bequeaths to the plaintiff "*all my farm machinery and livestock owned by me*".

58. The Roberts defendants argue that the contrast between the apparent designation of the entitlements attaching to the *"said lands"* at Bealalaw Myshall on the one hand and the bequest of *"all my farm machinery and livestock*" supports a non-unitary treatment of the lands. The Roberts defendants argue that this implies that only some of the entitlements are to be transferred to the plaintiff, meaning that the other entitlements are to remain with the lands falling into the residue.

59. However, there is something of a circularity here. If, as the plaintiff argues, the deceased intended the phrase "*at Belalaw, Myshall* " to refer to all of the lands comprising the farm then the phrase "*together with any entitlements attaching to the said lands*" would simply mean that all entitlements attaching to the farm were bequeathed along with the farm itself. Although the use by the deceased of the phrase "*said lands"* as against the use of the phrase "*all my"* might perhaps imply divisibility of the lands, such divisibility only emerges if one assumes that *"lands at Belalaw, Myshall"* applies only to the divisible portion of the lands, which is of course the question in issue.

60. In any event, as I understand it, although each entitlement is linked to a hectare of farmed land, entitlements are a monetary asset which can be transferred with or without the land. The treatment of entitlements in clause 2 is a largely neutral factor and does not assist in the ascertainment of what lands in particular are the subject matter of the bequest.

61. For the reasons set out above, I therefore do not find that the immediately relevant portion of the will - clause 2 - unambiguously bears the interpretation contended for by the plaintiff. The more difficult question is whether it can be said to bear the unambiguous interpretation contended for by the defendants.

62. In response to the contention of the Roberts defendants that the phrase "*my dwelling house, farm buildings and lands at Belalaw, Myshall"* suggests division of the farmlands, the plaintiff argues that the bequest to him of "*all my farm machinery and livestock*" suggests a bequest of the entire farm as a going concern. He asserts that a non-unitary treatment would render the portion of land bequeathed to him unviable as a farm, whilst leaving the remainder of the farm with no stock and no machinery. On the evidence before me, this argument goes too far. No evidence has been presented to demonstrate either that the farm is run as a unitary whole, still less that hiving off the Myshall and Raheenleigh lands would render the Bealalaw lands non-viable.

63. Whilst an intention to bequeath the farm, all machinery and livestock as a unitary whole may be seen as inherently more probable than an intent to bequeath part only of a farm - together with all machinery and livestock - with the remainder to be split nine ways between the residuary legatees, this is by no means a given.

64. In any event, as is clear from *O'Connell v. Bank of Ireland,* the question is not whether it is more likely that the deceased intended one outcome over another as this speaks only, to what *the deceased meant to do when he made his will. The question is what the words used in the will mean - what are the 'expressed intentions' of the deceased.* The decision to bequeath to the plaintiff *"all my farm machinery and livestock"* could not in and of itself import ambiguity into clause 2 if it were otherwise clear and unambiguous.

65. The plaintiff also emphasises that clause 2 refers to "*lands at Belalaw Myshall"* rather than "land at Belalaw Myshall". He argues that this implies, in the context of multiple holdings, that several holdings are countenanced. One could equally argue that the use of the plural, *"lands",* reflects the fact that there are two fields on the Bealalaw holding. Overall, however, my view is that these words are merely an example of legalise on which I do not place significant emphasis.

66. Overall, reading the immediately relevant portion of the will as a piece of English, I consider it as more consistent with an intention to devise to the plaintiff only that portion of the land situate at Bealalaw Myshall rather than the entire farm. However, for the reasons set out below, I cannot however hold that this is unambiguously the case.

67. The deceased has chosen to list separately the dwelling house, farm buildings and lands and it is difficult to discern the purpose of so doing. The Roberts defendants contend that the most likely purpose is an intention to split the lands between those devised to the plaintiff and those falling into residue. However, if this form of words was borne of an intention to split the lands, then it is a rather ambiguous way of doing so. If indeed the deceased had intended to

hive off the Bealalaw lands, then one would have expected greater specificity in this regard. This could, with clarity, have been achieved by words such as "that part of my lands situate at Bealalaw Myshall".

68. If the use of the signifier "Belalaw" in describing the lands bequeathed were a deliberate reference to that particular townland - in contradistinction to the townlands of Myshall and Raheenleigh - then one might have expected the deceased to refer to "the townland of Bealalaw". Further, the words used by the deceased to describe the lands bequeathed to the plaintiff are fairly distinct from the words used in the folio to describe the Bealalaw lands. Thus, the deceased refers to "*my dwelling house, farm buildings and lands at Belalaw, Myshall, in the County of Carlow"* whereas the folio entry for the Bealalaw lands refers to *"8.013 Hectares situate in the Townland of Bealalaw in the Barony of FORTH, in the Electoral Division of Myshall".* The deceased's omission to refer either to the townland of Bealalaw or to the defining words in the folio means that, by definition the words *"my… lands at Belalaw Myshall"* is some form of shorthand. Is it as the Roberts defendants contend a shorthand for that part of the lands in the townland of Bealalaw, Myshall or is it, as the plaintiff contends, a reference to the postal address of the farm as a whole[1]?

69. Sitting in the deceased's armchair and using his dictionary, what is the phrase "*my… lands at Belalaw Myshall"* a shorthand for? Therein lies the ambiguity which, combined with the other considerations outlined below, prevents me from holding that the immediately relevant portion of the will is clear and unambiguous.

[1] As to which see below

"Look at the other material parts of the will and see whether they tend to confirm the apparently plain meaning of the immediately relevant portion, whether they suggest the need for modification in order to make harmonious sense of the whole, or alternatively whether an ambiguity in the immediately relevant portion can be resolved."

70. The will is short and the most relevant *"other material part"* of the will is the opening paragraph in which the deceased describes himself as *"I, William Doyle of Belalaw Myshall in the County of Carlow".* These are the same words used in clause 2 to describe the bequest to the plaintiff.

71. The plaintiff submits that, rather than by reciting townlands, electoral divisions or boundaries or folio plan numbers or the like, clause 2 describes the deceased's residential farm by reference to its postal address, the same address that is used to describe the farm for all official purposes. The deceased's use of his familiar address to describe what is bequeathed to the plaintiff, is, he contends intentional and demonstrates that the intent was to leave him the entire farm.

72. The plaintiff asks the court to take judicial notice of the fact that the primary place name in rural Ireland is the postal address which may or may not correspond with the townland. The plaintiff argues that it is common in rural Ireland that a farm spread across several different townlands would be referenced by the "lead townland" where the dwelling house/farmhouse is located. Therefore, the more likely descriptor of a farm as a whole is by postal address and not by referring to townlands, electoral divisions and other boundaries.

73. The farmhouse is, the plaintiff contends, the hub or HQ of the farm and a reference to the postal address of the farmhouse is therefore intended to encompass the entire farm. The plaintiff accepts that it would have been better if the deceased had used the words "my dwelling house, farm buildings and lands at Bealalaw comprised in folio CW11156F". However, he argues that reference in clause 2 to the farm's address, which, it is said was the address

habitually used by the deceased to describe his farm, reveals an unambiguous bequest of the entire farm.

74. However, this argument significantly over-reaches as no evidence has been adduced as to how the deceased habitually described the farm.

75. It seems to me that looking at the other material parts of the will does not resolve the ambiguity noted above which therefore persists.

"If the ambiguity persists have regard to the scheme of the will and consider what the testator was trying to do."

76. There is nothing else in the scheme of the will which suggests that the deceased intended to bequeath to the plaintiff a specific portion of lands only. The parcels of land said by the Roberts defendants to fall into residue – the excluded holdings - are not identified or referenced in any way later in the will.

"…have resort to rules of construction, where applicable"

"see whether any rule of law prevents a particular interpretation from being adopted"

" one may get help from the opinions of other Courts and judges on similar words"

77. Save as already discussed above, no particular rule of construction or rule of law has been urged upon me by either party. Further, I have dealt already with the various cases cited by the plaintiff, all of which are in my view distinguishable for one reason or another. Therefore, it does not seem that the fourth, fifth or sixth *Lowry* principles are of relevance in the present case.

Conclusion

78. Although read on its own, the immediately relevant portion of the will - clause 2 - is in my view more consistent with an intention to split the lands than to treat them as a unitary whole, this is not unambiguously the case. Having regard to the other material parts of the will and to the scheme of the will, this ambiguity persists and indeed is somewhat enhanced. Accordingly, this court will receive extrinsic evidence of the deceased's intention.

79. I am not requested to make any ruling as to the admissibility of the various pieces of evidence that the parties propose to present. Some of the proposed evidence appears to be armchair evidence and some will have to satisfy the strict requirements of s. 90 in order to be admissible. Although I will shortly hear argument from the parties on this, my present intention is to hear all such evidence as the parties may reasonably wish to tender on a *de bene esse* basis.