**THE HIGH COURT**

[2022] IEHC 225

**[2019 No. 534 SP.]**

**IN THE ESTATE OF PETER ROOHAN, DECEASED**

**BETWEEN**

**ROSALEEN ROOHAN**

**PLAINTIFF**

**AND**

**EUNAN GALLAGHER AS THE PERSONAL REPRESENTATIVE OF ANDREW ROOHAN, DECEASED**

**DEFENDANT**

**JUDGMENT of Ms. Justice Nuala Butler delivered on the 8th day of April, 2022**

**Introduction**

1. These proceedings, brought by way of special summons, raise what are ostensibly straightforward legal questions as to the efficacy of a transfer of registered land which was never registered and whether, as a consequence of non-registration, the lands remained in the ownership of the transferor so as to form part of his estate after his death. Although ostensibly straightforward, in reality the questions posed reflect only the tip of a far more complex iceberg. Lurking below the surface is an unfortunate family history of conflict, loss and estrangement which, unfortunately, the determination of these issues, no matter what the outcome, will do little to heal.

2. The plaintiff is the widow of Peter Roohan who was, at the time of his death, the registered owner of just over 50 hectares of land at Clyhore in County Donegal. On 1st January, 2002, Peter Roohan executed a voluntary transfer of those lands in consideration of "natural love and affection" to his son, Sean Roohan. Peter Roohan died over a decade later on 24th September, 2012. Although it seems that Sean Roohan was both in possession and occupation of the lands (the plaintiff disputes this to a certain extent), for reasons which are touched on in more detail below, the transfer to him had not been registered by the time of his father's death. Equally, the transfer had not been registered by the time of Sean Roohan's death four years later on 30th March, 2016. The transfer to Sean Roohan was registered in July, 2017. The plaintiff disputes the legality of this registration but this is not the subject of these proceedings. Under his will, Sean Roohan left the lands to his brother, Andrew Roohan. Tragically, Andrew Roohan also died a relatively young man on 19th October, 2019 leaving a widow and children who, if the transfer of 1st January, 2002 was effective, are entitled to ownership of the Clyhore lands as part of Andrew Roohan's estate.

Background Facts

3. The plaintiff and her late husband resided in County Fermanagh in Northern Ireland. During his lifetime, the late Peter Roohan owned a number of properties and tracts of land. It seems that his land-holdings were fluid in that he both bought and sold land and also made dispositions of land by way of gift in the years before his death. As a consequence of this, although Peter Roohan was an active and productive farmer during his working life, at the time of his death, his estate in Northern Ireland was relatively modest.

4. The plaintiff was married to Peter Roohan for 45 years and they had ten children together, five sons and five daughters. It is a sad feature of this case that in addition to the two sons with a potential interest in Clyhore lands, both of whom are now deceased, two of the plaintiff's other sons are also dead having predeceased their father in 1994 and 2006. The plaintiff regards her marriage as having been unhappy and describes her late husband as difficult and controlling and as having inflicted mental and physical abuse on her. She left her husband for a period between 1998 and 2002 but returned, having been persuaded to do so by her sons. I am very conscious that these are not family law proceedings and the late Peter Roohan is not in a position to defend himself against these allegations. Although they form an important part of the plaintiff's account of the factors which have led to this litigation, they do not actually have a bearing on the legal issues which I have to decide. However, linked to the plaintiff's view of her marriage and her husband is her perception that her husband favoured his sons over his daughters and that he deliberately took steps to divest himself of property during his lifetime to ensure that she would not inherit from him after his death. Again, I do not have to determine the correctness of these views but they explain the institution of proceedings by the plaintiff in Northern Ireland which have in turn led to the institution of these proceedings in this jurisdiction.

5. Peter Roohan made his last will and testament on 21st September, 1994 which was some eighteen years before his death. His will was complex and appears primarily designed to leave farmlands at three different locations to three of his sons. The lands at Clyhore were left to Sean Roohan and other lands in County Fermanagh were left to his sons, Kieran and Paul. His wife, the plaintiff, was left the contents of his dwelling house and his personal effects together with a right of residence in the dwelling house (which was the family home) which was otherwise left to her son, Paul. She was also the residuary legatee and devisee.

6. In the eighteen years between the execution of his will and his death, Peter Roohan disposed of a significant proportion of his assets including, subject to the discussion below, the lands at Clyhore. The precise history of these disposals is unclear. For example, the solicitor who acted as executor of his estate in Northern Ireland understood that the dwelling house at Belleek did not form part of Peter Roohan's estate as he had executed an *inter vivos* transfer of it to the plaintiff and their daughter, Mary. The plaintiff disagrees. She says that this house was owned jointly between herself, Peter Roohan and their son, Sean. Peter Roohan transferred his share to another son, Paul, and Sean transferred his share equally between the plaintiff and Paul, leaving them each with a half share. She then states that her daughter, Mary, bought the house in 2011 when Paul got into financial difficulties and gifted a half share to the plaintiff. Both accounts agree that the plaintiff and Mary ended up owning the house jointly. It is not clear from the plaintiff's account how she came to be the owner of a one-third share in the first place nor how she lost the half share she owned at a later stage due, apparently, to the indebtedness of her son.

7. Shortly after the execution of the will, Peter Roohan's son, Kieran, died in December, 1994. Kieran was to have inherited lands in County Fermanagh along with stock and farm machinery. As Peter Roohan did not make a fresh will to take account of Kieran's death, in principle, the gifts intended for Kieran fell into the residue and, thus, would have been inherited by the plaintiff on Peter Roohan's death. However, the particular lands referred to seem to have been disposed of by the plaintiff during his lifetime to his son Paul. He also acquired two other folios of land in County Fermanagh in 2003 and 2004 subsequent to the execution of the will which are not expressly mentioned in it. Consequently, these parcels of land fell into the residue of his estate.

8. Following the death of Peter Roohan solicitors on the plaintiff's behalf entered into correspondence with the solicitor who had been appointed executor in 2012. For some reason, this correspondence stalled and was then renewed four years later in 2016 when the plaintiff sought a schedule of her late husband's assets and her solicitor wrote contending that Peter Roohan had failed to make reasonable provision for his wife. A grant of probate was extracted to Peter Roohan's estate in Northern Ireland on 17th July, 2017. The estate in Northern Ireland, comprising monies in a bank account and the two folios of land in County Fermanagh, had a value of £57,219. As it happens, much of the original content of Peter Roohan's will failed either because he had disposed of the subjects of the gifts during his lifetime (mainly to his sons) or because of the death of his son, Kieran. Thus, virtually the entire estate fell into residue and was inherited by the plaintiff as residuary legatee.

**Lands at Clyhore**

9. The lands at Clyhore amount to approximately 50 hectares comprised in six folios in County Donegal. At the time of his death in 2012, they were registered in the name of Peter Roohan and are currently registered in the name of Sean Roohan. I note that the folios describe the lands as being located at Cloghore rather than Clyhore but nothing turns on this. Further, the transactions discussed below relate to only five of the six folios. It appears there was an additional piece of land of approximately two acres described as *"railway land"* which, as of 2002, was unregistered. The subsequent registration of these lands in Peter Roohan's name is not dealt with in the papers before me and I have assumed, perhaps incorrectly, that these lands are contained in the sixth folio. There are two valuations of the lands before the court, neither of which are particularly up to date. The plaintiff values the land at €1,335,000 whereas the executor received a valuation of approximately €628,500. Either way, it is clear that the lands in Donegal are significantly more valuable than the entire of the estate admitted to probate in Northern Ireland.

10. The Clyhore lands were acquired by Peter Roohan in 1965 and registered in his name in 1967. The family lived in County Donegal for some time in the 1960s or 1970s but there does not appear to be a dwelling house currently on these lands. The plaintiff contends that she contributed to the purchase of the lands through two separate inheritances received by her totalling IR£9,200 – which would have been a significant sum at the time. However, the plaintiff's claim in this application is not based on her having an equitable

interest by virtue of having made contributions to the purchase of the lands but is a strictly legal one based on the registration of the title to the lands.

11. As will be recalled, in 1994 Peter Roohan made a will in which he left the lands at Clyhore to his son, Sean. At that time, Peter Roohan, who was born in 1934, was in his early sixties. In February, 1995, he leased the Clyhore lands for a period of ten years to Sean at an annual rent of IR£2,000. The purpose of this lease was to enable the parties to avail of pension and other benefits under a scheme which encouraged the transfer of farmland from farmers of retirement to younger farmers. This is evident from the terms of the lease itself in which the parties are referred to as "*the owner*" and "*the farmer*", rather than as lessor and lessee, and the lands the subject of the lease are referred to as "*the farm*". Sean, as "*the farmer*", covenanted to comply with the terms and conditions of the Farm Retirement Scheme under EU Regulation EC2079/92 and not to do any act which would affect the payment of a pension under that scheme to his father.

12. Before the expiration of the term of the lease, Peter Roohan executed a transfer of the lands to his son, Sean, on 1st January, 2002. The transfer is stated to be for "*natural love and affection*". Apart from transferring the land, on its face the transfer certifies two matters of potential relevance. The first of these is that s. 81 (Young Trained Farmers) of the Stamp Duties Consolidation Act, 1999 applied to the instrument (i.e. to the transfer). The significance of this section is that, if the transferee of land in certain circumstances was a qualified farmer by virtue of having completed a prescribed training course, the amount of stamp duty payable on the transfer would be reduced. Sean Roohan qualified under these provisions having completed the requisite courses and been awarded a certificate by Teagasc in 1994.

13. Secondly, the transfer certifies that Sean Roohan was an Irish citizen for the purposes of s. 45 of the Land Act, 1965. This of itself is of no relevance for present purposes but it is notable that Sean Roohan, the person providing the certification, does so "*being the person becoming entitled under and by virtue of this instrument to the entire beneficial interest in the land hereby transferred"*. As will be discussed further below, this suggests that the instrument of transfer was itself understood by the parties as being sufficient to transfer the entire beneficial interest in the lands. The transfer was signed by both Peter and Sean Roohan with their respective signatures being witnessed by two different solicitors from Ballyshannon. This suggests that they each had separate legal advice in relation to this transaction.

14. According to an affidavit sworn by Andrew Roohan prior to his death for the purposes of the proceedings in Northern Ireland, Sean occupied the Clyhore lands on an exclusive basis from 1995 and farmed those lands on an ongoing basis and was in receipt of the rents and profits therefrom. Documentary evidence is provided in the form of applications made between 2004 and 2016 for single farm payment and area aid by Sean Roohan as the "*owner*" of the lands to which the applications related and the evidence of Andrew Roohan that payments were made to Sean on foot of these applications. Sean was also the registered owner of a herd number attaching to the lands.

15. Further, Andrew Roohan states that Sean Roohan was in possession of a sizeable amount of money (approximately STG£140,000) having worked on the building of the Channel Tunnel in the early 1990s. He states that Sean used this money to discharge outstanding loans that Peter Roohan had with the ACC in respect of the lands. The folios record charges over the lands registered in favour of ACC in 1973 and 1989 being cancelled on 17th January, 2002 pursuant to a deed of discharge dated 20th December, 2001. The documents before the court do not indicate the amount of the debt that was cancelled, nor the source of the monies used to discharge the loans. Nonetheless, the timing may be significant in that the loans were cleared immediately prior to the transfer of the lands to Sean. Amongst the documents required to effect the transfer is a statutory declaration made by Peter Roohan in December, 2001 to the effect that he was able to meet his debts and liabilities without recourse to the lands the subject of the transfer. If Andrew Roohan is correct, and there is certainly circumstantial evidence supporting his contention, then, in addition to a transfer for natural love and affection, Sean Roohan may have had an equitable claim on the lands to the extent of the monies advanced by him to clear his father's debts. In those circumstances, the transfer to him would not have been entirely voluntary.

16. Some of this evidence is disputed by the plaintiff. She states that regardless of the applications made by and payments made to Sean for single farm payment and area aid as the person ostensibly farming the lands, Sean did not in fact reside in Ireland between 1998 and 2006. She states that following a violent incident involving Sean at her family home he fled to the UK and remained there for eight years. In making his case, the plaintiff's counsel emphasised that since the deaths of Peter, Sean and Andrew, the plaintiff is now the only person in a position to give evidence of these matters and also that, as his mother, she is the person best placed to give evidence as to the whereabouts of her son. I am not sure the latter suggestion is correct. If Sean Roohan fled from Northern Ireland in 1998 because of an attack he perpetrated on his mother's home and in fear of possible criminal charges in consequence of his actions, there is no particular reason to assume that he would have kept his mother appraised of his whereabouts. The absence of other witnesses due to their death in the intervening period goes to an issue raised by the defendant as to prejudice arising because of the plaintiff's delay in pursuing these issues, a matter to which I shall return.

17. Notwithstanding the execution of the transfer in January, 2002, the transfer was not registered until 2017. In order to avail of the stamp duty reduction, Sean Roohan had to provide a certificate from Teagasc evidencing the fact that he was a qualified farmer. A certificate was provided by Teagasc dated 14th January, 2002. It is not entirely clear what happened to that certificate save that it was not used to progress the registration of the transfer in 2002 or any time thereafter. There is an attendance note of Sean and Andrew Roohan's solicitor dated 2012 in which Sean Roohan called to his office in respect of what is described as an unstamped and unregistered transfer. It appears from this attendance note that Sean Roohan believed the solicitor had been provided with the certificate in 2002 whereas the solicitor was of the view that this was not correct and he had not received anything in respect of young farmers. Thereafter, there is a letter from

Teagasc dated 4th May, 2016 addressed to John Roohan (i.e. Sean) enclosing a further certificate also dated 4th May, 2016. Sean had of course died some weeks earlier on 30th March, 2016 and it appears that the application for a replacement certificate was made in April, 2016 by his brother, Andrew, rather than by Sean himself. An application was then made to have the transfer of the lands to Sean registered and this was effected in July, 2017.

18. The plaintiff takes exception to the fact that the transfer of the lands from Peter to Sean Roohan was registered in 2017 after the deaths of both parties to the transfer. Further, Sean made a will in October, 2015 in which he appointed his mother, the plaintiff, to be executrix. Under the will, the farm at Clyhore is left to his brother, Andrew, and Andrew is also appointed residuary legatee and devisee. The plaintiff contends that as the nominated executrix of Sean's will, she was the only person legally entitled to take action on behalf of the estate in connection with the registration of this transfer.

19. As it happens, the plaintiff did not proceed to extract a grant of probate to Sean's estate nor to give effect to the gifts under that will in favour of his brother, Andrew. Consequently, on Andrew's instructions, an application was made to the High Court for an order under s. 27(4) of the Succession Act, 1965 to grant liberty to the defendant in these proceedings, a solicitor, to extract letters of administration with will annexed to the estate of Sean Roohan. That application was allowed on 4th November, 2019 and a grant issued to the defendant on 11th February, 2021. The timing of these events is of some significance to the defendant's arguments. Andrew Roohan died on 19th October, 2019. The plaintiff issued these proceedings by way of special summons on 20th December, 2019 naming Mr. Gallagher as the defendant in his capacity "*as the personal representative of Andrew Roohan deceased*". Mr. Gallagher is not and never was the personal representative of Andrew Roohan and was not the personal representative of Sean Roohan at the time the proceedings were issued. An order of the High Court had been made granting him liberty to extract a grant of administration to the estate of Sean Roohan but, as a result of the practical steps which have to be taken to extract a grant (and presumably additional delay caused by the lockdowns due to the Covid-19 pandemic), that grant was not in fact extracted until early 2021. The defendant complains that the proceedings are fundamentally flawed for these reasons.

**Proceedings in Northern Ireland**

20. The plaintiff made an application to the High Court in Northern Ireland in December, 2018 in the estate of Peter Roohan seeking that adequate provision be made for her out of his estate and also seeking an extension of time in order to bring that application. Although the court has not been provided with a clear statement of the relevant law in Northern Ireland, it appears that succession law in that jurisdiction does not provide for any automatic entitlement or "*legal right share*" for a spouse in the estate of a deceased testate spouse. Instead, a spouse who believes that adequate provision has not been made for them in their spouse's will has a statutory right to apply to court for reasonable financial provision from the estate under Article 3 of the Inheritance (Provision for Family and Dependents) Order, 1979. This seems to be a mechanism similar to that available to

the children of a testate deceased parent in this jurisdiction under s. 117 of the Succession Act, 1965. The application made by the plaintiff in Northern Ireland is premised on the contention that the principle asset in the estate of the deceased is the lands at Clyhore, County Donegal which are described as having been bequeathed to Andrew Roohan consequent on the death of Sean Roohan "*but still in the name of Peter Roohan*". Much of the factual information set out in the proceeding passages of this judgment is drawn from the exchange of affidavits in the Northern Ireland proceedings as exhibited in these proceedings. Crucially, this includes affidavits sworn by Andrew Roohan who has since died.

21. A number of preliminary points have been raised against the plaintiff in the Northern Ireland proceedings including both a failure to comply with the relevant statutory time limit and more generalised delay in circumstances where the transfer of which she complains was executed in 2002 some ten years before the death of the deceased and proceedings were not instituted for a further period of six years after his death. However, when the case was last before the High Court in Northern Ireland in October, 2019, Huddlestone J. appears to have taken the view that, before any order could be made in the Northern Ireland proceedings, it was necessary to determine whether the lands in Donegal formed part of Peter Roohan's estate. Given that this turns on the legal effect of non-registration of a transfer of land under a statutory scheme for the registration of title in this jurisdiction, it is a question which can only be determined in accordance with Irish law. Consequently, at the suggestion of the Northern Irish courts, the plaintiff issued a special summons in this jurisdiction on 20th December, 2019 to have that question determined. I understand that no further steps have been taken in the Northern Ireland proceedings.

**Special Summons**

22. The special summons raises two questions which I will set out in full:-

    (a) Did the purported transfers by Peter Roohan (deceased) on or about 1 January 2002 to his son Sean Roohan (now also deceased) of the lands in the above named folios fail and were of no legal effect as same were never registered with the Registrar of Titles prior to the death of Peter Roohan on 24 September 2012, as required by Section 51(2) Registration of Title Act1964?

    (b) If the answer to that question is positive, did the said lands remain as part of the estate of Peter Roohan on the date of his death 25 September 2012? (The date of death appears to be incorrect here but nothing turns on this.)

23. At the outset, I should note that I have serious concerns as to the suitability of the second of these questions for disposal in a summary manner and without pleadings. A special summons is intended for cases which involve pure issues of law and where any factual issues can be resolved without oral evidence. I accept that the first question raises a discrete legal issue as to the effect of non-registration of a transfer of registered lands. The second question, which is dependent on the court concluding in response to the first question that the 2002 transfer failed and was of no legal effect, asks whether the lands

remained part of Peter Roohan's estate. It should be evident from the discussion above that that question is not capable of being determined as a purely legal question. For example, it is suggested that Sean Roohan would be entitled to an equitable interest in the lands by virtue of the sizeable contribution made by him in clearing his father's debts in late 2001 immediately prior to the transfer. Alternatively, if the transfer failed, there is a case to be made that Sean Roohan had acquired adverse possession by virtue of his occupation of the lands for a period in excess of twelve years. Of course, this occupation is disputed by the plaintiff as a matter of fact. The plaintiff also asserts that she made a significant contribution to the purchase price of the lands at an earlier stage in which case she might also be able to assert an equitable interest independent of any statutory claim to her late husband's estate . Leaving aside the risk that the deaths of all members of the Roohan family most closely involved with the Clyhore lands has created a situation where these questions could never be fairly determined, these are undoubtedly matters which a court could only decide having heard extensive oral evidence and the various witnesses being subject to cross-examination.

24. A difficulty also arises because most of the factual evidence in this case is not attested to directly on affidavits sworn for the purposes of these proceedings but is contained in affidavits sworn for the purposes of related proceedings which are exhibited in these proceedings. Whilst in many circumstances a pragmatic view could be taken that the affidavits sworn in the Northern Ireland proceedings could simply be considered as if they were affidavits sworn for the purposes of the special summons proceedings, additional difficulties arise because these include affidavits sworn by Andrew Roohan who is now, unfortunately, deceased and, indeed, was deceased before the proceedings in this jurisdiction were instituted. This should not normally be a problem in special summons proceedings where it is to be expected that any factual disputes will be limited and relatively discrete. Where there is wholesale disagreement on factual matters which could be crucial to the determination of a question, such as in this case whether the lands remained part of Peter Roohan's estate at the time of his death, it should be obvious that the matter will not be capable of being dealt with in a summary manner and, thus, is not suitable for the special summons procedure. In this regard, it is notable that O. 3 of the Rules of the Superior Courts permits procedure by way of special summons to be adopted in certain classes of claims but does not require that it be adopted in respect of all claims coming within those classes. Therefore, even if an issue falls within one of the classes set out under O. 3 (and I accept that questions relating to the administration of an estate of a deceased person and the determination of questions affecting the rights or interests of persons in the estate of a deceased person do fall within those classes), it will not always be appropriate to adopt the special summons procedure.

25. Although I have raised this issue at the outset, I propose to determine the first question raised on the basis that if the first question were to be answered positively, the second question could, in theory, be adjourned for plenary hearing and if it is answered negatively, then the difficulty does not arise. I also propose to address briefly some of the preliminary issues raised by the defendants before focusing on the central question as to the legal effect of non-registration of a transfer of registered land.

**Preliminary Issues raised by Defendant**

26. The defendant issued a motion in response to the plaintiff's proceedings seeking to have the proceedings struck out under O. 19, r. 28 of the Rules of the Superior Court and/or under the inherent jurisdiction of the court for failing to disclose a reasonable cause of action and for being unsustainable in law and in fact. The defendant also seeks to have the proceedings struck out on the grounds of delay or because they are statute barred under s. 126 of the Succession Act, 1965 or s. 9(2) of the Civil Liability Act, 1961. Both the defendant's motion and the plaintiff's special summons were ultimately listed for hearing together which, to a large extent, deprived the defendant's motion seeking to have the proceedings struck out without being heard of its intended effect. For that reason, I do not propose to consider in detail the legal principles applicable to an application to strike out under O. 19, r. 28 or pursuant to the court's inherent jurisdiction. Part of the rationale for the availability of this relief is that a defendant should not have to incur the time, stress and cost associated with the defence of manifestly unstateable proceedings. Where the time, stress and cost has already been incurred, it may, however unfairly, tip the scales in favour of the plaintiff's right of access to court since there is little to be gained by striking out the proceedings under those headings at this stage of the process.

**Delay**

27. That said, I do propose to deal with two discrete arguments made by the defendant during the course of their motion. Firstly, the defendant argues that the plaintiff is out of time to bring her application both by reference to various potentially applicable statutory time limits and, more generally, because of delay.

28. I have some difficulty in holding that the plaintiff is statute barred from taking this claim not least because it is difficult to pinpoint exactly how that claim should be characterised in circumstances where it is a spin-off from proceedings in Northern Ireland in respect of a cause of action that does not exist in this jurisdiction. As regards statutory time limits, the defendant contends the claim must be governed either by the two-year time limit under s. 9(2) of the Civil Liability Act, 1961 or by the six-year time limit under s. 126 of the Succession Act, 1965. As these proceedings were issued in December, 2019, more than seven years after the death of Peter Roohan, both of these time limits had expired.

29. I do not agree that the plaintiff's action is necessarily governed by these provisions and, certainly not the central issue as to whether certain property fell within the deceased's estate. Section 9 of the Civil Liability Act applies to causes of action which survive the death of a deceased person and are maintainable against his estate. Subsection (2) of that section provides that proceedings will not be maintainable in respect of any cause of action which has survived against the estate of a deceased person unless either the proceedings had been commenced and were pending at the date of his death or proceedings are commenced in respect of the cause of action within two years after the date of death. The earlier of these two time limits applies and, in both cases, the proceedings must have been issued within whatever other statutory time period is applicable. The plaintiff's claim here is against the estate of her late husband and relates to her entitlements from that estate. In my view, this cannot be characterised as a claim

which survived the death of the deceased. It is a claim which arose because of his death and which could never have been maintained against him while he was still alive. Thus, I do not regard s. 9(2) as having any application to this case.

30. Section 126 of the Succession Act, 1965 amended the Statute of Limitations, 1957 by the insertion of a new s. 45 into that Act. Section 45 now provides that no action in respect of any claim to the estate of a deceased person or to any share or interest in such estate shall be brought after the expiration of six years *"from the date when the right to receive the share or interest accrued"*. Thus, the key issue is, if the plaintiff has an entitlement to a share in the estate of Peter Roohan – a matter which must be determined by a court - when the right to receive that share accrued. I note that there is a discrete statutory time limit applicable to claims made under s.117 of the Succession Act 1965 which is analogous to the cause of action the plaintiff asserts in Northern Ireland, although as a spouse she would have no statutory entitlement to make such a claim in this jurisdiction. To my mind this suggests that the share of an estate that might be awarded by a court to a family member alleging a failure on the part of the testator to make adequate provision was not seen by the Oireachtas as being the accrual of the right to receive a share in an estate for the purposes of s.126. However as there is no provision in this jurisdiction for the claim the plaintiff is actually making, it is probable although not certain that it would be regarded as being governed by s.126.

31. In the leading text on the Succession Act (Spierin on *The Succession Act, 1965 and Related Legislation*), it is pointed out that where an executor is appointed under a will, time begins to run from the date of death rather than the date on which a grant is extracted. The grant recognises the authority of the executor rather than conferring that authority upon him. In this case, Peter Roohan appointed executors under his 1994 will and so, in principle, the plaintiff could have instituted her proceedings against the estate of Peter Roohan within six years from his death in September, 2012 notwithstanding that a grant was not extracted until 2017.

32. However, the matter is complicated by two factors. Firstly, strictly speaking, the plaintiff has not instituted proceedings in this jurisdiction making a claim to or seeking any share or interest in the estate of Peter Roohan. The proceedings seek a determination as to whether particular lands fell within his estate at the time of his death. Her claim to a share of his estate is made in Northern Ireland and, consequently, is a claim to which neither the 1965 Act nor the 1957 Act apply.

33. Secondly, I have noted that the plaintiff is making a claim for reasonable financial provision in Northern Ireland in circumstances where succession law in that jurisdiction does not provide for an automatic entitlement for a spouse to a portion of the estate of their deceased spouse. Section 111 of the Succession Act, 1965 provides that, in this jurisdiction, where a testator leaves a spouse and children, the spouse has a right to a one-third share of the estate commonly referred to as the legal right share. Under s. 115, where there is a gift to a spouse in the will of their deceased spouse the spouse may elect to take either the gift under the will or the share to which they would be entitled as a

legal right. Section 115(4) imposes a duty on the personal representatives to notify the spouse in writing of their right of election. The right of election may be exercised for six months after the receipt of such written notification or within one year from when representation is taken out to the deceased's estate, whichever is the later. In this case, no grant of probate has been extracted in respect of the estate of Peter Roohan in this jurisdiction because his executor took the view that the Clyhore lands did not form part of his estate and, consequently, there were no assets in this jurisdiction to warrant the taking out of a grant. If the plaintiff were to succeed in this claim and the court were to hold that the Clyhore lands did form part of the estate of Peter Roohan, then it would be necessary to extract a grant of probate in respect of his estate in this jurisdiction. The personal representatives would then be obliged to notify the plaintiff of her right of election and she would have a period within which to exercise that right.

34. The resulting position is not clear-cut for many reasons. The plaintiff has already accepted the gift of the residue of Peter Roohan's estate in Northern Ireland which would, in principle, preclude her from also opting to accept her legal right share (although quite often it is agreed that the actual gift can be treated as part of the legal right share). However, as she was not advised of her right of election, it is not certain that this would suffice to debar her from seeking to exercise that right now. Of course, the claim made by the plaintiff in Northern Ireland is not to a legal right share but to reasonable financial provision to be determined by a court. Consequently, even though I accept as correct the defendant's basic argument that any claim to be made by the plaintiff against the estate of the deceased, at least as regards his estate within this jurisdiction, should be made against his executors within six years from the date of his death, given the uncertainties about the other issues discussed in this paragraph I do not propose to strike out the plaintiff's claim on this ground.

35. In addition to arguing that the plaintiff was statute barred, the defendant argued that she was guilty of inordinate and inexcusable delay as a result of which a fair hearing of the case could no longer take place. In meeting this aspect of the case, the plaintiff's counsel accepted that the delay was inordinate but argued that it was excusable. He focused on the difficult life which the plaintiff had lived, describing her as being coerced into silence and summoning up the courage to bring this application. He stated that she was subject to a campaign of coercive control by her husband and sons from which she found it hard to break free. In summary, he submitted that the plaintiff was a woman who had suffered a great deal in her life and was now living in modest circumstances on a social welfare pension. Unfortunately, very little of this was on affidavit and much of what counsel submitted was entirely unsupported by the evidence. The plaintiff does give evidence as to her husband's abusive nature and the difficulties in her marriage. She does not give evidence that she was subject to a campaign of coercive control by her sons. Other aspects of the evidence would suggest that her relationship with her sons was, at times, good. For example, Sean Roohan returned to live with her during his final illness and appointed her executor of his will.

36. I also note that the plaintiff made enquiries of the executor of her husband's will as to the extent of his assets in 2012. She instructed solicitors in Northern Ireland in 2012 who entered into correspondence with the executor in relation to the estate. There is an interval of four years before that correspondence is resumed in 2016 at which time the plaintiff also instructed solicitors in this jurisdiction. No explanation is offered for this four-year interval during which the plaintiff was clearly aware of the fact that there was a potential issue regarding her husband's estate and the lands in County Donegal. In the absence of any explanation, it is difficult to see how the court could accept that the delay was excusable. Even if the court were to accept some initial reluctance on the part of the plaintiff to commence litigation against her husband's estate which would necessarily impact on other members of her family, she was certainly live to this possibility in 2012 and yet took no steps to pursue it for over six years. Therefore, with some regret, I have to regard the delay on the plaintiff's part as inexcusable.

37. In circumstances where delay is extraordinary and inexcusable the court must look to where the balance of justice between the parties lies and whether there are special circumstances which would justify allowing the plaintiff's case to proceed. I have a serious concern as to whether the issues potentially falling within para. (b) of the special summons can be fairly determined because of the delay which has already occurred since the relevant events took place. It is now over twenty years since the date of the transfer, ten years since the date of Peter Roohan's death and six years since the death of Sean Roohan. If Sean Roohan provided money to discharge the debts of Peter Roohan, he did so more than twenty years ago. The plaintiff raises issues about the whereabouts of Sean Roohan between 1998 and 2006 which, if correct, cast doubt on the veracity of declarations made by him in the course of applying for single farm payment and area aid during part of that period. Sean Roohan is no longer available to attest to his whereabouts. I understand that Andrew Roohan was actively involved in farming and other activities with Sean Roohan. He, unfortunately, died in 2019. Thus, apart from Peter Roohan himself, the two main witnesses as to the ownership, occupation and use of the lands from 1995 to 2016 are both dead. It would be extremely prejudicial to the point of being positively unfair to the widow and personal representative of Andrew Roohan to require her to defend the plaintiff's proceedings involving, as they do, the details of family interactions over a twenty-four year period of which she was not a material part. If I am incorrect in my view that the plaintiff's delay is inexcusable, I would nonetheless regard the time which has elapsed in this case coupled with the prejudice which has arisen due to the deaths of both sons as being such that the case cannot now be fairly heard. Consequently, even if the plaintiff's claim is not statute barred (and I have reservations on this issue), the delay in this case is such that I am satisfied that at this stage only the most straightforward legal issue can be fairly determined by the court.

**Identity of Defendant**

38. The other element of the defendant's preliminary objections that warrants consideration is the complaint that he has been wrongly sued for a number of reasons. The defendant is not the personal representative of Andrew Roohan but of Sean Roohan. The defendant regards the plaintiff as having deliberately delayed the administration of Sean Roohan's

estate by failing to renounce her executorship in circumstances where she was clearly conflicted in light of the position taken by her regarding the Clyhore lands. As a result of this failure, the grant of letters of administration to the defendant did not issue until 11th February, 2021, nearly fourteen months after the plaintiff had issued her proceedings naming him as the defendant. Not only did he not have competence or capacity to act on behalf of the estate of Sean Roohan at the time the proceedings were issued, he lacked that capacity for a considerable time thereafter.

39. The plaintiff has approached this issue on the assumption that it is really a procedural complaint about what the plaintiff's solicitor characterises as a typographical error. The plaintiff's solicitor regards this as an error capable of rectification by amending the title of the proceedings to replace the name "*Andrew Roohan*" with that of "*Sean Roohan*" and has included this relief in a motion seeking directions issued in January 2021. There is no engagement by the plaintiff with the other aspect of the defendant's argument, namely that the defendant was not the personal representative of Sean Roohan at the time the proceedings were instituted.

40. In his written legal submissions, the defendant relies on the decision of Laffoy J. in *Gaffney v. Faughnan* [2006] ILRM 481 to support the proposition that, as the authority of the administrator of the estate of a deceased person derives from the grant of letters of administration, until a grant has issued, the estate of the deceased person does not vest in the intending administrator. The defendant's written submissions also refer, quite fairly, to two subsequent decisions in which *Gaffney v. Faughnan* was not followed, namely the decision of McKechnie J. in Finnegan v. Richards [2007] IEHC 134 and that of Finlay Geoghegan J. in *Bank of Scotland v. Gray* [2013] 1 IR 551. I have read each of these judgments (which were not opened in argument) and, in my view, the position is not quite as straightforward as suggested by the defendant, although it is undoubtedly the case that the plaintiff issued proceedings against an incorrect defendant and, despite being advised of this by the defendant from a very early stage, has only belatedly sought to rectify her error .

41. In *Gaffney v. Faughnan* (above), Laffoy J. extended an existing legal principle which precluded someone purporting to act as a plaintiff from instituting proceedings on behalf of an estate at a time when they did not have the legal competence or entitlement to do so to cover somebody sued as a defendant in respect of an estate at a time when that person was not competent or entitled to act on behalf of that estate. In the particular case, the nephew of the deceased had taken out a grant of administration pursuant to the provisions of O. 79, r. 5 without the necessity of a court order some seven months after proceedings had been issued naming him as a defendant. The proceedings did not name the defendant as the personal representative of the deceased. Laffoy J. acknowledged that no authority had been cited to her which considered the position of a defendant in a representative capacity but felt that the same principles should apply. Consequently, she held:-

*"When a summons is issued the person named as defendant must be competent at that time to answer the alleged wrongdoing and meet the remedy sought. If he is not, the action is not maintainable. If he subsequently obtains a grant of administration, that will not cure the fundamental defect and render the action maintainable."*

42. However, in Finnegan v. Richards, decided only a short time later, McKechnie J. expressly declined to follow Laffoy J.'s decision. In particular, McKechnie J. was concerned that the decision of the Privy Council in *Austin v. Hart* [1983] 2 WLR 866 which cast doubt on the correctness of a decision been cited with approval and applied by analogy by Laffoy J. (namely *Ingall v. Moran* [1944] 1 KB 160) had not been opened to her. In *Austin v. Hart,* Lord Templeman expressed unease about the principle which precludes a person purporting to institute proceedings as plaintiff in advance of or without obtaining formal legal title to do so and expressly declined to extend that principle beyond the narrow ambit in which it had been previously applied. McKechnie J, characterised this as the attachment of a "rejectionist label" to the rule of law as espoused in *Ingall v. Moran* such that it should only be followed and applied by the High Court where it was bound to do so or where there were underlying reasons which justified its application. As Austin v. Hart had not been opened to Laffoy J., McKechnie J. was not satisfied that *Gaffney v. Faughnan* represented her concluded views on the point and, consequently, declined to follow that decision. In his written submissions, the defendant suggests that this decision was hugely influenced by the conduct of the defendants in that case. It is certainly true that McKechnie J. (at para. 24 of the judgment) indicated that he would, in any event, refuse the application because the conduct of the defendants resulted in the plaintiffs' reasonable reliance on what they considered to be assurances from the defendants that they would not be required to obtain an ad litem grant. However, this rationale is expressly stated by McKechnie J. to be an alternative basis for the conclusion which he had already reached. That conclusion was that where a person has a prima facie case against an estate and does not require the existence of a grant to confer the status of plaintiff, a writ issued prematurely against a defendant who subsequently extracts a grant of administration and becomes the personal representative of the deceased, should not automatically be treated as a nullity.

43. The subsequent judgment of Finlay Geoghegan J. in *Bank of Scotland v. Gray* (above) acknowledged the existence of two conflicting decisions on this point which meant that she had to consider the question as a matter of principle and on the facts of the particular case bearing in mind the views expressed in both judgments. Ultimately, she decided the case before her on a somewhat different basis linked to its peculiar facts. In *Bank of Scotland v. Gray,* the High Court had made an order under s. 27(4) of the Succession Act, 1965 on 11th July, 2011 granting the defendants liberty to apply for a grant of letters of administration to the estate of the deceased. Subsequent to making that order, the defendants were required to take the procedural steps specified in O. 79 of the Rules of the Superior Courts and to formally make an application for a grant of administration to the Probate Office. Letters of administration were granted to the defendants on 24th November, 2011 but, prior to that date on 18th November, 2011, summary proceedings

had issued naming the defendants. Finlay Geoghegan J. felt, in light of the particular facts, it would be a significant injustice to treat the proceedings issued on 18th November, 2011 as a nullity and not maintainable. She distinguished the decision in *Gaffney v. Faughnan* on the basis that Laffoy J. was not considering a claim against representative defendants in whose favour an order under s. 27(4) had been made. She stated (at para. 51 of her judgment):-

> *"In the scheme of s. 27(4) and O. 79 of the Rules of Court, it appears to me that where, as on the facts of this case, the persons named as defendants in a representative capacity as administrators of the estate are, on the date of issue of the summons, persons already appointed pursuant to s. 27(4) of the Act of 1965, to be administrators of the estate, they must in my judgment be considered as having a status in relation to the estate, albeit not yet as administrators to whom a grant has issued. They and those dealing with the estate are entitled to consider, as they did herein, that once the procedural requirements in O. 79 are completed, a grant would issue to them."*

Consequently, she decided that proceedings issued against the defendants making a claim against the estate in the intervening period between the making of an order under s. 27(4) in favour of the defendants and the issuing of letters of administration to them were valid.

44. It seems to me that this latter judgment is of some significance in this case as an order was made by the High Court under s. 27(4) on 4th November, 2019 granting the defendant liberty to extract letters of administration to the estate of Sean Roohan albeit that the grant itself did not issue until 11th February, 2021. Thus, at the point in time where the special summons which is currently before the court was issued on 20th December, 2019, in the words of Finlay Geoghegan J., the defendant was "*at a minimum, contingently competent to represent the Estate".* Therefore, on balance, I am not inclined to treat the proceedings as a nullity purely on the basis that a formal grant of letters of administration had not issued to the defendant at the time the proceedings were instituted.

45. Of course, that does not deal with all of the plaintiff's difficulties as the flaw in the form of the proceedings relates not only to the date upon which the defendant became entitled to act in the estate of Sean Roohan but the fact that he was not and is not the personal representative of Andrew Roohan. As noted, the notice of motion issued on behalf of the plaintiff on 27th January, 2021 and seeks an order that the title of the proceedings be amended in this regard. Rather oddly, there are two affidavits from the plaintiff's solicitor, both of which seem to have been sworn to ground this application but they are in quite different terms. In the first of these, the solicitor states that the naming of the defendant as the personal representative of Andrew Roohan was a typographical error. In my view, it would be difficult to properly characterise this as a typographical error and, in the later of the two affidavits, no attempt is made to do so. Instead, the solicitor simply acknowledges that an error was made without providing any explanation as to how that

error came to be made. In normal circumstances, I would be reluctant to allow the plaintiff to make such a fundamental amendment to the title of the proceedings at the hearing of the action. The substitution of Sean's estate with that of Andrew's brings with it a host of difficulties for the plaintiff including potential difficulties under the Statute of Limitations because, as things currently stand, Sean Roohan's estate is not yet properly the subject of the plaintiff's proceedings. There are certainly issues as to whether earlier service on the defendant qua personal representative of Andrew Roohan will be effective to stop time running as regards the plaintiff's claim against the estate of Sean Roohan.

46. Notwithstanding all of these difficulties, I am nonetheless minded to determine the central issue that has been raised in this case. I do this out of respect to my judicial colleagues in Northern Ireland whom, it appears, are of the view that they cannot proceed to determine the plaintiff's application against the estate of her late husband in that jurisdiction until an appropriate determination has been made in this jurisdiction as to whether the Clyhore lands form part of that estate. As that is a net legal issue and as the defendant was not merely present before the court but was represented by counsel who engaged in the argument on his behalf, I consider it would be disrespectful of my colleagues in the Chancery Division of the High Court in Northern Ireland to decline to answer the question because of the many procedural difficulties that have arisen due to the manner in which these proceedings have been framed and pursued on the plaintiff's behalf. I should note that although I am declining to accede to the defendant's application to dismiss the proceedings on these grounds, I do so in circumstances where I acknowledge that many of the points made by the defendant are meritorious and, in other circumstances, might well have been accepted.

**Non-Registration of Transfer**

47. The plaintiff's case as regards the effects of the non-registration of the 2002 transfer is admirably straightforward. The plaintiff relies on a combination of s. 51(2) of the Registration of Title Act, 1964; the 1909 decision of the Court of Appeal in M'Gettigan v. Roulstone [1910] 2 IR 17 and [1910] 44 ILTR 27; and the commentary of the author in McAllister's seminal 1973 work *Registration of Title in Ireland,* to argue that, until the registration of a transfer of registered land, title remains in the transferor. Consequently, because the 2002 transfer was not registered at the time of Peter Roohan's death, it was ineffective and failed to transfer his interest in those lands to Sean Roohan. Instead, title to the lands remained vested in Peter Roohan and, thus, the lands formed part of his estate at the time of his death. The plaintiff also casts doubt on the legality of the subsequent registration of Sean Roohan's title after the death of both transferor and transferee.

48. Section 51(2) of the Registration of Title Act, 1964 provides as follows:-

> *"(2) There shall be executed on the transfer an instrument in the prescribed form… but until the transferee is registered as owner of the land transferred, that instrument shall not operate to transfer the land."*

The final clause of this provision reflects the earlier provisions of s. 35 of the Local Registration of Title (Ireland) Act, 1891 which provided that an instrument of transfer was to have no effect until registration. Section 25 of the 1891 Act provided that a person would not acquire any estate in land under a conveyance until he is registered as the owner of the land. The effect of these provision is consistent with s. 31(1) of the 1964 Act which provides for the conclusiveness of the register. This provides that the register shall be "*conclusive evidence of the title of the owner to the land as appearing on the register"* and then confers a jurisdiction on the courts to rectify the register "*on the ground of actual fraud or mistake".*

49. *M'Gettigan v. Roulstone* turned on the effect of s. 25 of the 1891 Act, albeit in a materially different context to the case currently before the court. In the days before democracy was synonymous with a universal franchise, the right of a voter to be entered on the register of electors depended on his meeting eligibility requirements (usually relating to property ownership) stipulated in the law of franchise at the material time. The case concerned a would-be voter's attempt to establish his eligibility for a freehold franchise. The claimant had purchased the freehold in certain lands from the estate of the registered owner. The lands had been conveyed to the claimant who was in occupation of them but the conveyance had not been registered under the 1891 Act. He appealed from the rejection of his claim to be registered as a voter. The defendant's argument as recorded in the law reports seemed to accept that the claimant was "*equitably seized*" of the land but proceeded on the basis that he had no title until the conveyance was registered as title had to be strictly proved to avail of a freehold franchise. This argument was accepted by the Court of Appeal. Interestingly, I was provided with two versions of the reported judgment of this case, one from the Irish Reports and the other from the Irish Law Times Reports. These are materially different to the extent that the ILTR includes a judgment delivered by Chief Baron Pallas whereas the Irish Reports simply notes that he concurred with the judgments of his colleagues. Counsel for the plaintiff places particular reliance on the statement of Pallas L.C.B. that the generally accepted view was that *"no estate passes until registration*". He concluded, as did his colleagues, that "*the freehold franchise depends not upon occupation but upon actual title".*

50. Finally, counsel points to the analysis of s. 51(2) and of *M'Gettigan v. Roulstone* by McAllister who opined as follows:-

> *"It seems clear, having regard to section 51(2) of the Act, that until registration of the transferee the registered ownership remains in the registered owner. When the transferee is registered, the registration effects, so to speak, a transmutation of such ownership to the transferee. A similar principle is to be found in section 19(1) of the English Land Registration Act, 1925,…*
>
> *The unregistered right of the transferee to be registered, created by the execution and delivery of the transfer, can be protected by a suitable entry on the register."*

51. Counsel for the defendant emphasised the second part of this quotation, namely the unregistered right of a transferee to be registered which is created by the execution and

delivery of the transfer. He rejected the plaintiff's argument that a failure by the transferee to secure registration meant that their unregistered right to be registered lapsed on the death of the registered owner. He argued that the execution of the transfer in 2002 vested the equitable estate in the lands in Sean Roohan with his father holding only the bare legal title thereafter until registration would vest the legal in addition to the equitable title in Sean Roohan. Further, *M'Gettigan v. Roulstone* was not followed by the Irish Supreme Court in a series of later cases. These cases – *Devoy v. Hanlon* [1929] IR 246; *In Re Strong* [1940] IR 382; and Coffey v. Brunel Construction [1983] IR 36 – did not treat s. 51(2) in the absolute manner that the Court of Appeal had done in 1909 but looked at that section alongside other provisions of the 1964 Act from which it was evident that an equitable or beneficial interest could be passed to a transferee by way of an unregistered instrument.

52. Those judgments emphasise two other provisions of the 1964 Act (or the equivalent provisions in the 1891 legislation). The first of these is s. 68(2) which provides as follows:-

> *"(2) Nothing in this Act shall prevent a person from creating any right in or over any registered land or registered charge, but all such rights shall be subject to the provisions of this Act with respect to registered transfers of land or charges for valuable consideration."*

The second, s.90(1) expressly provides that a person who is entitled to be registered as the owner of registered land by virtue, *inter alia*, of "*a transfer made in accordance with this Act"* may take certain action in relation to that land including transferring, leasing or charging any part of it "*in the like manner and with the same effect as if the person were the registered owner at the date of the action concerned*". This entitlement is subject to an important qualification in s. 90(2) in that it is subject to burdens or rights which would affect the interest had it been registered and to the provisions of the 1964 Act "*with regard to registered dealings for valuable consideration".*

53. These provisions are related in that they allow for dealings to take place affecting registered land which are not recorded or reflected in the register. Section 68 allows the owner of registered land to create unregistered rights over such land and s. 90 allows a person who is entitled to be registered as owner of registered land but who is not in fact so registered to exercise rights of ownership in relation to that land. The qualification applicable in both cases operates to protect the position of a *bona fide* purchaser for value of registered land or of a right or interest in registered land in that his interest cannot be detrimentally affected by a prior unregistered interest. The proviso is important in the circumstances of this case because the plaintiff's argument is not premised on the existence of an intervening purchaser for value but rather on the operation of the transferor's death as allowing the transferor's estate lay claim to property in which the transferor had previously transferred the entire equitable estate to the transferee. However, the transferor's estate cannot claim a greater interest in the land than the transferor himself could have claimed were he still alive. In circumstances where the

transferor could not himself reclaim the equitable interest which he had transferred to the transferee, it does not seem to me that the transferor's estate can make that claim either. I am of the view that the defendant's arguments as to the effect of the interaction between these sections and the vesting of the beneficial interest in the lands in Sean Roohan as a result of the 2002 transfer is correct.

54. In *Devoy v. Hanlon*, Kennedy C.J. in considering the same argument as advanced here on behalf of the plaintiff, albeit under the 1891 Act, stated as follows:-

> *"The Register is made conclusive evidence of the title of the owner of the land "as appearing thereon" (sect. 34, sub-sect. 1) but the statute does not extinguish or invalidate estates or interests in, or rights in, to or over registered land for the registration of which it makes no provision. It simply keeps the statutory Registers clear of them. The valid existence of such unregistered estates, rights, and interests outside the statutory Registers is actually recognised by the Act…*
>
> *It is objected that this view is not consistent with the enactment in sect 34, as to the Register being conclusive evidence of the title of the owner of the land, to which is added the important words, "as appearing thereon". Now, in the first place, it may be conceded that the Register is always conclusive evidence of the fact that the legal estate in the lands is vested in the registered owner as appearing on the Register, and that the registered owner is the only person entitled to transfer the land by registered disposition. But then the statute clearly recognises a distinction between a registered transferee for valuable consideration and a volunteer. [Kennedy C.J. then cites the provisions of s. 44(2) of the 1891 Act which are mirrored in those of s. 68(2) of the 1964 Act]*
>
> *In so far then as Pim v. Coyle may be thought to be an authority for saying that a registered owner cannot create any right, estate, interest, equity, or power in or over registered land otherwise than by a registered disposition, it is, in my opinion, in conflict with sect. 44, sub-sect. 2, and other sections of the Act not cited to the Court, and cannot be regarded, therefore, as a ruling decision on that question.*
>
> *Assuming then, and so deciding, that it is competent for a registered owner by an unregistered instrument—for example, by an unregistered deed of transfer—to confer a beneficial right or estate or interest on another by way of gift or otherwise, valid against other persons claiming as volunteers under the registered owner, the next question for determination is, whether on the facts of the present case such a right, estate, or interest was conferred…"*

Although Kennedy C.J.'s judgment was actually a dissent, the dissent was on a relatively narrow issue. All members of the court agreed that *"the registered owner can by an unregistered disposition create an estate in registered land which will be valid as against the owner of the land"* (per Murnaghan J. at p. 262). The point of disagreement was whether, on the facts, a voluntary transfer as between the father and son had been completed so as to give the son the equitable interest he claimed. The majority held that

it had not because the evidence did not establish that the father had "*delivered*" the deed (which had been lost in a solicitor's office) with the intent that it should become effective.

55. Whilst the members of the Supreme Court did not expressly cite *M'Gettigan v. Roulstone* in their judgments, the report notes that it was cited in argument by counsel for the defendant to support the contention that no equitable right could be created by an unregistered transfer, which argument was clearly rejected. Further, the *dicta* in *Pim v. Coyle* [1907] 1 IR 330, which Pallas L.C.B. had regarded as having settled the issue in *M'Gettigan v. Roulstone*, is expressly disapproved by the Supreme Court. *Devoy v. Hanlon* itself was recently approved by the Court of Appeal in *Tanager DAC v. Kane* [2019] 1 IR 385. At para. 35 of her judgment, Baker J. notes that whilst registration is evidence of the title of the owner appearing in the register, "*It is not, and was never intended to be, evidence of beneficial ownership…".*

56. In *In Re Strong,* the Supreme Court held that the purchaser for value of registered land was entitled to have cancelled from the register a judgment mortgage registered against the vendor's interest prior to the registration of the deed of transfer but after payment of the purchase monies. Whilst the judgment of O'Byrne J. focuses on the fact that the plaintiff was a purchaser for value, he regarded the effect of what is now s. 68(2) of the 1964 Act as allowing for the creation of unregistered rights in registered land as having been settled by *Devoy v. Hanlon.* He concluded:-

> *"In my opinion the foregoing provision deals only with the effect of the transfer and operates so as to prevent any estate or interest being conveyed by the transfer until registration. It would, in my opinion, be going beyond the provisions of the section and would be inconsistent with s. 44, sub-s. 2, to hold that no unregistered right can be created in the registered land. It is not the transfer which is relied upon by the appellant but the contract for purchase, coupled with the payment of the purchase money."*

57. A similar conclusion was reached in *Coffey v. Brunel Construction* as regards the registration of a *lis pendens* affecting the interests of the vendor of registered land after the plaintiff had contracted to buy lands and had paid the agreed purchase price but before their title had been registered. The Supreme Court upheld a decision directing the Registrar of Title to cancel the burden with O'Higgins C.J. stating as follows:-

> *"Section 51, sub-s. 2 of the Act of 1964 deals only with the effect of the instrument of transfer and, as indicated, provides that such instrument shall not operate to transfer the land until the registration of the transferee as owner. Here, however, the plaintiffs have not to rely merely on the instrument of transfer. They had purchased the land pursuant to a contract and had paid over the full purchase money. Therefore, there can be no doubt that, on the execution of the transfer by the registered owner (the transfer being so executed on payment of the purchase money), the entire beneficial estate and interest in the lands passed to the plaintiffs and the registered owner became a bare trustee for them."*

Although these latter cases focus on the position of a purchaser for value, counsel for the defendant correctly notes that the transfer in *Devoy v. Hanlon* was a voluntary one in which the son had not paid valuable consideration to the father. In many respects, the facts are strikingly similar to this case in that the object of the transfer appears to have been to enable the father to become eligible to receive an old age pension. However, there was no evidence before the court that the deed was ever acted on or that the father had received the old age pension. This is not the case here. The documentary evidence establishes that Sean Roohan claimed and received single farm payment and area aid in respect of these lands from the time that they were transferred to him. He seems to have believed that he instructed his solicitor to register the transfer in 2002 and had provided the Teagasc certificate to him for that purpose – although the certificate and attendant instructions appear to have gone astray. Thus, regardless of whether the plaintiff can establish that Sean Roohan was out of the jurisdiction for a number of years prior to and after the date of the transfer, there is undoubtedly evidence that the 2002 transfer was acted on by both the transferor and the transferee.

58. Based on these authorities, three decisions of the Supreme Court and one of the Court of Appeal, it seems clear that while *M'Gettigan v. Roulstone* may not have been wrongly decided as a matter of franchise law (a matter of purely historic interest now), it is not authority for the proposition the plaintiff asserts, namely that the 2002 deed of transfer failed and was of no legal effect due to its non-registration until 2017. As registered owner, Peter Roohan could and did transfer an equitable interest in the entire of the property to his son through the deed of transfer executed in 2002. Thus, at the date of his death, Peter Roohan held only the legal title to the Clyhore lands and did not hold the equitable estate in the lands which, at that time, was vested in his son, Sean. Consequently, Peter Roohan's estate included only the legal title to those lands and no equitable or beneficial interest in them. Conversely, as Sean Roohan was the equitable owner of the lands, they formed part of his estate at the time he died and left them to his brother, Andrew Roohan.

59. In the foregoing analysis, I have not addressed the issue on the basis that Sean Roohan was registered as the owner of these lands in 2017. In light of the views which I have expressed above as to the effect of the 2002 transfer, it is not necessary for me to determine whether the subsequent registration of that transfer was legally valid in order to be satisfied that an equitable interest in those lands had been transferred by Peter Roohan long prior to his death. The plaintiff argues that the transfer was not and could not have been validly registered in 2017 particularly because s. 61(2) and (3) provide that the personal representatives of a deceased owner of registered land alone shall be recognised as having any rights in respect of the land and that any application for registration by a person claiming to be entitled to the land of a deceased registered full owner is to be accompanied by an assent or transfer by the personal representative. The plaintiff was not, of course, the executor of her husband's will, he still being the registered owner in 2017. She was, however, the executor of Sean Roohan's will and she was not aware of, let alone consented to, the registration of the transfer to him. The defendant points out, correctly, that the register is conclusive evidence of title and the

plaintiff has not sought to cancel or otherwise challenge the registration of Sean Roohan as full owner in 2017. I do have some reservations as to the manner in which Sean Roohan's title was registered after his death but I do not think it is entirely clear cut that that registration was invalid pursuant to s. 61 or otherwise. As this issue is not properly before the court, I do not propose to comment on it further.

**Conclusions**

60. In light of the above analysis, the answers to the questions posed in the special summons are as follows:-

(a) The transfer by Peter Roohan (deceased) on 1st January, 2002 to his son, Sean Roohan (now also deceased), of the relevant lands did not fail due to non-registration pursuant to s. 51(2) of the Registration of Title Act, 1964. The transfer was effective to vest the equitable estate in those lands in Sean Roohan such that only the legal title to the lands remain vested in Peter Roohan at the date of his death.

(b) The question posed in the special summons at sub-para. (b) is only required to be answered in the event that the answer to question (a) is positive. As I have not answered question (a) positively, it follows that I do not need to formally answer question (b). That question asks whether the lands remained part of Peter Roohan's estate as of the date of his death on 24th September, 2012. In light of the conflict of evidence between the parties on potentially relevant issues I do not regard that question as appropriate for determination in proceedings by way of special summons. Further I should observe that, were it necessary to answer that question, I would, in any event, have declined to do so as the answer must depend on a range of disputed factors on which the court would be required to hear evidence before coming to a conclusion. As the three persons most intimately involved with the devolution, possession, occupation and farming of the Clyhore lands over the last twenty-four years are all now deceased, it would not, in my view, be possible for the court to make any meaningful decision on these issues. The delay on the part of the plaintiff in raising these issues has, unfortunately, created such a degree of prejudice to the person now interested in defending them (i.e. the personal representative of Andrew Roohan's estate, who is also his widow) that it is no longer possible for a court to fairly determine these issues. Fortunately, I do not have to decide this case by declining to consider this issue as the issues raised in the special summons can be and have been determined by virtue of the answer given to question (a).