# THE HIGH COURT

**[2023] IEHC 204**

**Record No. 2015/59M**

**BETWEEN**

**C.D.**

**APPLICANT**

**-and-**

**B.B.**

**RESPONDENT**

**JUDGMENT of Ms. Justice Stack delivered the 24th April, 2023.**

## Introduction

**1.** This is an application brought by the applicant's solicitors pursuant to Order 7, rule 3 of the Rules of the Superior Courts, seeking liberty to come off record and is made both in unusual circumstances – where the above proceedings have already been at hearing for 19 days – and on an unusual basis – where the applicant, in the course of the trial, lost her capacity to give instructions such that the applicant's solicitors' retainer has been terminated as a matter of law.

**2.** Order 7, rule 3 (1) of the Rules provides as follows:

*"Where a solicitor who has acted for a party in any proceedings has died or become bankrupt or cannot be found or has failed to take out a practising certificate or has been struck off the roll of solicitors or has ceased to act for the party, and the party has not given notice of change of solicitor or notice of intention to act in person in accordance with the provisions of rule 2, any other party to the proceedings or (where the solicitor has ceased to act) the solicitor may, on notice to be served on the first-mentioned party, personally, or by letter addressed to his last-known place of residence, unless the Court otherwise directs, apply to the Court for an order declaring that the solicitor has ceased to be the solicitor acting for the first-mentioned party in the proceedings, and the Court may make an order accordingly."*

**3.** Essentially, the applicant's solicitors say that their retainer has been terminated as a matter of law by reason of a supervening incapacity of the applicant, that is, occurring since the commencement of the trial, and they have therefore *"ceased to act"* within the meaning of Order 7, rule 3 and should be granted liberty to come off record.

**4.** The application is brought by way of Notice of Motion in these proceedings, which are a claim by the applicant that she is the *"qualified cohabitant"*, within the meaning of s. 172(5) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010, of the Deceased, and in which the applicant seeks *"proper provision"* from the Estate of the Deceased pursuant to s. 194 of the 2010 Act. The Deceased died some months after the commencement of the Act on 1 January, 2011, leaving a very valuable Estate which comprises a series of trusts in favour of his children. The applicant claims that she was in a longstanding intimate and committed relationship with the Deceased for a period of over 30 years prior to his death, but, despite the fact that the Deceased's Estate is a very valuable one, his Will made no provision for the applicant, although she is specifically mentioned in the Letter of Wishes accompanying the Will.

**5.** It is not necessary to go into the detail of that Letter of Wishes, which obviously is not legally binding, but suffice it to say that the applicant was described as his *"assistant"* and the Deceased stated that she should remain employed in his companies. He recommended that she be paid a salary of €40,000 per annum and this was paid for a time after his death but has not paid for some years. He also stated that, while the applicant should not have any interest in the extensive property in which the applicant claims they cohabited, she should have rights equivalent to a *"non-exclusive right of residence for her life"* in that property. The applicant was also named as a co-Executor of the Estate, along with the respondent, but has renounced her rights as Executrix in order to bring these proceedings.

**6.** In addition to these proceedings, which were brought just within the statutory period of six months from the issue of a Grant of Probate in the Estate, the applicant in 2016 also brought proceedings alleging oppression pursuant to s. 212 of the Companies Act, 2014, and seeking orders restraining the removal of her as a director in a company originally run by the Deceased ("the Company Law Proceedings").

**7.** In 2021, the respondent, in his capacity as Executor of the Deceased's Will, sought possession of the property in which the applicant had continued to live since the death of the Deceased ("the Possession Proceedings"). These, along with the application for proper provision, were listed before me in June, 2021. An indication of the protracted and contentious nature of the proceedings is that this is the fourth written judgment in the case — notwithstanding that the trial which has already run for 19 days, has in essence only just got started, as I understand there are approximately 30 witnesses yet to be heard.

**8.** Although a Notice of Motion has issued only in these proceedings, the motion seeks liberty to come off record in the Company Law Proceedings and the Possession Proceedings also. It should be noted that the Possession Proceedings are relatively straightforward and, while these have adjourned, will presumably turn on the outcome of these Cohabitation

Proceedings and whether it is found that the applicant is entitled to provision out of the Estate and in particular whether such provision should include a right for the applicant to remain in possession of the property.

**9.** I will return to the question of whether the applicant's solicitors are entitled to come off record in the Company Law Proceedings and the Possession Proceedings at the conclusion of my judgment, after dealing with the application insofar as it relates to these Cohabitation Proceedings.

**Timeline of proceedings**

**10.** Although the Deceased died in 2011, no Grant was extracted until 2015 which meant that no application pursuant to s. 194 could be made until after that time. The special summons was ultimately remitted to plenary hearing, although, somewhat unusually, the parties did not exchange pleadings prior to calling the plenary matter on for trial.

**11.** In any event, it was called on for ten days on 8 June, 2021. Of the 19 days of hearing so far, approximately 15 have been spent on the applicant's evidence, and approximately 12 of these have been spend on cross-examination of the applicant. That comprises some time spent in recalling the applicant for cross-examination due to the voluminous nature of the documentation introduced on behalf of the applicant for the first time in re-examination.

**12.** In addition, half a day has been spent on legal submissions as to the applicability of the 2010 Act, one on an unsuccessful attempt to agree the admissibility of documents produced by the applicant in the course of the hearing, and approximately two on calling witnesses in support of the applicant's contention that she was in a committed relationship with the Deceased for a period in excess of five years prior to his death. The witnesses included friends of the applicant and the Deceased and some of the Deceased's relations. This evidence will, I understand, be contradicted by other mutual friends and other relations of the Deceased.

**13.** On 8 July, 2021, an application to adjourn the trial was made, arising out of the applicant's solicitors' concerns about the applicant's capacity. I adjourned the matter to 27 July, 2021, and, in the interim, a Report on the applicant's capacity was provided by Professor Harry Kennedy, a well-known Consultant Forensic Psychiatrist, on 25 July, 2021, in which he gave his opinion that the applicant did not have capacity to give instructions for or to participate in the trial.

**14.** Where a person is lacking in capacity, proceedings may be maintained on their behalf by a Next Friend. Three possible persons were nominated by the applicant, including at least one family member, but, on being advised of the risk that they would have to bear the costs if the proceedings were unsuccessful, they understandably declined to act. Given the likely length of the proceedings, it appears that, although the applicant herself owns significant assets, these would not be sufficient to indemnify any Next Friend who might consent to act as such.

**15.** The applicant's solicitors then sought to apply for the appointment of a Next Friend on the basis that he or she would not be liable for the costs of the proceedings. I sat to deal with the matter in September, 2021, but was told that the respondent was objecting to my seeing that Report in full and the matter adjourned to October, 2021, and then to 2 November, 2021, in order to allow the parties time to agree redaction of the report. Those efforts did not succeed and on 2 November, 2021, I adjourned the matter to such judge as might be assigned in order to hear the applicant's solicitors' application. That application was heard by Egan J. in March, 2022, and she delivered judgment on 23 June, 2022 ([2022] IEHC 381). Having refused the relief, Egan J. then referred the matter to the Medical Visitor pursuant to s. 12 of the Lunacy Regulation (Ireland) Act, 1871, a provision which permits this Court to direct the referral of a person to a Medical Visitor. This contrasts with the more usual procedure where a Petition is brought pursuant to s. 15 of the 1871 Act on the basis of two independent medical reports

which express the view that the person the subject of the petition is unable to manage his or her affairs.

**16.** Subsequent to that referral, but before the Medical Visitor had carried out that assessment, the matter was listed before me on 27 July, 2022, on the application of the respondent. At that point, the respondent applied to have the evidence of three witnesses of very advanced years, who had been familiar with the Deceased and the applicant, heard as soon as possible. I ruled on 28 July, 2022, that I would prefer to hear the evidence of these witnesses as soon as possible and before the conclusion of the applicant's case, but could not do so in circumstances where it was contended by the applicant's solicitors, who were still on record, that they could not take instructions for the purposes of cross-examination. At this point, obviously, the Medical Visitor had not yet had the opportunity to assess the applicant and, essentially, the applicant's solicitors were awaiting the outcome of that process before taking any further steps relating to the alleged incapacity of the applicant.

**17.** The respondent also indicated that he intended to apply for permission to inform the insurer of the property that it was apprehended that the applicant was unable to manage her affairs and was the subject of proposed Wardship proceedings, as the respondent said this was a matter which he was obliged to disclose under the terms of the insurance policy. I gave liberty to issue a motion returnable for 29 August, 2022, on the basis that should the insurance on the property become void, that would entail very serious risks for the Estate.

**18.** In the interim, the Medical Visitor conducted an assessment of the applicant on 27 August, 2022, and, in a report dated 28 August, 2022, expressed her satisfaction that the applicant had capacity to make health and welfare decisions, and decisions relating to property and financial affairs. This report was filed in the High Court on 31 August, 2022.

**19.** At the hearing of the respondent's motion on 29 August, 2022, and, in response to an objection from the respondent that the applicant's counsel could not oppose the motions in

circumstances where it was contended that she could not get instructions due to the applicant's incapacity, the applicant's counsel indicated that the applicant's solicitors would issue a motion to come off record. This was done and the motion made returnable for 7 October, 2022.

**20.** The respondent has ultimately, in view of the conclusion of the Medical Visitor in the Wardship process, applied to adjourn his motion in relation to disclosure to the insurance company, and has contended that the applicant is of sound mind and that the proceedings should progress. Insofar as it is contended that the Report of the Medical Visitor is conclusive as to the applicant's capacity to give instructions and participate in these proceedings, I do not think this is correct as the issue of capacity is specific to the decision or process in which a person is engaged. However, it should be said that the respondent's fundamental position is that this application is a matter for the Court, to be determined on the basis of submissions from the applicant in person and counsel for the applicant's solicitors.

**21.** The applicant represented herself, therefore, in the course of this application to come off record. She has expressed a wish that the case proceed, has denied that she is lacking in capacity, and has indicated that if the motion is granted, she will try to get new solicitors.

**22.** However, I think it must be assumed that the applicant would find it extremely difficult to get new solicitors if I accept that she is lacking in capacity to give instructions and, indeed, even if the motion were moved for other reasons, it would be difficult for a litigant to obtain new solicitors and counsel 19 days into a lengthy trial. This is in addition to the fact that the logical consequence of finding that the applicant does not have capacity to give instructions to her legal team or to participate in the hearing must be that she would not have capacity to do so even if she gets new solicitors or even if she decides to represent herself. The claim would effectively be at an end and it would only remain to determine the costs of the trial to date.

**23.** It is not necessary for me, given the conclusions I have reached, to make any finding relating to costs but I note that the issue of costs is a frequent theme in the authorities on the

effect of a litigant either losing capacity while proceedings are pending or of incapacity of a client only coming to a solicitor's attention during the currency of proceedings, and there appears to be some authority for the proposition that the solicitor of an incapax litigant may become liable for the costs if they could reasonably have discovered the incapacity at an earlier time. However, in view of the conclusions I have reached, such issues do not arise at this time.

**24.** There is no doubt that the ongoing delay in the trial, which has been caused by the necessity to deal with the issues surrounding the concerns on the part of the applicant's solicitors as to the applicant's possible lack of capacity, risks significant injustice to the respondent. There is a risk to the fairness of the trial if it does not resume in a timely fashion. It is not disputed that at least one close relative of the Deceased died prior to the commencement of the trial, and there are now three further witnesses likely to have significant evidence as to the relationship between the applicant and the Deceased who are of advanced age.

**25.** As a consequence, when the matter was mentioned to me in October, 2022, I rejected the suggestion, made by the applicant's solicitors, that the trial could simply adjourn to await the enactment of the Assisted Decision Making Act, 2015, which was at that time in the process of undergoing very substantial amendment in the form of the Assisted Decision Making Act, 2022. At the for mention date in October, 2022, it was envisaged that the Act would be commenced in December, 2022, but it has subsequently transpired that the Act will commence on 26 April 2023.

**26.** I digress briefly at this point to say that, notwithstanding that the Act will commence in a matter of days, the process envisaged by the Act is to seek a declaration of incapacity in the Circuit Court, and it is very unclear as to when the Circuit Court would be in a position to deal with the application. I think I have to assume a delay until at least the autumn and that is possibly an optimistic assumption given that there may be a very large number of applications which require to be made as a matter of urgency once the Act is commenced. Given the risk of

injustice to the respondent, it is my view that the trial can no longer adjourn pending an application under that Act, given that almost two years has already passed since it was adjourned to allow the applicant's solicitors take such steps as they thought appropriate in response to their concerns about the applicant's capacity. Needless to say, it was not envisaged in July, 2021, that the trial would adjourn for such a lengthy period.

**27.** In the circumstances of this case, therefore, it is my view that the imminent commencement of the Act does not affect my view that there is an ongoing serious risk of injustice to the respondent if the issue is not determined in a timely fashion. The approach which I believe is fairest to all parties is to adjudicate on the applicant's capacity now on the basis of the available evidence and, given the conclusions I have reached on that point, to address any further application for adjournment on the basis that it is intended to make an application under the 2015 Act when the basis for such an application and the timing of its hearing are capable of being ascertained.

**28.** To return to the narrative of the proceedings to date, in view of my stated concern for the fairness of the trial, the applicant's solicitors indicated that they would proceed with their application to come off record. While the matters raised by the respondent in late July, 2022, had, of necessity, to be raised before me as the trial judge, the original motion for directions which had been issued by the applicant's solicitors and in which Egan J. had delivered the written judgment already referred to, and in the course of which Egan J. requested the medical assessment of the application pursuant to s. 12 of the 1871 Act remained adjourned. However, on 2 November, 2022, that motion was struck out. The matter was then mentioned before me from time to time with a view to asking Professor Kennedy to prepare an updated or supplementary report in light of the Medical Visitor's Report.

**29.** Unfortunately, it appears that Egan J. was not asked at any point during the currency of the motion for directions to determine any question relating to the redaction of Professor

Kennedy's report and, consequently, when this application to come off record was listed before me earlier this year, I did not have available to me any of the bases for Professor Kennedy's opinion that the applicant lacked capacity to give instructions for and to participate in the trial. For reasons stated below, that was evidently unsatisfactory. The problem having been identified, I gave an opportunity to the applicant's solicitors to seek to agree with the respondent if some lesser redaction could meet their objections to my seeing the report. As set out in more detail below, very little of that lengthy report has now been redacted, notwithstanding that the entire of it apart from the ultimate conclusions and opinion of Professor Kennedy were initially redacted in full.

**30.** It also became necessary to relist the motion for more extensive submissions, given the nature of the legal issues involved. Ultimately, having listed the motion on 13 January, 2023, 27 January, 2023, 10 February, 2023, 23 February, 2023, and 8 March, 2023, (some of these being for mention dates) the motion was eventually heard in full and I reserved judgment.

**31.** Before turning to consider the issues which I have to determine, I wish to point out that the applicant's solicitors have acknowledged the unusual nature of the application and also to say that, while it has resulted in a delay which is regrettable and which, to me at least, was completely unforeseen in July, 2021, they have acted at all times solely in response to *bona fide* concerns in relation to the applicant's capacity. It is of course entirely appropriate that solicitors would not ignore such concerns and would instead take whatever steps seem to be required in order to address them.

## The solicitor's retainer

**32.** Before turning to the evidence as to incapacity, it is necessary first to look at the legal principles relevant to the determination of a solicitor's retainer. The seminal authority on this point is *Underwood v. Lewis* [1894] 2 Q.B. 306, in which it was held that, in a common law

action, *"it seems obvious that the law must imply that the contract of the solicitor upon a retainer in the action is an entire contract to conduct the action to the end"* (*per* Lord Esher M.R. at pp. 309-310).

**33.** The notion of an *"entire contract"* is vividly illustrated by the analogy drawn by Jessel M.R. in *Re Hall and Barker* (1878) 9 Ch. D. 538, at 545, where he stated:

*"If a man engages to carry a box of cigars from London to Birmingham, it is an entire contract, and he cannot throw the cigars out of the carriage half-way there, and ask for half the money; or if a shoemaker agrees to make a pair of shoes he cannot deliver one to you and ask for half the price."*

**34.** In general, therefore, where a solicitor agrees to conduct an action on behalf of a client, he or she must stay on record to the end of the trial. This contract to conduct proceedings on behalf of a client can, therefore, only be determined for reasonable cause (such as a refusal by the client to pay necessary disbursements made on his or her behalf, or where a client insists in the course of a trial that the solicitor take some dishonourable step).

**35.** By contrast, *Underwood v. Lewis* is also authority for the proposition that similar restrictions do not apply during the pendency of an action, a solicitor is entitled to decline to act further for the client therein, provided he gives reasonable notice to the client of his intention to decline to act further, so as to enable the client to obtain the services of another solicitor (see p. 307).

**36.** In *O'Fearail v. McManus* [1992] 2 ILRM 81, the Supreme Court (*per* O'Flaherty J.) granted liberty to come off record to solicitors instructed by an insurance company for a defendant in a personal injuries action where the company, after instructing the solicitor in question to deliver a defence, decided that the cause of action was not one covered by the insurance policy. This Court (Johnson J.) had refused to permit the solicitor to come off record, saying that solicitors as officers of the court should be slow to take any step in the proceedings

until they were satisfied that their instructions were as complete as possible and that the insurance company should have investigated the circumstances of the accident more thoroughly before instructing solicitors to act.

**37.** The Supreme Court agreed but added (at p. 83) that it would be a *"forced form of liaison"* to say that the solicitor should continue to act. There it was clear that the insurance company had in fact repudiated and any issue as to the correctness of that was a matter to be determined in other proceedings. There was no doubt that the solicitor had no instructions.

**38.** It does not appear that that case had come to trial or even that it had gone much further than delivery of a defence, which is quite a different situation to what pertains here, where the application is being made mid-trial. Furthermore, in that case, it was the instructing client (the insurance company under the doctrine of subrogation) who was terminating the retainer. In this case, the applicant wishes her solicitors to continue to act for her. It is therefore important to note that, even in that case where it was the client who was terminating the retainer, the Supreme Court specifically stated (at p. 82) that O.7, r.3 gives the courts *"a wide discretion"*. They also granted the relief strictly on condition that the insurance company would pay the costs of all parties.

**39.** In the circumstances of this application, where the trial has started and a significant amount of evidence has been heard, I am satisfied that these proceedings are ones in which, if the applicant's solicitors were to seek to terminate the retainer, they would face an uphill struggle to establish that they were entitled to do so. It is difficult to see how notice of such termination given after several weeks of a plenary action could be reasonable, save, perhaps where the client attempts to instruct the solicitors to take a dishonourable step in the course of the trial. In fairness to the applicant's solicitors, they explicitly acknowledge that the application they are making is unusual and it should of course also be acknowledged that

solicitors must be cautious to take all necessary steps should concerns as to a client's capacity arise.

**40.** It should be stressed, of course, that the applicant's solicitors have put forward the application, in substance, on an entirely different legal basis. Although the entitlement to terminate a retainer for good reason and on the giving of reasonable notice has been referred to in the written submissions filed, it in fact has been moved on the basis that the retainer is being terminated, not by notice given by the applicant's solicitors, which would require an examination of whether they were entitled to give that notice, but by reason of the operation of law. Essentially, it is submitted that the applicant lacks capacity and that, as a consequence, their retainer has been determined as a matter of law.

**Termination of a solicitor's retainer by reason of lack of capacity on the part of the client**

**41.** Moving to situations where doubts emerge about the capacity of a client to give instructions, the starting point appears to be *Drew v. Nunn* (1879) 4 Q.B.D. 661, where the plaintiff sought to sue the defendant for goods bought by the defendant's wife during a period in which the defendant had clearly not been of sound mind and indeed had been detained in an asylum. The issue for determination was the circumstances in which a third party can hold a person liable for contracts concluded by that person's agent at a time when the principal lacked capacity, and the case proceeded upon an assumption that the contract of agency is terminated automatically, as a matter of law, by the incapacity of the principle.

**42.** The applicant's solicitors also referred me to *Yonge v. Toynbee* [1910] 1 K.B. 215, which concerned the conduct of proceedings by solicitors, but ones which never reached trial. The solicitors originally had the defendant's authority to act for him, but, before the relevant proceedings were instituted, the defendant was lawfully detained as being of unsound mind. Nevertheless, the solicitors entered an appearance, delivered a defence, and participated in

interlocutory applications which put the plaintiff to expense by way of incurring the costs of an action which was being defended without authority. The issue in the case is whether the solicitors should be personally liable for the plaintiff's costs, given that they had the means to discover their client's lack of capacity from a time prior to the institution of proceedings. (In this respect, the approach was similar to that of the Supreme Court in *O'Fearail v. McManus*.)

**43.** Those cases concern the circumstances in which a third party can rely on the authority of an agent where it is subsequently found that the principal lacked capacity at the time of the contract with the third party and they proceeded on an assumption that the authority of the solicitor had been terminated by operation of law. That assumption was probably correct given that, in those cases, the incapacity seems to have been both obvious and not confined to a lack of capacity in relation to a specific act or transaction. In *Yonge*, for example, the client had been involuntarily detained as a result of his incapacity, and in *Drew v. Nunn*, the Court of Appeal confined its comments to cases of serious and obvious mental illness: see Brett L.J. and Bramwell L.J. at pp. 669-670, respectively.

**44.** In Irish law, the situation was clarified as recently as *Re TH (A Ward of Court)* [2022] IECA 228, at para. 16, where it was clearly held that where a person was admitted to Wardship, then the ward would, by operation of law, cease to be a client of the solicitors.

**45.** In *Blankley v. Central Manchester and Manchester Children's University Hospitals NHS Trust* [2015] EWCA Civ 18 it was claimed that the contract of retainer as between solicitor and client was subject to a different principle from that relating to the authority of the solicitor in his or her dealings with third parties, and did not terminate automatically on the loss of capacity on the part of the client. Ultimately, the retainer in that case was found to have been drafted in contemplation of a supervening incapacity and it was therefore not frustrated. As such, *Blankley* probably turns on its own facts and does not apply here.

**46.** The applicant's solicitors, as I understand their written submissions, accept that the retainer does not terminate automatically and it seems that they are thereby adopting the concession in *Blankley*. Whether that concession is good law in this jurisdiction, given the Court of Appeal judgment in *Re T.H.*, and given that the client in *Blankley* had been the subject of proceedings before the Court of Protection in England and Wales, remains to be seen.

**47.** I do not think anything turns on that for present purposes, however, because the applicant of course was found by the Medical Visitor to be of sound mind and capable of managing her own affairs and therefore falls into a less clear case than that of Wardship, which was the subject of the decision in *Re T.H.* Where, as appears to be the case here, no provision has been made in the retainer for what is to happen if a supervening incapacity arises, I think the applicant's solicitors are correct in stating that the question is *"whether such retainer has become impossible to perform given the client's incapacity and the particular circumstances of the case"* (written submissions, para. 24.vii). If a client is incapable of appreciating the transaction or litigation in respect of which the solicitor was retained, it is difficult to see how they could take any instructions.

**48.** I think that the applicant's solicitors are also correct in stating that capacity must be assessed from the point of view of litigation capacity and I would add that this must be assessed by reference to the particular proceedings.

**49.** Finally, I think the applicant's solicitors are correct in submitting that the comments of the English Court of Appeal in *Blankley* which are to the effect that, even where specific provision is not made for what is to happen in the event of a supervening incapacity, the solicitor's retainer would continue to permit applications which were necessary in consequence of the incapacity. The applicant's solicitors rely on that *dictum* in support of the proposition that they had authority to move the application before Egan J. It certainly would support steps to appoint a Next Friend in the usual way.

**50.** As I understand it, the applicant's solicitors essentially say that, while obviously the applicant has not been admitted to Wardship, they are no longer able to take instructions due to the applicant's incapacity. I would accept that, even in the absence of admission to Wardship, the solicitor's retainer would terminate on the client lacking capacity to give instructions in the proceedings, though I think this case demonstrates the increased uncertainty involved in identifying incapacity in the absence of the type of general loss of capacity which would have given rise to Wardship in the past.

**51.** In any event, the real issue for determination is whether the applicant is no longer capable of giving instructions so as to allow her solicitors to act for her in the proceedings.

**Whether the applicant lacks capacity**

**52.** The capacity to give instructions for the purposes of proceedings was considered in *Nolan v. Carrick* [2013] IEHC 523, in which Dunne J. approved the approach of the English Court of Appeal, in *Masterman-Lister v. Brutton and Company (Nos. 1 and 2)* [2003] 1 W.L.R. 1511, which she identified as follows (at pp. 45-46 of her judgment):

> *"Capacity requires an ability to make and communicate, and where appropriate give effect to, all decisions required in the context: this in turn requires the ability to recognise a problem, obtain and receive, understand and retain relevant information, including advice; to weigh the information (including that derived from advice) in the balance in reaching a decision, and communicating that decision. In short, it requires an ability to understand the transaction when it is explained by advisers. Although the court should have regard to the complexity of decisions under consideration it should not have regard to its own valuation of the gravity of those decisions….*

*All adults are presumed to be competent to manage their property and affairs. The contrary has to be proved by those alleging incapacity; the fact that an individual was at some stage incompetent does not displace this requirement by way of the presumption of continuance, though clear evidence of incapacity for a considerable period of time may mean that the burden of proof is more easily discharged. Medical evidence will almost certainly be required.*

*In determining capacity under the rules of court, it is necessary to have regard to time and context, namely the particular litigation: in contrast, the court of protection has to look to the totality of the property and affairs of the alleged patient and has to have regard to the complexity and importance of that person property and affairs. The issue of the specific nature of the test means that it is possible to have capacity to make all decisions related to litigation, but not to decide how to administer an award made. Consequently, a decision as to capacity in one context, does not bind a court which has to consider the same issue in a different context. A person may be a patient for purpose of RSC O. 80, r. 1, or CPR 21.1 (a need litigation friend), but not for the purposes of s. 94 (2) of the Mental Health Act 1983 (Court Protection), and visa versa; any medical witness asked to assist in relation to capacity needs to know the area of the alleged patient's activities in relation to which his advice is sought."*

**53.** Dunne J. also cited (at p. 47) the judgment of Chadwick L.J. where he stated (at para. 58 of his judgment):

*"The authorities are unanimous in support of two broad propositions. First, that the mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second, that what is required is the capacity to understand the nature of that transaction when it is explained."*

**54.** Dunne J. applied those principles to the case before her and identified (at pp. 53-54) what she had to consider as:

> *"Was the Defendant's cognitive ability impaired to the extent that he did not sufficiently understand with the assistance of such proper explanation from legal advisers and such experts as the nature of the case may have required, the issues on which his decision was likely to be necessary, the nature and effect of the decisions made in the course of the litigation, and the consequences of the decisions made by him for the litigation at that time?"*

**55.** In *Nolan v. Carrick*, the applicant had been the subject of an award of damages following a civil trial which was conducted in November, 2012, and sought to set aside the judgment and order, and to order a new trial on the basis that he lacked the mental capacity to properly defend the actions. He had suffered a head injury in a road traffic accident in June, 2012.

**56.** The medical evidence was to the effect that the applicant suffered from mild cognitive impairment and he had obtained a low score (it seems to have been 74/100) in the Addenbrooke's Cognitive Examination-Revised test and 24/30 on the Mini-Mental State Examination (MMSE). He had short term memory problems and was inclined to wander off point and had to be brought back. Both experts agreed that there was a mild evolving dementia. The MacCat-FP test was administered and it showed a possible problem on the part of the applicant with practical reasoning. A Consultant Forensic Psychiatrist was of the view that the applicant was impaired in all domains and a Consultant Psychiatrist and Neuro Psychiatrist expressed the opinion that the applicant did not have the ability to represent himself or defend himself in legal proceedings due to a combination of factors and that this had been the case at the time of the civil trial.

**57.** The applicant had consented to his solicitors coming off record in the proceedings on the day when the cases were first listed for hearing. He did not arrange for alternative representation, nor did he arrange for anyone on his behalf to attend court in circumstances where he was housebound. He was informed that the actions had not adjourned but proceeded with hip replacement surgery without arranging for anyone to turn up on his behalf, and did not appeal the decision not to adjourn the cases.

**58.** Dunne J. accepted the medical evidence that the applicant had a mild cognitive impairment, and that other factors such as depression and pain impaired his ability to function on a day-to-day basis. However, she also noted that the applicant had participated in a criminal trial which did not conclude until after his accident and in respect of which he had been represented by experienced criminal solicitors. No issue as to his fitness to plead had been raised. Dunne J. also noted that the applicant had been able to give a clear and detailed account of the facts and background to the litigation to the various experts who examined him.

**59.** Interestingly, one of the areas where capacity to undertake a legal transaction is frequently an issue is in the area of testamentary capacity, where the transaction-specific test in *Banks v. Goodfellow* (1870) L.R. 5 Q.B. 549 has been accepted as good law in this jurisdiction. That test was applied in *Scally v. Rhatigan* [2011] 1 I.R. 639 in which, again, notwithstanding at least some medical opinion to the contrary, Laffoy J. expressed herself satisfied that an obviously impaired testator who suffered from motor neuron disease, nevertheless had capacity to make his will. The medical evidence was that, at the time of making his will, his treating consultant was of the view that the deceased had not only balance difficulty, parkinsonism, progressive speech loss (he was mute), swallowing difficulty, muscle wasting, but also had cognitive difficulties which were *"characterised by frontal lobe executive dysfunction including slowness in thought process, some deficits in mental flexibility and sequential thinking"* (see the extract from the medical opinion at p. 653).

**60.** It should be noted that this did not lead the deceased's treating doctor to conclude that he lacked capacity, but a conflicting medical opinion was in evidence in the subsequent proceedings to determine the validity of the will. This opinion was based in part on neuropsychological test findings conducted by a doctor who did not give evidence which concluded that, on a range of formal objective tests to evaluate specific aspects of executive dysfunction there was clear evidence of significant impairment. The tests disclosed evidence of *"clear deficits in mental flexibility, planning, sequential thinking, and the higher order regulation of goal directed behaviour. The latter was particularly evident on tests that require regulation and self monitoring while switching from one task to another and adhering to rules"* although memory *per se* was not a problem. (See para. 58.)

**61.** I have referred to some of the evidence in those cases for the purpose of demonstrating that cognitive difficulties are not in themselves sufficient to establish a lack of capacity albeit that they are of course helpful in considering the legal test for incapacity, and the more severe they are, the more likely they are to establish incapacity without the need for other evidence.

**Application to this case**

**62.** One of the striking features of the application is that it appears to be asserted that the incapacity first arose within a short period of the case commencing. It does not appear that there were any concerns as to the applicant's capacity to instruct until a consultation which took place after cross-examination had concluded.

**63.** The solicitor in the applicant's legal team dealing with the litigation has sworn two affidavits. The first was sworn on 6 September, 2021, and at para 6, she states that it was during the applicant's evidence that she became concerned about the competency of the applicant, *"with such concerns intensifying following several discussions which I had with the Applicant*

*upon the conclusion of the cross-examination"*. She goes on to say that she did not have concerns prior to the hearing and her concerns related to *"whether the Applicant properly and fully understood advices that were given to her in the matter; properly and fully understood the consequences and effects of her instructions; and whether she properly and fully understood the process that she was involved in."* She goes on to say that similar concerns were articulated separately and jointly by junior and senior counsel.

**64.** This solicitor again confirms at para. 6 of her affidavit of 16 January, 2023, that she did not have any concerns regarding the applicant's capacity prior to the commencement of the hearing. She goes on to say that concerns arose during the lengthy cross-examination when the applicant appeared at times to be confused and highly emotional. However, the applicant's solicitor explicitly accepts that cross-examination can be a stressful experience and it is not unusual for the process to produce confusion or upset, particularly in such an emotive case.

**65.** It appears therefore that the real concerns arose, not from cross-examination itself, but in consultation with the applicant immediately after the conclusion of the cross-examination, at which point the applicant appeared to be *"very confused and highly distressed"* and engaged with her legal team *"in a wholly different manner to our previous interactions with her up to the beginning of the cross-examination and there appeared to have been a marked decline in her mental state."* No evidence as to any interactions between the applicant and her legal team since that date has been put on affidavit by the applicant's solicitors, other than that the applicant has, in this motion, produced a "*Statement"* which she has purportedly sworn and which I have accepted in view of the fact that she is, for the purposes of this motion, unrepresented. This Statement makes certain criticisms of the applicant's solicitors to the level of information given to the applicant surrounding both her examination by Professor Kennedy and the reasons why a Next Friend was sought to be identified.

**66.** It should be pointed out that the applicant's solicitors have denied this and have said that they have at all times sought to carefully and fully explain what was happening in these proceedings to the applicant. However, in circumstances where, as I understand it, the applicant wishes her solicitors to continue to act for her, I do not think that is the most pertinent aspect of the Statement. The issue which strikes me is that, notwithstanding the fact that the Statement is not in compliance with O.40, and for which I think the applicant acting in person in this application can be excused, the Statement does not demonstrate any lack of understanding by the applicant of the significance of this application or its implications for her.

**67.** On the contrary, she says that her solicitors have acted for her for over ten years without ever raising any concern about her *"comprehension or conduct"*. This is not denied. Essentially, the applicant says that, because she is 78, sometimes matters need further explanation but that she understands the information and advice she is receiving. She also points out that she is the client and *"while I listen and acknowledge their advice, decision on any considerations or offers relating to my case are at my discretion."*

**68.** Furthermore, there is simply no evidence on affidavit from the applicant's solicitors as to interactions with the applicant other than that which took place immediately after the conclusion of her cross-examination from which it could be inferred that the applicant does not understand the issues in the proceedings. It is, moreover, clear from the applicant's Statement that she understood, for example, that had any one of the three nominated people acted as her Next Friend, they could have become liable for the costs of the proceedings.

**69.** In addition, two reports of Professor Kennedy have been put before the Court. The now largely unredacted principal report of 25 July, 2021, first became available to me by way of an exhibit to an affidavit of a partner in the applicant's solicitors, which was sworn on 22 February, 2023. Prior to that, the entire report was redacted save for the conclusion, with the result that more than 18 of the 21 pages were unavailable to me. The version exhibited two months ago

redacts only four paragraphs and a sentence in three other paragraphs. Given that the report consists of 170 paragraphs together with a 13 paragraph "Opinion" giving Professor Kennedy's conclusions, which had already been disclosed, it will be seen that the vast majority of the report seems to have been unnecessarily redacted from the outset. Whether this was a result of objections from the respondent or assumptions by the applicant's solicitors as to the requirements of the author is unclear and does not need to be determined here. I simply make the point that there is vastly more information now available to me than at any time prior to late February, 2023.

**70.** I have also been furnished with an updated report of Professor Kennedy, dated 18 November, 2022, ("the Supplementary Report") prepared after sight of the Report of the Medical Visitor, Dr. Camilla Curtis, dated 28 August, 2022. The Report of the Medical Visitor was not provided for the purposes of these proceedings but was exhibited to an affidavit sworn in these proceedings on 21 December, 2022. I understand that it was not exhibited previously because an application had to be made to the President of the High Court to release it for disclosure in these proceedings.

**71.** It should be noted that the test for capacity is a legal one rather than a medical one and there is no evidence from any person who is close to or acquainted with the applicant in her daily life. Furthermore, the evidence of the solicitor dealing with the litigation is confined to the averments set out above. The entire application therefore rests on the opinion expressed by the medical expert retained by the applicant's solicitors in light of the concerns identified above. It is therefore necessary to consider in some detail that opinion and the matters on which it is based.

**Principles material to consideration of expert evidence**

**72.** Before setting out the nature of that evidence, it is appropriate to note some comments of the Court of Appeal in a very recent case, *Duffy v. McGee* [2022] IECA 254, as to the correct approach to expert evidence. I would like to stress from the outset that the lack of impartiality by the proffered expert opinion in that case raised issues which, in the main have no relevance to this case. There is no question whatsoever about the independence and impartiality of the medical opinion on which this application is based.

**73.** Nonetheless, the application was advanced on the basis that there was uncontroverted medical opinion in this case as to lack of capacity. Collins J. at para. 18 reiterated that the Supreme Court had made it clear in *Donegal Investment Group Ltd. v. Danbywiske* [2017] IESC 14, [2019] 1 I.R. 150 that even uncontroverted expert opinion does not have to be accepted by a court.

**74.** In this case, there was also, as set out above, a long delay before the body of the principal report on which the application was founded was disclosed to me by way of exhibit. At para. 19 of *Duffy v. McGee*, Collins J. states:

*"To properly perform its function, the court must be able to understand and engage with the evidence, which in turn requires that experts should sufficiently explain their opinions and the basis for them."*

**75.** He also quoted with approval the following *dictum* of Charleton J. in *Flynn v. Bus Éireann* [2012] IEHC 398, at para. 9, that the entitlement of experts to give their opinions:

*"is predicated upon also informing the court of the factors which make up their opinion and supplying to the court the elements of knowledge which their long study and experience has furnished to them whereby they have formed that opinion so that, in those circumstances, the court may be enabled to take a different view."*

**76.** The furnishing of a conclusion to a lengthy report, which advances an opinion on the ultimate issue I have to decide, could never therefore have legitimately persuaded me to find

that the applicant lacks capacity. It was always imperative that I would see the body of the report in order to identify the basis on which the opinion was offered and, if necessary, to differ from it. A report asserting lack of capacity to continue proceedings requires detailed consideration for the reasons identified by Charleton J. in *Flynn v. Bus Éireann.*

**77.** Bearing those principles in mind, I now turn to consider the medical evidence submitted which consists of the two reports of Professor Kennedy and the report of the Medical Visitor, which, although not prepared for the purposes of this application, was obviously relevant to the issue of capacity.

**The medical evidence relied upon by the applicant's solicitors**

*i. The Principal Report of Professor Kennedy of 25 July 2021*

**78.** Professor Kennedy commences his report by stating that he has been asked to give a psychiatric opinion regarding the applicant's functional mental capacity to give instructions to her legal team and to participate in her trial. He says that, specifically, he has been asked to provide a psychiatric opinion regarding the applicant's ability to understand, to reason and to appreciate the choices available to her and to appreciate the importance of the decisions that must be made, to communicate her decision and in addition, her ability to follow evidence at trial and to participate by giving instruction to her solicitors and legal team in the course of the trial. He then says he has been asked particularly to address the applicant's functional mental capacity to give instructions, to receive advice, and to participate in litigation.

**79.** Large portions of the report – approximately the first nine pages - consist of the taking of a history from the applicant of her upbringing and life in general and does not contain any significant comment in relation to capacity, with the possible exception of a note that the applicant tended to digress in order to hide difficulties in recall.

**80.** Under the heading *"Mental State on Examination"*, it does not appear that the interview revealed anything unusual. In particular, at para. 11.13, Professor Kennedy states:

> *"Concerning abnormal beliefs and interpretations I could not elicit anything to suggest ideas of reference or persecution."*

**81.** In section 12 of the Report, Professor Kennedy relates the results of Bedside Cognitive Testing. The applicant scored 15/30 on the Montreal Cognitive Assessment (MOCA) and he states that she had particular difficulty with a test of executive ability, the number-letter trail-making test, which Professor Kennedy explains tests "fluid" ability, the ability to solve problems by reasoning about them, to spot patterns in information and to use that to solve the problem.

**82.** The applicant scored poorly on a test of visuospatial ability to perceive and solve visual problems. I would note in passing that the relevance of this to the ability to give instructions in the litigation has not been explained.

**83.** The applicant performed well on an immediate recall test but Professor Kennedy noted impaired delayed recall, which he said was relevant to the applicant's ability to participate in her trial *"for example to be reliable when giving evidence and being cross-examined"*.

**84.** On a test of abstraction, the applicant displayed an impaired ability to understand information and to reason about it.

**85.** On the Addenbrooke's Cognitive Examination (ACE-III, Version A), the applicant scored 84/100, and 18/18 on tests of attention including immediate recall. She scored 20/26 for memory, 11/14 for fluency, 24/26 for language ability and 11/16 for visual spatial ability. It was explained that this gave a score of 84 but that a score below 88 gives a 94% sensitivity and 89% specificity for dementia, which was *"suggestive but not diagnostic"*.

**86.** In conclusion on these cognitive tests, Professor Kennedy said there were deficits in executive function and attention, particularly when combined with impaired delayed recall memory.

**87.** In section 13, Professor Kennedy says that he examines *"Functional Mental Capacities in relation to the present court proceedings"*. In para. 1 of this section, Professor Kennedy asked the applicant to explain the purpose of the proceedings and she said it was *"to prove [she] was in an intimate, loving and committed sexual relationship with [the Deceased]"*. This is plainly the key issue in the case, accurately stated.

**88.** In the next paragraph, the applicant stated her interpretation of her relationship with the Deceased, referring to certain objective circumstances (she questions why anyone would think she would give up a career for a man she was not in a relationship with) and events which she says point to an intimate relationship rather than one of companionship, namely that she lived in the main property where the Deceased resided rather than one of the other houses available to the Deceased, and that she spent most Christmases over a period of in excess of 30 years with the Deceased, rather than with her family to whom she is obviously close.

**89.** Without commenting in any way on whether her interpretation of these circumstances and events will be found to be correct or not, one could not say there is anything irrational in the viewpoint expressed and it displays, in my view, an understanding of features of the evidence which will be material to the issues I have to decide.

**90.** Professor Kennedy then sets out some hypothetical questions that he put to the applicant . These are related under the heading *"Moral Reasoning"*. There is nothing obviously irrational in the applicant's replies to the scenarios put to her and Professor Kennedy does not seem to draw any conclusions from them.

**91.** Professor Kennedy then turned to the applicant's functional mental capacities. Under the heading *"Understanding"*, Professor Kennedy asked the applicant a series of questions,

some of which were directed to what the applicant would do *"if the lawyer explained something to her and they seemed to have it wrong"*, to which the applicant said she would tell them they were not in tune with each other. In response to the question what she would do *"if the lawyers told her something that she did not believe"*, the applicant said she would put to them *"the sense of my own situation and I'd convey that to them. It doesn't take Einstein to understand my situation."* This seems to be a reference to the fact that the case revolves around ordinary human behaviour, familiar to any adult, and turns on the question of whether the applicant and the Deceased were in an intimate relationship with each other, rather than merely one of companionship.

**92.** Of course, later in the proceedings, should the applicant succeed in proving that the relationship was an intimate one, there will be an examination of the applicant's own assets and those available to the Estate for the purposes of examining whether proper provision was made and, if not, what provision should now be made. These issues are not explored in any way in Professor Kennedy's report and the only reference to financial and property matters is in the Medical Visitor's report, which I discuss below. However, I pause here to say that there is nothing in this section of the Report which suggests that the applicant is not familiar with the central issues in the case.

**93.** Under the next heading, *"Reasoning"*, Professor Kennedy asked the applicant certain hypothetical questions which seem to be directed to understanding the potentially negative consequences of certain decisions. These are posited first as if they occurred in a neutral situation and then as one involving choices in which the applicant had a sense of what was right and wrong.

**94.** In the neutral situation, the applicant indicated that she would go for the option where she would *"gain a lot with not much to lose"* (albeit that the most relevant option was that she would gain *"something"*, rather than *"a lot"*), but when she was asked to review her choice in

a situation where she had a strong sense of what was right and wrong in relation to the choices, she indicated that would make a difference and that she would choose what was best for her. When asked if she thought she was capable of making a mistake, she indicated: *"not when I would be sure of my situation"*.

**95.** She also indicated that she would undertake a risky operation if the alternative was worse, but that if she had a strong feeling, she wouldn't go ahead.

**96.** Perhaps of most relevance under this section is that the applicant expressed her own certainty that she knows how the case will turn out regardless of any advice she may have received from her legal team.

**97.** The report at p.15 them moves to an observation of the applicant's physical health which is not material other than that the applicant says that she was in pain while being cross-examined as she was awaiting a hip replacement operation, a matter which I recall being mentioned in evidence.

**98.** On the basis of the above tests and observations, Professor Kennedy concludes that the applicant has *"signs of cognitive impairment including impaired delayed recall, impaired executive functions for sequencing tests and other deficiencies apparent on two bedside screening tests."* He noted that the applicant used digressive and irrelevant anecdotes to cover for times when she was unable to cope with the cognitive burden of replying to complex questions posed and memory tasks.

**99.** He opines that the applicant is *"cognitively rigid"* which he says is a typical feature of cognitive impairments of a more global nature and that the applicant finds it difficult to take on board new information regarding *"old"* topics or changes in context and circumstances.

**100.** He concludes that the applicant holds strong moral dispositions and moral sentiments which she believes are universal, actionable and punishable, accompanied by strong emotional charges which Professor Kennedy says further contributes to impaired cognitive functioning in

the context of cognitive impairments and that the applicant *"is strongly morally outraged by her situation and sees this as so universally self evident that she cannot believe advice that runs contrary to her 'gut instincts'."*

**101.** Professor Kennedy concludes that the applicant had signs of cognitive impairment including impaired delayed recall, impaired executive functions for sequencing tasks and other deficits apparent on two bedside screening tests. He says these cognitive impairments were apparent even during a calm and positive interaction with good rapport and were evidenced in the applicant's use of digressive and often irrelevant anecdotes to cover for times when she was unable to cope with the cognitive burden of replying to complex questions posed and memory tasks.

**102.** He states that the applicant was emotionally labile during a long interview, i.e., she had repeated mood swings. This is familiar to me from observing the applicant under cross-examination. He is also of the view that she is cognitively rigid, finding it difficult to take on board new information regarding old topics, and that this arises from cognitive impairment.

**103.** He states that the applicant holds strong moral dispositions and sentiments, accompanied by a belief that these are universal, actionable and must be vindicated, that she is strongly outraged by her situation and may misperceive the behaviour of others both positively and negatively as a result.

**104.** Before turning to the other reports, I pause here to say that Professor Kennedy has identified difficulties with delayed (but not immediate) recall, a tendency to digress in order to cloak those difficulties, a tendency for emotional outbursts, and a refusal to accept advice contrary to her own views of a morally charged situation, specifically her treatment by the respondent in his capacity as Executor of the Deceased's Will.

**105.** Although Professor Kennedy goes on to conclude, by reference to the test for capacity to give instructions in legal proceedings, that the applicant does not have such capacity, the

body of his report does not, in my view, support that conclusion. There is no doubt that the cognitive difficulties set out in the report would have an effect on the applicant's ability to recall factual matters accurately, particularly under pressure in the witness box, and a reluctance to accept adverse advice from her lawyers due to her own strong belief in the correctness of her position, which she views in moral terms. Her objectivity is said to be suspect, as her view of others is based on whether their actions and beliefs align with her perception of her situation, which she views in moral terms.

**106.** However, it is not clear how it is said that the applicant does not understand the issues in the case, the matters on which she might be expected to give instructions, and the consequences of her of success or failure in the litigation.

**107.** Indeed, there is an allegation in the proceedings that the applicant has suborned a particular witness to give particular evidence which, if accepted as true, would be highly material to the issues in the case. If the respondent's allegation on this is correct, it would certainly reflect poorly on the applicant's honesty and credibility, but it would tend to demonstrate that the applicant is acutely aware of the nature of the evidence that is likely to help her succeed on the principal issue of whether the relationship between her and the Deceased was intimate.

**108.** The report arguably supports a conclusion that the applicant has a tendency to refuse to accept advice contrary to her own views as to the rights and wrongs of her situation. However, all legal professionals will be familiar with clients who refuse to take advice, even when the advice is itself well-founded and well-reasoned. But it does not follow from that, in my view, that the applicant does not appreciate what is at issue in the proceedings and litigants are entitled to take risks, should they so wish.

**109.** I also note that, in *Carrick v. Nolan*, Dunne J. cited with approval the judgment of Laffoy J. in *Fitzpatrick v. KF* [2009] 2 IR 7, 40, which concerned the capacity to refuse medical

treatment and where it was held, *inter alia*, that *"[i]n assessing capacity it is necessary to distinguish between misunderstanding or misperception of the treatment information in the decision-making process (which may sometimes be referred to colloquially as irrationality), on the one hand, and an irrational decision or a decision made for irrational reasons, on the other. The former may be evidence of lack of capacity. The latter is irrelevant to the assessment."*

**110.** Of course, the person should be able to weigh the consequences of taking those risks but there is nothing in the report, nor is there any evidence from the applicant's solicitors, that the applicant has failed to understand the risks of failure in the litigation, notably the potentially very extensive liability for the costs of a long-running trial. Even if she had, that is a risk which was, no doubt, identified prior to the commencement of proceedings. I do not think it was foreseeable that the applicant would be cross-examined for such a long time, but given that there are three sets of proceedings in total and a large number of witnesses, it should have been foreseen that the costs would be considerable. However, once the applicant understands this – and there is no evidence that she doesn't – then the applicant is entitled to take that risk and the willingness to do so is not evidence of lack of capacity.

*ii. The Supplementary Report of Professor Kennedy of 18 November 2022*

**111.** Turning to Professor Kennedy's Supplementary Report, which was prepared in light of the Medical Visitor's report and on the basis of another interview with the applicant, the first five and a half pages deal with introductory matters, principally the applicant's health and activities since she had last met Professor Kennedy.

**112.** Second 6 is headed: *"Mental State on Examination, 17th November 2022"*. And contains comments on the applicant's appearance and behaviour, speech, and mood. The only

matter of relevance which is disclosed under those headings is the applicant's tendency to digress into irrelevant matters.

**113.** Similarly, under the comments on the applicant's thoughts, the applicant makes reference to certain flamboyant characters that she claims to have known in her life in London as a young woman. Under the heading of *"Abnormal Beliefs and Interpretations"*, she reports, in response to a question as to whether she had ever been troubled by concerns that people were against her, that she was bullied in secondary school. Professor Kennedy notes that at several points in the interview that the applicant had referred to the possibility of ethical conflicts of interest amongst lawyers, a point to which I will return.

**114.** He also notes that the applicant had claimed a wider significance for her case for the betterment of others and this appears to be a reference to the applicant hearing about my judgment in October, 2021, ([2021] IEHC 684) to the effect that the 2010 Act applied to all deaths which took place after the date of its commencement. That judgment was not appealed and it is true to say that it is a precedent now for the application of s. 194 of the 2010 Act to all post-commencement deaths, even where some of the period of cohabitation occurred prior to commencement, so that the applicant is not necessarily wrong to say that her case will be of assistance to others in a similar position.

**115.** In section 7, Professor Kennedy comes back to *"'Bedside' Cognitive Testing"*, and states that the applicant declined to do the Montreal Cognitive Assessment. However, he conducted the Frontal Assessment Battery, a brief test for frontal dysexecutive forms of cognitive impairment. The applicant scored 1/3 on conceptualisation, 2/3 on lexical fluency (mental flexibility), but with the addition of a neologism, 2/3 on the motor series *"Luria"* test (programming), 2/3 on a test of conflicting instructions (sensitivity to interference), 3/3 on a test of inhibitory control (go no-go) and 2/3 on a test of prehension behaviour (environmental autonomy).

**116.** Overall, the applicant scored 12 out of a possible maximum of 18 on the Frontal Assessment Battery. A cut off score of 12 is reported to have a sensitivity of 77% and specificity of 87% in differentiating frontal dysexecutive type cognitive impairments from more global types of cognitive impairment. The applicant's score was, therefore, on the borderline.

**117.** Moving forward to his Conclusion, Professor Kennedy states that the applicant's cognitive impairments have not improved and appear to have worsened. On the occasion of the assessment on 17 November, 2022, he noted clinical evidence of perseveration (repetitiveness) and subtle language impairment (use of a neologism because of impaired word and name finding). He states that this prompted him to carry out a bedside test of frontal, executive function and the test result, along with clinical evidence of perseveration and word finding difficulty, is in keeping with his earlier assessment of impairments.

**118.** He then notes the applicant's apparent suspicion and distrust of collusion between lawyers and that she had expressed a false belief that her senior counsel had worked closely with the senior counsel for the other side in the past.

**119.** I interrupt to point out that the applicant confused her own barrister with a barrister with the same given name. This is a mistake that could perhaps be made by many people who suffered no cognitive deficiency at all. The real question is whether the applicant thought (wrongly) that her own barrister had worked closely with the opposing barrister in the past meant that there was some form of collusion.

**120.** Professor Kennedy relates the applicant's account of what occurred in court on 21 July, 2021, when the case adjourned. There is no issue about the accuracy of that account.

**121.** The first reference to collusion in the report is at para. 8.4 where Professor Kennedy writes:

*"Because of [the applicant's] description of the interaction between her barrister, the Judge and the [respondent's counsel] at the end of her 13 days of evidence, I asked [the applicant] if she meant that there was some collusion between the lawyers. [The applicant] replied, 'Professor Kennedy, I'm leaving that for another day.'"*

The applicant then proceeded to relate the history of her legal representation in the case. I think it is true to say that she displays a level of dissatisfaction with what has occurred but whether she is asserting collusion is not altogether clear.

**122.** My concern with both reports is that they do not identify, with reference to the litigation in question here, what the applicant is said not to understand about the case. In my view, these reports, read as a whole, do not establish on the balance of probabilities that the applicant does not understand the issues in the case, which are, broadly speaking, whether she was in an intimate relationship with the Deceased (as she claims and which she views as self-evident), and whether, as a consequence, she is not entitled to have provision made for her out of his Estate.

**123.** In fairness to Professor Kennedy, I think it is likely that such a conclusion could only be based on evidence from the applicant's own solicitors as to their interactions with the respondents, with consequent evidence as to matters the applicant did not understand or evidence as to a lack of appreciation of the issues in the case and the risks for her. Medical evidence is of course desirable and an important component of the examination of capacity in any circumstances, but in a case such as this where it is contended that there is a specific incapacity in relation to the ability to conduct and give instructions for the purposes of ongoing legal proceedings, the evidence of the instructing solicitors is important.

**124.** In *Carrick v. Nolan,* Dunne J. had specific regard to the fact that criminal proceedings before a jury in the Circuit Court were conducted by a reputable and highly experienced firm of criminal solicitors at the time when it was said that the applicant lacked capacity to conduct

civil proceedings and indeed where the evidence suggests that the applicant did not act in his own best interest. The evidence of lawyers who are fully appraised of the relevant proceedings and what they entail, in my view, is important evidence where incapacity of this nature is asserted.

**125.** The one issue highlighted by Professor Kennedy in his Supplementary Report as demonstrating a lack of understanding of proceedings is that the Medical Visitor reports that she informed the applicant that she had come to conduct the examination at the request of the Courts Service. This was explained to the applicant, including the process of Petition and Medical Affidavits that would usually precede a Medical Visitor assessment. The Medical Visitor then said that the applicant *"was unsure as to who the petitioner may have been, and which medical personnel would have completed examinations of her upon which to ground medical affidavits."*

**126.** Reading this, Professor Kennedy comments: *"I note that this apparent lack of understanding regarding affidavits and related processes is relevant to this present case concerning the functional mental capacity to understand legal advice and to give instructions concerning complex litigation."*

**127.** This is a very understandable comment in light of the usual proceedings undertaken when applying to make someone a ward of court. However, Professor Kennedy appears to have interpreted the applicant's questioning of who the petitioner may have been and how she may have been examined by medical personal prior to the examination of the Medical Visitor, as a lack of understanding of those processes. It appears that Professor Kennedy was not instructed that, in this particular case, the usual procedures for Wardship under s. 15 of the 1871 Act were not followed as Egan J., subsequent to her judgment, directed that the applicant would be examined by a Medical Visitor pursuant to the alternative procedure in section 12. As a result,

there was no petitioner nor was there any prior examination by two medical doctors, as would normally be the case.

**128.** The applicant was, it would appear, legitimately confused as to how the Visitor might have come to examine her given that she was not aware of any prior medical assessment or of any petition. I do not agree that this shows an inability to understand the legal proceedings but rather relates a somewhat understandable query by the applicant, who was not represented before Egan J., as I understand it, as to how the Medical Visitor had come to assess her. This issue was a purely introductory matter from the point of view of the Medical Visitor and was not the focus of her report. As a result, the drafting of the brief portion of the report which mentions this is somewhat unclear. However, it appears to demonstrate that the applicant was aware that there had been no petition or prior medical assessments.

**129.** She may not have entirely understood the process used in her case as it appears to have been explained to her both that the Visitor had been appointed directly by the Court and what the usual procedures would have been. It is possible that she was confused as to the procedure which had in fact been applied in her case, but I would be very reluctant to infer from that that she was suffering from anything other than the type of confusion which one would expect from many lay people when the discussion turns to legal procedures. Her response on this point does not, in my view, demonstrate a lack of capacity which would render her unable to pursue her claim.

*Conclusion on Professor Kennedy's reports*

**130.** Having read both reports with some care, and bearing in mind that ultimately the test for capacity is a legal rather than a medical one, my conclusion is that the presumption of capacity has not been rebutted by these reports.

**131.** The reports carefully detail the applicant's propensity to digress and her cognitive difficulties with delayed recall and executive function. Professor Kennedy's expertise in administering such tests is not in doubt, and has recorded the results for the benefit of the Court, but it seems that the Medical Visitor expressly pointed to the less rigorous nature of the MMSE test which she conducted. I obviously accept the evidence in the report as to the tests conducted, the results obtained, and what they demonstrate (difficulty with delayed recall, for example).

**132.** In his first report, Professor Kennedy makes certain relevant comments about the applicant's ability to participate in her trial, and makes a series of recommendations, mainly directed to making it easier for her to put up with the rigours of cross-examination, which of course had concluded by the time the report was drawn up, though Professor Kennedy may not have been aware of that.

**133.** In fairness to Professor Kennedy, the question of what is required in order to understand advice from lawyers, weigh it, and make a decision on the basis of it, is a matter which will vary depending on the precise litigation in question. I have to consider the likely decisions now to be made by the applicant and whether she has sufficient capacity to make them.

**134.** I enquired specifically in the course of oral submissions in support of this application, but, although it was contended in a general way that the applicant was incapable of receiving advice, weighing it, and making a decision, I was not pointed to any particular issue on which the applicant's solicitors had identified the applicant actually having such difficulties.

**135.** As the trial has progressed to the point where the applicant and seven witnesses called on her behalf have all concluded their evidence, the likely instructions and decisions in the case appear to be:

i. The identification of witnesses to be called on behalf of the applicant and the giving of instructions as to the relevant evidence they may be in a position to give;

ii. The giving of fact specific instructions for the purposes of cross-examining the respondent's witnesses;

iii. Instructions as to the applicant's assets and income at the present time;

iv. Instructions as to what the applicant would regards as proper provision for her out of the Estate of the Deceased.

**136.** As regards the first, in an effort to more efficiently manage the trial, I directed that witness statements should be provided by the applicant and her lawyers fully cooperated in this process. It therefore seems that most, if not all, of those witnesses have been identified and instructions taken.

**137.** The second issue poses more difficulties given the degree of cognitive difficulties identified by Professor Kennedy in his reports. There are difficulties of recall which may come to the fore in the process of giving the instructions necessary for cross-examination. However, I note that certain cognitive difficulties of litigants in both *Nolan v. Carrick* and *Scally v. Rhatigan* were held by this Court not to be sufficient to rebut the common law presumption of capacity from which the applicant benefits. While every case turns on its own facts, it does not seem to me that the cognitive difficulties which have been established as being present in this case are such as to rebut the presumption of capacity. In particular, the difficulties of recall are ones which fall as part of the assessment of the applicant's evidence rather than ones which indicate a lack of capacity to understand the nature of the proceedings and the risks involved.

**138.** As regards the third and fourth issues, which relate to financial and property matters, these are not explicitly dealt with anywhere in the reports of Professor Kennedy and it is convenient to discuss them as part of the general discussion of the Medical Visitor's Report.

**The Medical Visitor's Report**

**139.** The Medical Visitor, Dr. Curtis, visited the Applicant at her home on 27 August, 2022. As referred to above, it was this Court (Egan J.) who referred the matter to the Medical Visitor and the usual application to present a Petition, which would require a Petitioner and assessment of the applicant by two medical practitioners was not followed in the very specific circumstances of the case.

**140.** Dr. Curtis conducted a three-hour interview with the applicant and conducted an MMSE on which the applicant scored 29/30, which Dr. Curtis states indicates that there were no obvious or gross deficits in her cognitive function at the time of assessment. However, Dr. Curtis noted that while MMSE serves as a useful screening tool, it would not have the validity or reliability of the more complex cognitive screening batteries undertaken by clinical psychologists. For this reason, I think there is no doubt but that it is the reports of Professor Kennedy, and the tests contained therein, which identify the relevant cognitive deficiencies, and not the Medical Visitor's Report.

**141.** Dr. Curtis stated that she assessed the applicant's decisional capacity using the functional test of capacity provided for in s. 3 of the Assisted Decision-Making (Capacity) Act, 2015, namely the applicant's ability to understand information, retain information, use or weigh up information and communicate information relating to specific decision to be made. Capacity was assessed relating to her ability to make health and welfare decisions, and decisions relating to property and financial affairs, and her capacity to make decisions was presumed from the outset.

**142.** The applicant's solicitors do not assert that there is any lack of capacity on the part of the applicant to make health and welfare decisions, and they further submit that Dr. Curtis does not offer an opinion on the specific issue of whether the applicant lacks functional capacity to participate in the litigation and to give instructions. It is on that basis, they say, that Professor Kennedy's reports are uncontroverted.

**143.** It should be noted that Dr. Curtis does not specifically mention litigation but does confirm that she assessed capacity with reference to ss. 3 and 8 of the 2015 Act. Section 8 of the 2015 Act sets out various *"guiding principles"*, including, in subsection (6) the principles that an intervention in respect of a relevant person shall be made in a manner that minimises the restriction of the relevant person's rights, and the restriction of the relevant person's freedom of action, having due regard to the need to respect the right of the relevant person to dignity, bodily integrity, privacy, autonomy, and control over his or her financial affairs and property.

**144.** Section 3 of the 2015 Act sets out how capacity is to be assessed, and is in the following terms:

> *"(1) Subject to subsections (2) to (6), for the purposes of this Act, a person's capacity shall be assessed on the basis of his or her ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time.*
>
> *(2) A person lacks the capacity to make a decision if he or she is unable—*
>
> *(a) to understand the information relevant to the decision,*
>
> *(b) to retain that information long enough to make a voluntary choice,*
>
> *(c) to use or weigh that information as part of the process of making the decision, or*
>
> *(d) to communicate his or her decision (whether by talking, writing, using sign language, assistive technology, or any other means) or, if the implementation of the decision requires the act of a third party, to communicate by any means with that third party.*
>
> *(3) A person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it*

*given to him or her in a way that is appropriate to his or her circumstances (whether using clear language, visual aids or any other means).*

*(4) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him or her from being regarded as having the capacity to make the decision.*

*(5) The fact that a person lacks capacity in respect of a decision on a particular matter at a particular time does not prevent him or her from being regarded as having capacity to make decisions on the same matter at another time.*

*(6) The fact that a person lacks capacity in respect of a decision on a particular matter does not prevent him or her from being regarded as having capacity to make decisions on other matters.*

*(7) For the purposes of this section, information relevant to a decision shall be construed as including information about the reasonably foreseeable consequences of—*

*(a) each of the available choices at the time the decision is made, or*

*(b) failing to make the decision."*

**145.** In light of the submission that Dr. Curtis did not address the applicant's capacity to conduct the litigation, it should be noted that Dr. Curtis was of the view that the applicant had capacity to manage her property and financial affairs. Section 2 of the 2015 Act defines *"property and affairs"* as meaning one or more of the following matters:

*"(a) the custody, control and management of some or all of the relevant person's property or property rights;*

*(b) the sale, exchange, mortgaging, charging, gift or other disposition of the relevant person's property;*

*(c) the acquisition of property by the relevant person, or on his or her behalf;*

*(d) the carrying on, on behalf of the relevant person, of any profession, trade or business which may lawfully be carried on by a person other than the relevant person;*

*(e) the making of a decision which will have the effect of dissolving a partnership in which the relevant person is a partner;*

*(f) the carrying out of any contract entered into by the relevant person;*

*(g) the discharge of the relevant person's debts, tax and duty liabilities and obligations or other obligations;*

*(h) the execution or exercise of any of the powers or discretions vested in the relevant person as a tenant for life;*

*(i) providing, to the extent that the relevant person might have been expected to do so, for the needs of a decision-making assistant, a co-decision-maker, an attorney, a designated healthcare representative or a decision-making representative for the relevant person or of other persons;*

*(j) the conduct of proceedings before any court or tribunal, whether in the name of the relevant person or on his or her behalf;*

*(k) making an application for housing, social welfare or other benefits or otherwise protecting or advancing the interests of the relevant person in relation to those matters."*

**146.** I have considered whether Dr. Curtis' report should properly be read as applying to the conduct of litigation as this falls within the statutory definition of *"property and affairs"* in s. 2 of the 2015 Act, and it is clear that, while Dr. Curtis obviously was not purporting to operate the procedures in that Act, she clearly assessed capacity by reference to the definition of capacity and to the guiding principles in the new Act. However, Dr. Curtis does not use this precise phrase at para. 6.5 of her report but refers instead to *"property and financial affairs"*, which does not on its face appear to include litigation.

**147.** Nevertheless, it is important that, in the course of her consideration as to whether the applicant had capacity to manage her property and financial affairs, Dr. Curtis stated that the applicant:

*"provided an account of the complexity of the property situation regarding her current place of residence, in terms of companies, trustees, matters of will and probate and legal issues relating to cohabitation. She demonstrated an understanding of the complexity of this information and of the issues arising for her individually within this complexity. She demonstrated an ability to retain information and use and weigh-up information relating to matters of property ownership, and to communicate this information with a reasonable degree of clarity despite the complexity of the pertinent legal issues."*

**148.** While Dr. Curtis does not foreground the litigation in her report, it is clear that she discussed the litigation with the applicant as it is inextricably linked to the applicant's property and financial affairs, both current and potential. As already set out above, the applicant's assets and whether proper provision was made for her will, if she succeeds in demonstrating that she was a *"qualified cohabitant"* within the meaning of s. 172 of the 2010 Act, will become central issues later in the trial. The Medical Visitor's report certainly suggests that the applicant will be capable of giving instructions in relation to those matters.

**149.** In this respect, therefore, Dr. Curtis traverses ground which is not addressed by Dr. Kennedy and that is the applicant's ability to understand her own property and financial affairs, and the relationship between those and this litigation. Professor Kennedy confines himself very specifically to the capacity to conduct the litigation and to the question of whether the applicant has the ability to give instructions and receive advice. While he asks questions of the applicant designed to elucidate her attitude to legal advice which she would not regard as favourable, he does so in a generic way and does not address the applicant's understanding of the issues in the case. While he evidently interviewed the applicant about her upbringing and life in general, he

does not appear to have asked any question designed to elicit information about the applicant's assets, her understanding of them, and their relationship to the case. Neither is there any evidence from the applicant's solicitors on this issue. The statements of Dr. Curtis in this regard are, therefore, uncontroverted.

**Conclusion**

**150.** In my view, having regard to the legal test for capacity to conduct litigation, the presumption of capacity has not been rebutted in this case.

**151.** To repeat the test as established in *Carrick v. Nolan*, I have to ask myself if the applicant's cognitive ability was impaired to the extent that she did not sufficiently understand, with the assistance of such proper explanation from legal advisers and such experts as the nature of the case may have required, the issues on which his decision was likely to be necessary, the nature and effect of the decisions made in the course of the litigation, and the consequences of the decisions made by her for the litigation at that time.

**152.** The onus of proof is on the applicant's solicitors to rebut the presumption of capacity and I do not believe that it has been discharged. While expert medical opinion established that the applicant is suffering from certain cognitive difficulties, it has not been established that she does not understand the nature of the proceedings in which she is involved, the issues which arise in them, the nature of the decisions which she as the client has to make in the course of the remainder of the proceedings, or the risks involved in the litigation. Nor do they establish an inability to give instructions and to participate in the proceedings.

**153.** The contents of the reports do not demonstrate that the applicant is not aware of the issues in the case and the purpose of these proceedings. I am satisfied that the applicant understands the nature of the proceedings in which she is involved, their ultimate purpose, and

the central issues in the case, as well as the type of evidence which is material to those issues and which might be helpful to her case.

**154.** The cognitive difficulties identified may well be material to an assessment of the applicant's evidence, both from the point of view of accuracy of recall and her objectivity and reliability in giving her evidence, a process which cannot commence until all of the witnesses have been heard, but they do not, in my view, establish on the balance of probabilities that the applicant lacks capacity to conduct the proceedings.

**155.** Certain matters relating to property and other issues which are highly material to all three proceedings are addressed in the Medical Visitor's Report but not in Professor Kennedy's reports. The conclusion of the Medical Visitor was that the applicant had capacity to manage her affairs. While the conclusion of the Medical Visitor and the outcome of the Wardship proceedings is not determinative of this application, the comments of the Medical Visitor in relation to the applicant's ability to understand the complexities of the financial and legal issues relevant to her assets is relevant to what I have to decide because these issues are linked to the issues in the litigation. The Medical Visitor's Report therefore, while it does not address litigation capacity specifically, supports a finding that the applicant has capacity to give instructions for and participate in these proceedings.

**156.** By way of strictly *obiter* comment, I note that, both pursuant to the s.15 procedure for Wardship under the 1871 Act and pursuant to the Mental Health Acts, both involving procedures which significantly restrict individual rights, medical opinion from more than one doctor is required. While not equating the consequences of the applicant in this case were her solicitors permitted to come off record with either admission to Wardship or detention under the Mental Health Acts, had my view on the medical reports been different, and in view of the fact that a finding of lack of capacity would have resulted in the applicant being unable to pursue her application pursuant to s. 194 of the 2010 Act, I would have had to give

consideration as to whether it was appropriate to make such a finding without seeking the views of an additional medical expert. The caselaw to be developed pursuant to the 2015 Act may well clarify the approach to be taken and I note that, pursuant to s.50 of the 2015 Act, a court to whom an application for a declaration of incapacity is made may direct that a medical report would be furnished to it, which would seem to contemplate that a court may wish to obtain a further medical report itself. However, in view of the conclusions I have come to, I have not had to consider that issue and this comment is strictly *obiter*.

**157.** As stated at the outset, the application to come off record in relation to the Possession Proceedings and the Company Law Proceedings have not been properly put before the Court, and I am in any event refusing the application in relation to those proceedings.

**158.** However, if I am wrong in that, for the reasons already stated, I do not accept that the evidence relied upon by the applicant's solicitors is indicative of a lack of capacity to deal with the Possession Proceedings or the Company Law Proceedings either. I would, however, repeat that there is no question about the *bona fide* nature of their concerns or of the propriety with which they have acted.

**159.** I would therefore refuse the application in its entirety, that is, I refuse leave to the applicant's solicitors to come off record in any of the three proceedings.