Neutral Citation No: [2026] NICh 15	*Ref:* SCO13022
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*ICOS No:* 24/045743
	Delivered: 26/03/2026

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

HOWARD McLEAN
as Executor of the Estate of
Thomas Fleming (deceased)

Plaintiff

-and-

(1) PAMELA KIDD; and
(2) ASHLEY FLEMING

Defendants

In the matter of the Estate of Thomas Fleming (deceased)

Richard Shields (instructed by Millar Shearer & Black, Solicitors) for the plaintiff
Rory Fee (instructed by Logan & Corry, Solicitors) for the first defendant
Mark McEwen (instructed by Walker McDonald, Solicitors) for the second defendant

Scoffield J

Introduction

[1] The first defendant and the second defendant are in dispute as to the proper construction and effect of the will of their father, Thomas Fleming (deceased), made on 2 December 2013. The plaintiff, a solicitor and the executor of the will, has applied to the court by way of construction summons in order to have the dispute settled. He is effectively neutral on the outcome of the application, having described himself in correspondence with the defendants as "between a rock and a hard place" (although, as appears further below, he had sought an opinion from senior counsel for his own advice on the matter, which favoured the position adopted by the first defendant). The argument in the case was advanced by counsel for the respective defendants, with the executor simply 'throwing the ball in'.

[2] Mr Shields appeared for the plaintiff; Mr Fee for the first defendant; and Mr McEwen for the second defendant. I am grateful to each of them for their helpful written and oral submissions.

The issue in dispute

[3] The will at the centre of the dispute provides, insofar as material, as follows:

> "In referring to my Farm Map from the Department of Agriculture and Rural Development dated 9 March 2006, and my Land Registry Maps, which are attached to this my will, I leave devise and bequeath my property as follows:
>
> 1) All of the lands comprised in Folio 32112 County Tyrone which includes my dwelling house, gardens, outbuildings and property at 19 Rossmore Road, Dungannon, to my daughter Pamela absolutely.
>
> 2) All of the lands comprised in Folio 22803 County Tyrone, being field number 4, to my son David absolutely.
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> 3) That part of the lands comprised in Folio 27075 County Tyrone, being field number 6, to my son Nigel absolutely.
>
> 4) All the rest, residue and remainder of my lands which are comprised within Folio 27075 County Tyrone, to my son Ashley.
>
> All the rest, residue and remainder of my estate both real and personal and wheresoever situate I leave to such of my said children, Ashley, David, Nigel and Pamela, as shall be living at the date of my death and if more than one in equal shares absolutely."

[4] The issue of construction relates principally to what is meant by numbered paragraph 1 above, as well as what is meant by paragraph 4 and how they interrelate. The issue can only really be readily appreciated when one has regard to the deceased's holdings and how they present on the maps. The 'Farm Map' attached to the will (held by the Department of Agriculture and Rural Development (DARD) and dating from March 2006) and the Land Registry maps attached to it (dating from late 2008) do not show the same internal boundaries in relation to the land owned by the deceased. In particular, there is a difference between Folio 32112

on the Land Registry Map (which is rectangular in shape) and Field No 2 on the Farm Map (which is L-shaped). Each of these appear to include the dwellinghouse referred to in numbered paragraph 1 of the will.

[5] The dispute really resolves to a question of to whom the testator left a number of outbuildings which are in dispute. These are outbuildings which are in proximity to the dwellinghouse at 19 Rossmore Road (and which, on the first defendant's case, fall within its curtilage) but which happen to fall outside Folio 32112 (and, for that matter, Field No 2) but are within Folio 27075.

Factual background

[6] The first defendant has served affidavit evidence from herself and two of her brothers, Nigel Fleming and David Fleming. The second defendant has also provided evidence. The evidence of all deponents relates largely to the physical position on the ground and the use to which several buildings within the deceased's holdings were put, as well as to various alleged indications of the deceased's wishes and intentions in his final years. As discussed further below, recourse to some of this evidence is unnecessary or even inappropriate, save in certain circumstances. For completeness, however, a brief summary is provided below. All of the evidence was on affidavit; and neither party sought to cross-examine the other or any other deponents. That was in recognition of the fact that the task of the court was essentially one of construction of the will.

[7] The defendants' mother died in April 2009. The first defendant avers that, from that point on, she was the primary carer for her father until his death; and that, from 2016, she cared for him alone. By that time he was not able to live independently. Her evidence was that they were very close and that he regularly discussed his wishes in respect of his will with her, as well as with her brothers. She considers that she has a clear understanding of her father's wishes, which she says support her interpretation of the will. When she saw the will, she said she immediately knew that the manner in which the folios were referred to was inaccurate and inconsistent with her father's wishes. She averred that her brothers David and Nigel formed the same view, independently both of her and of each other.

[8] The first defendant has given further evidence about discussions she had with her father involving her having to grant access in due course to her brothers – Ashley and Nigel – over her field, Field No 2. I need not set this out for present purposes. In addition, she provided evidence about her father commencing renovation work to the rear of the house to re-concrete the area from its back door to all the garages. This work had to be abandoned due to his declining health but, the first defendant submits, it indicated her father's mindset that the outbuildings 'belonged' to the family home. Yet further evidence, which I also do not need to set out in detail for present purposes, alleged that the second defendant had parked a large box lorry so as to obscure their father's view of Field No 2 when he had health

and mobility issues, in order that the second defendant could move his boundary fence at No 19a Rossmore Road and begin using part of Field No 2 for farming purposes. The first defendant's case is that Field No 2 also attaches to the dwellinghouse and that it had been used for domestic rather than agricultural purposes.

[9] For his part, the second defendant's evidence was also that the deceased had expressed what he was leaving to each of his children: the first defendant "would get the house"; his brothers David and Nigel would each get a site; and he "would get the rest of the farm". He has provided up-to-date Land Registry maps, along with previous iterations of his father's will which he sought from the plaintiff and which are in his possession. He accepts that the first defendant is entitled to a shed, garage and two greenhouses (all of which are contained within Folio 32112 and shown on the up-to-date folio map). It is other outbuildings which are the subject of the dispute which fall within Folio 27075, the full extent of which he claims, save for Field No 6 which was expressly carved out of the folio and left to his brother Nigel. The outbuildings in dispute consist of a twin garage, a large shed and a smaller shed used for firewood (the 'stick shed').

[10] The second defendant's evidence is that he is a part-time farmer and that, when his late father was farming, he would have helped him out around the farm. He did this from the time when he was a small boy until his father gave up farming approximately 5-6 years before he died, when one of his animals was diagnosed with TB. The second defendant has continued to farm since then on a part-time basis, using lands which his father owned and other lands, as well as also working as an HGV technician.

[11] The second defendant avers that the sheds and structures which are the subject of dispute were used in connection with the husbandry of animals by his father and him, and thereafter by himself, and were always considered by him to be part of the farm and not part of the lands surrounding the dwellinghouse. He further says that neither of his brothers were interested in farming.

[12] The second defendant accepts that his sister looked after their father, particularly in the period leading up to his death, when he lived with her in her home. He accepts that attendance notes recording his father's instructions (discussed further below) reflect that his father wanted to acknowledge the care given to him by the first defendant by giving her his house. He also accepts that he had previously received a site from his father when his father was alive. (The house which was built on that site is to the north of the area of land which is in dispute). He contends that his father ultimately decided to leave the remaining farm lands to him, save for lands which would provide sites for each of his brothers, with the house going to his sister. He considers that the devise of lands to him included the outbuildings within Folio 27075. In his view, the issue which has arisen does not reflect a real issue but, rather, his sister (and/or his brothers on her behalf) "finding fault" with the will.

[13] The two other brothers, David and Nigel, have also each filed affidavits. Their evidence supports that of their sister, the first defendant. It indicates that the garages, outbuildings, vegetable garden and Field No 2 have always been associated with the dwellinghouse at 19 Rossmore Road. The only access to the twin garages and outbuildings is from the driveway of that property. They consider that the second defendant's contention would result in their father's home being "broken up" in a way which he would never have wanted. They have also provided evidence in relation to the use of the outbuildings. One old garage, built by David Fleming, is now said to contain household items. Others are said to contain their mother's car, an old oil-burner, firewood and coal, all related to the dwellinghouse. The outbuildings have outside taps supplied by the mains water from the house. The brothers also take issue with the second defendant's characterisation of his use of the outbuildings. They say he never helped with, or helped maintain, these buildings.

[14] In addition, Nigel Fleming's evidence is that his father discussed with him his having to get access to his field, Field No 6, though the second defendant's field (No 5) and the first defendant's field (No 2). As Field No 2 extends beyond the boundaries of Folio 32112, this is said to support the suggestion that the first defendant was to be left more than the strict content of that folio. Nigel's is adamant in his sworn evidence that he could say with certainty that all outbuildings and Field No 2 were to pass to Pamela. His evidence also provides detail as to the use of Field No 2 for storing, sawing and splitting firewood for the house, in front of the 'stick shed.'

[15] The deceased died on 20 March 2020, a widower, survived by his four adult children. The will was admitted to probate on 22 December 2020. The issue between the first and second defendants arose thereafter.

[16] The second defendant relies upon a letter sent by the plaintiff to the deceased's children dated 19 May 2020, which (insofar as material) was in the following terms:

> "The dwelling house and garden, which is not accurately shown on the Farm Map but has its own separate Deed Map, goes to Pamela. That is the property comprised in Folio 32112 County Tyrone and a copy of that Deed Map is attached. You will see the almost rectangular boundaries of that property as it abuts the old graveyard.
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> The remainder of the lands is to be conveyed to Ashley."

[17] The second defendant contends that the plaintiff has changed his view to one where the first defendant would no longer have an entitlement to a portion of lands

which is rectangular but, rather, is now L-shaped. He contends there was no proper basis for this change of view.

[18] In the course of the evidence submitted, I was provided with a more up-to-date Land Registry map showing the boundaries of Folio 27075, the full extent of which (save for Field No 6) the second defendant claims. The majority of the folio is made up of Field No 5, also referred to as "the big field", as to which there is no dispute. To the east of that field is Field No 6, also referred to as "the wee top field", as to which there is also no dispute. To the west of Field No 5 is a smaller rectangular protrusion (referred to in Mr McEwen's submissions as the 'tongue' of the folio) which contains the disputed outbuildings and extends across the upper part of Field No 2 as shown on the Farm Map. However, in addition to this area, there is a further, small, L-shaped strip of land included within Folio 27075 at its southwest corner. This runs along the private laneway at the side of No 19 and in front of No 19's garden at the public road.

[19] It is clear that a dispute arose between the deceased's children as to how the will was to be interpreted and that the plaintiff did retreat from the view he initially expressed. He sought to have the beneficiaries agree a position between themselves, which proved impossible. At the plaintiff's request, Mr Mark Orr KC then provided an opinion on the issue in dispute on 7 January 2022. Notwithstanding this and the efforts of the plaintiff as executor, further attempts at compromise or resolution failed. The plaintiff therefore considered that the present application had become necessary.

Relevant legal principles

[20] There was little, if any, serious dispute as to the legal principles to be applied by the court when construing the relevant will. I was taken to a range of well-known authorities addressing this issue.

[21] In *Perrin v Morgan* [1943] AC 399, Lord Simon described the exercise to be undertaken by the court in the following way:

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

[22] In this jurisdiction, Horner J approved and adopted that formulation, amongst others, in *Duffin v McElhill & Others* [2016] NICh 5, at para [8]. He also cited the important and authoritative judgment of Lowry LCJ in this jurisdiction in *Heron v Ulster Bank & Others* [1974] NI 44, in which he set out the following guide:

"I consider that, having first read the whole Will, one may with advantage adopt the following procedure:

1. Read the immediately relevant portion of the Will as a piece of English and decide, if possible, what it means.

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

3. If ambiguity persists, have regard to the scheme of the Will and consider what the testator is trying to do.

4. One may at this stage have resort to rules of construction, where applicable, and aids, such as the presumption of early vesting and the presumptions against intestacy and in favour of equality.

5. Then see whether any rule of law prevents a particular interpretation from being adopted.

6. Finally, and, I suggest, not until the disputed passage has been exhaustively studied, one may get help from the opinions of other courts and judges and similar words, rarely as binding precedents, since it has been well said that 'no Will has a twin brother' but more often as examples (sometimes of the highest authority) of how judicial minds nurtured in the same discipline have interpreted words in similar contexts."

[23] These passages were more recently cited and applied by Humphreys J in *In Re the Estate of Mary Alice Smyth (deceased)* [2021] NICh 16.

[24] I would add reference to an important decision of the UK Supreme Court in this context, *Marley v Rawlings* [2015] AC 129, which seems strangely to have been somewhat neglected in recent case-law as to the construction of wills in this jurisdiction (with the exception of McBride J's decision in *In Re the Estate of JS*

(Deceased) [2017] NICh 13). In that case, Lord Neuberger (with whom Lords Clarke, Carnwath and Sumption agreed) provided the following guidance:

> "19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. In this connection, see [*Prenn v Simmonds* [1971] 1 WLR 1381] at 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, per Lord Wilberforce, *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in [*Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900], per Lord Clarke at paras 21-30.
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> 20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, para 64, "No one has ever made an acontextual statement. There is always some context to any utterance, however meagre." To the same effect, Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, that "[c]ourts will never construe words in a vacuum".
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> 21. Of course, a contract is agreed between a number of parties, whereas a will is made by a single party. However, that distinction is an unconvincing reason for adopting a different approach in principle to interpretation of wills: it is merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned. Thus, the court takes the same approach to interpretation of unilateral notices as it takes to interpretation of contracts – see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, per Lord Steyn at 770C-771D, and Lord Hoffmann at 779H 780F.

> 22. Another example of a unilateral document which is interpreted in the same way as a contract is a patent – see the approach adopted by Lord Diplock in *Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC 183, 243, cited with approval, expanded, and applied in *Kirin-Amgen* at paras 27-32 by Lord Hoffmann. A notice and a patent are both documents intended by its originator to convey information, and so, too, is a will.
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> 23. In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents. This may well not be a particularly revolutionary conclusion in the light of the currently understood approach to the interpretation of wills (see eg *Theobald on Wills*, 17th edition, chapter 15 and the recent supplement supports such an approach as indicated in *RSPCA v Shoup* [2011] 1 WLR 980 at paras 22 and 31). Indeed, the well known suggestion of James LJ in *Boyes v Cook* (1880) 14 Ch D 53, 56, that, when interpreting a will, the court should "place [itself] in [the testator's] arm-chair", is consistent with the approach of interpretation by reference to the factual context."

[25] Lord Neuberger went on to discuss the now highly relevant statutory provision relating to the interpretation of wills contained in section 21 of the Administration of Justice Act 1982. The analogue provision in this jurisdiction is Article 25 of the Wills and Administration Proceedings (Northern Ireland) Order 1994 ("the 1994 Order"), which provides a discretion on the part of the court to consider extrinsic evidence in certain circumstances, as follows:

> "(1) This Article applies to a will—
>
> (a) in so far as any part of it is meaningless;
>
> (b) in so far as the language used in any part of it is ambiguous on the face of it;
>
> (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.

(2) In so far as this Article applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation."

[26] In Lord Neuberger's judgment, the first sub-paragraph of this provision confirmed that a will should be interpreted in the same way as a contract, a notice or a patent, namely as summarised in para [19] of his judgment (set out in full at para [24] above). In particular, "evidence" is admissible when construing a will; and that includes the "surrounding circumstances." However, the second sub-paragraph goes further. It indicates that, if one or more of the three requirements set out in Article 25(1) is satisfied, then direct evidence of the testator's intention is admissible, in order to interpret the will in question.

[27] Thus, a will is usually to be interpreted in the same way as any other document, but, in addition, in relation to a will (or a provision in a will) to which Article 25(2) applies it is possible to assist its interpretation by reference to evidence of the testator's actual intention (eg by reference to what he told the drafter of the will, or another person, or by what was in any notes he made or earlier drafts of the will which he may have approved or caused to be prepared): see paras [25]-[26] of Lord Neuberger's judgment.

[28] Article 26 of the 1994 Order is also potentially relevant in this case. It provides for the construction of certain expressions in wills, although always subject to a contrary intention appearing from the will. In particular, it provides at Article 26(1)(e) that: "Unless a contrary intention appears from the will, in a will … "land" includes … buildings and other structures; …".

[29] I should also mention Article 17(1) of the 1994 Order which makes clear that the will speaks from death. It provides as follows:

"(1) Every will is to be construed, with reference to the property referred to in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears from the will.

(2) No conveyance or other act, made or done subsequently to the execution of a will, of or relating to any property referred to in the will, prevents the operation of the will with respect to that property to the extent that the testator has power to dispose of that property.

(3) The reference in paragraph (2) to an act does not include an act which revokes the will."

Summary of the parties' positions

[30] The first defendant submits that there is clearly an error in the drafting of the will; and that the mischief arises in the manner in which the folios are referenced. She says that the reference to "*property* at 19 Rossmore Road" is important [italicised emphasis added]. The first defendant says that the affidavit evidence served on her behalf makes clear that this reference is to the outbuildings and lands around the house at that address. She argues that, if the second defendant's position was upheld, it would result, inter alia, in his having been left a strip of land to the front of the garden of the dwellinghouse, which could not have been intended.

[31] In contrast, the second defendant says that he considers the disputed sheds and structures to be part of the farm and not a part of the lands surrounding the dwellinghouse. The first defendant's riposte is that, even if this was correct, it does not assist the second defendant, since he was not left "the farm." The fields have been divided up between the first defendant's brothers. The second defendant has merely been left a larger field, Field No 5. On the first defendant's case this is not a situation, as implied by the second defendant, where sites have been 'cut out' of a more substantial farm for non-farming children and the working farm has been left to the child who engages in farming.

[32] Instead, the devise which refers to the second defendant does not refer to a farm or farm buildings; it merely refers to "the rest, residue and remainder *of my lands* which are comprised within Folio 27075…" [italicised emphasis added]. The first defendant also lays particular emphasis on the fact that the deceased specifically referred to "outbuildings" at paragraph 1 of the will yet only referred to "lands" at paragraph 4. She contends that the position is clear and that her father intended to leave her the outbuildings in proximity to and associated with the house.

[33] The second defendant *also* contends that the will is clear, but in the opposite direction. He submits that evidence as to his late father's subjective intentions must be ignored (although, in the alternative, he contends that this supports his interpretation). On his argument, the deceased clearly distinguished between the two relevant folios, leaving Folio 32112 to his sister (which would include any outbuildings *within* that folio), but leaving to him the entirety of Folio 27075 (excepting only Field No 6, which was left to his brother Nigel). Their respective gifts were defined by virtue of the folio maps when they could have been, but were not, defined by virtue of other maps (including by reference to the Farm Map and the delineation of Field No 2).

[34] On the second defendant's case, this plainly involved his being left a number of outbuildings within Folio 27075. However, he contends that these outbuildings were used in connection with the small-scale farming enterprise carried out in the lands within Folio 27075 and other lands in the ownership of the deceased which were bequeathed elsewhere.

[35] The second defendant further submits that this is in accordance with the approach taken by Girvan LJ in *Moffatt v Moffatt* [2011] NICh 18, in which case the judge declined to take up the suggestion of the plaintiff that a provision in the will leaving a farm of land would *not* include a farmhouse located on the farmland. Applying that to the present case, the second defendant suggested that it could not have been the intention of the deceased to leave the farmlands comprised in Folio 27075 to him without also including the outbuildings in that folio and associated with farming (or, put the other way, to leave the outbuildings associated with farming to Mrs Kidd).

Consideration

[36] In this case, it might be said at first glance that the ordinary and natural meaning of the words used favour the second defendant's case. This may explain the simplistic approach initially adopted by the plaintiff in his letter of 19 May 2020. However, in my judgment the position is a good deal more complicated than that when one also looks at a number of other matters the court is permitted, indeed obliged, to consider in correctly construing the provisions of the will in their proper context; in particular, the other provisions of the document and its purpose, along with the facts known to or assumed by the testator at the time the will was executed.

[37] The will is clearly designed, first, to make provision for the first defendant and, in doing so, to leave her the farmhouse and associated "gardens, outbuildings and property" at its address: in other words, the farmhouse and what would naturally go with it are left to her.

[38] In light of what would have been known to the testator at the time the will was executed, it appears to me that there is, in fact, an element of ambiguity *within* numbered paragraph 1 of the will. That is because the opening phrase suggests that everything that follows is comprised in Folio 32112; whereas the disputed outbuildings, which are outside that folio, would *also* fall within the meaning of the phrase "… outbuildings and property at 19 Rossmore Road".

[39] I accept the first defendant's case (supported by her other two brothers) that, as a matter of fact, the disputed areas were and are at that address and have always been considered to form part of that property. They are not part of the second defendant's property at No 19a. They are accessed via the driveway of the house at No 19; they face the house (and face away from the second defendant's property to the north); they service the house; and, for instance in terms of water connections, are serviced by it. In short, as a matter of fact and common sense, the outbuildings form part of the property at No 19. There is therefore an inherent tension within numbered paragraph 1 of the will. To similar effect, although less importantly, when one looks at the Land Registry map attached to the will which delineates Folio 32112, it shows only *one* outbuilding at No 19, which is inconsistent with the later reference to "outbuildings" in the plural.

[40] In seeking to resolve that ambiguity, it appears to me that the clear intention expressed in the will is that the first defendant should take the house and the gardens, outbuildings and property which accompany it. Leaving aside the reference to Folio 32112, that is the ordinary and natural meaning of the devise in numbered paragraph 1. Moreover, I consider that that intention is further evident from the fact that that devise specifically refers to "outbuildings and property", in addition to the dwellinghouse, whereas the other devises (at numbered paragraphs 2-4) refer only to "lands." That supports the interpretation that each of the first defendant's brothers were simply left land. Although Mr McEwen relied upon Article 26(1)(e) of the 1994 Order to suggest that the bequest of "lands" to his client included all the buildings on those lands, I consider that that interpretation is displaced by the wording of paragraph 1. In others words, a contrary intention appears from paragraph 1 excluding the operation of Article 26(1)(e).

[41] It is also significant that the devise to the second defendant is not expressed in the form of "*all* of the lands comprised" in Folio 27075 (in contrast to the devise to David Fleming at numbered paragraph 2). On the contrary, the reference to "all the rest, residue and remainder" of the testator's lands which were in Folio 27075 – with this devise appearing fourth in the list – appears to me to have the effect merely of leaving to the second defendant anything *which is left* within Folio 27075 which had not been bequeathed to one of the testator's other children in the preceding provisions. Although that most obviously relates to Field No 6 having been left to Nigel Fleming, it is equally applicable if one appreciates that the testator (at paragraph 1) also intended to leave certain outbuildings and property associated with the dwellinghouse but within Folio 27075 to the first defendant.

[42] I was provided with a range of evidence as to the use of the outbuildings in issue. The first defendant contends that these are non-farm buildings. They include a garage which was built by David Fleming. On the first defendant's case, none of the outbuildings have been used for farming for many years. Her position in this respect is supported by her two other brothers; and the second defendant's evidence in relation to farming use of these buildings was vague and unpersuasive. I accept the firsts defendant's evidence on this issue and consider that this also forms part of the surrounding circumstances which I am entitled to take into account when construing the intention expressed in the will.

[43] The first defendant also contends that, significantly, the division of lands contended for by the second defendant would be impractical for the following reasons. First, there is not practical access to the oil tank of the house for its residents if the second defendant is correct. Second, the garages (or at least some garages) to be used for vehicles connected to the house would be removed from it. Third, access to the 'stick shed' where wood is stored for the fire within the house would be removed from it. Fourth, access to the rear lawn of the farmhouse when one was using the 'ride-on' lawnmower to mow it would be cut off, along with access to

other property used for the disposal or composting of garden waste. Fifth, access to other outbuildings of which the house traditionally had use would be restricted.

[44] I accept the first defendant's case that the impracticality described at para [43] above cannot be what the deceased intended. In my judgment, paragraph 1 of the will was designed to leave to the first defendant the house at No 19 Rossmore Road along with its associated gardens, outbuildings and property. I accept that an error appears to have been made in the assumption that the associated outbuildings and property all fell within the one folio, namely Folio 32112. However, save for the reference to that folio number, I consider the intention to be clear that not only would the dwellinghouse be left to the first defendant but so too would its gardens and the related outbuildings and property which service the dwellinghouse, which would commonly be understood to be at No 19 Rossmore Road. In my view, that plainly includes the outbuildings accessed through its driveway.

[45] The construction contended for by the second defendant, particularly having regard to the updated position as to what Folio 27075 contains (see para [18] above), would make little or no sense. It would leave the house at No 19 essentially landlocked, as well as cut off from buildings which have traditionally provided necessary facilities or services for the house. Mr McEwen asserted that the strip at the front of No 19 which remained in the parent folio, Folio 27075, was simply the portion to the centre line of the public road, over which there was a public right of way. He denied, therefore, that the house would be landlocked if this was left to the second defendant. Even if that is strictly correct, which I am not in a position to confidently determine on the present evidence, I still see no reason why this strip would not have been left to the first defendant along with the house the curtilage of which it abuts. I do not believe the testator could have intended this. Nor, construing the will on its face (see paras [37]-[41] above), do I consider this to be the intention expressed by the words used.

[46] Finally, I do not consider that the second defendant's reliance on the *Moffatt* case really assists him. As indicated in the authorities cited above, assistance is rarely to be found in other cases since no will has a twin and each case must be assessed in its own particular context. That case involved construction of the phrase "farm of land" in an entirely different context. In the present case, unlike *Moffatt*, the will does not leave the "farm" to any particular sibling; nor is there any indication that it is designed to distinguish between farming and non-farming children. (Nor, indeed, was any such distinction made in the deceased's earlier will dating from 2008, in which all of his estate was to simply be left equally to his children.)

The attendance notes

[47] For the reasons given above, I consider that this case can be determined without reference to extrinsic evidence of the testator's intention and by construing the will as a whole within its factual context, as urged by the *Heron* and *Marley* authorities discussed above. However, if I am wrong in that and there remains any

ambiguity, either arising on the face of the will or considering evidence of the surrounding circumstances, Article 25(2) of the 1994 Order would then permit evidence of the testator's intention to be admitted to assist in the interpretative exercise.

[48] Each defendant relies, in different respects, upon attendance notes compiled by the plaintiff in advance of the will being drafted and executed. I discuss these below. Consideration of them fortifies me in the conclusion I had reached independently above in reliance upon the terms of the will.

[49] There is an attendance note from 31 May 2011 in which the deceased met with his solicitor and proposed changes to his will. Inter alia, this note records that his daughter Pamela, the first defendant, had been exceptionally kind to him since the death of his wife and that he wished to make very specific provision for her: "He wishes to leave his dwelling house, garden front and rear and all outbuildings to Pamela". Turning to his sons, it notes that the second defendant "has already been given a site for a house and has got some land so he is already at a bit of an advantage compared to his brothers". Field No 4 on the Farm Map was to go to David; and Field No 6 to Nigel. Field No 5 "would probably fall to Ashley although it is by far the largest and therefore it would mean that Ashley is getting a disproportionate benefit". The testator was to give some thought to leaving that field to Ashley on the understanding that he in turn then made additional 'equalizing' provision for Nigel and David. The note concludes that the solicitor would 'do up a draft' and they would meet again.

[50] A further attendance note of 26 March 2012 records a meeting with the testator as regards the Land Registry maps and will. It is noted that the boundary for Folio 32112 seems incorrect when looking at the boundaries for adjacent ground. In particular, it is noted that Field No 2 on the farm map does not accord with Folio 32112 as Field No 2 is bigger. A query was raised about boundary rectification, which was to be given some thought. Matters were noted to be straightforward in that regard as the testator was the registered owner of both. There is a note that if the client intended to prepare a will, which he did, or make a transfer to his daughter, "the property comprised in that folio needs to be sorted". The testator was shown the attendance note of 31 May 2011 and said that in general terms he agreed with it. This appears to me to reaffirm the intention that the first defendant should receive the house and all outbuildings. The issue was how best to ensure that this was ultimately expressed or delivered. The intention also appears to be that Field No 2 should form part of the gift to the first defendant but recognising that this was not reflected in a simple devise of Folio 32112. It seems to me that the later mistake in the will may have been because the proposed rectification of Folio 32112 to include additional lands was never attended to.

[51] Mr Fleming attended his solicitor's office again on 2 October 2012 with the draft will which the plaintiff had prepared for him. He had a few amendments he

would like to make which are detailed in the note of that date. None of these amendments appear to sound on the issues discussed above.

[52] There is a final attendance note of 2 December 2013, the date the will was executed. The testator attended the office in relation to amendment of the will. This appears to have been amendment of a draft will which had been sent out to him on 16 October 2012, a copy of which is exhibited to the second defendant's affidavit. There are two significant features of that draft for present purposes. First, paragraph 1 (the devise to the first defendant) does not refer to outbuildings. Second, paragraph 4 (the devise to the second defendant) leaves the residue of lands within Folio 27075 to the second defendant but subject to a complicated provision requiring him to pay 25% of its value to each of his siblings (ie 75% in total) within two years of the testator's death.

[53] The note of 2 December 2013 records that the testator wanted to make a change to paragraph 4. It continues:

> "He would like Ashley to have all the land in Folio 27075 without payment to his other children. He feels this is "miserable" and thinks all his children have got what they wanted. He thinks this is fair and this is all he can do."

[54] Mr McEwen understandably relies on the portion which says that the testator would like the second defendant "to have *all* the land in Folio 27075"; but it seems to me that the key point of this note relates to scrapping the need for payment to the other children.

[55] The note then records that the solicitor went through the rest of the will with the testator, who was content with it, and the will was amended and executed. Comparing the executed will with the draft will at that stage, paragraph 4 removed the requirement for the second defendant to pay an 'equalizing' share to each of his siblings. However, paragraph 1 also inserted the reference to "outbuildings."

[56] This appears to me to be significant in two respects. First, it underlines the intention of the testator that the first defendant receive the outbuildings, which he obviously did not think was clear enough from the earlier draft of paragraph 1. He made sure that this important reference was included. Second, although the testator clearly thought that the second defendant was doing disproportionately well, having previously been gifted a site, he considered it would be "miserable" to require him to pay some contribution to his siblings and therefore removed that stipulation. That suggests that the second defendant was considered to be doing well even *without* the outbuildings which were now clearly to be left to the first defendant.

[57] I consider that these attendance notes provide additional evidence of the testator's intention which I have nonetheless found to be (adequately) expressed in the will above. The first note, from 31 May 2011, makes clear in my view that the

deceased wished to leave the first defendant the dwellinghouse including *all* of the outbuildings. I see nothing in the further attendance notes which appears to resile from or countermand that clear wish. On the contrary, the second note (from March 2012) appears to acknowledge that the folio boundaries do not neatly encapsulate the dwellinghouse and associated outbuildings in one folio. That required to be sorted out. One option would have been amending the folio boundaries but, for whatever reason, that does not appear to have been taken forward.

[58] The second defendant contends that the deceased was plainly aware, prior to the execution of the will, that there was a difference between what Folio 32112 comprised and the extent of Field No 2 on the Farm Map, which is reflected in the attendance note upon the deceased of 26 March 2012. That is correct. However, it might well be that the deceased thought this was corrected in the final version of the will which had the word "outbuildings" expressly included in paragraph 1.

[59] As also noted above, none of the attendance notes or draft wills appears to make the farming *versus* non-farming distinction relied upon by the second defendant.

[60] I have not needed to consider in any detail the further evidence given by the children of what their father told them about his express wishes. Such evidence can frequently suffer from a number of frailties. However, the averments about the first defendant having to potentially grant access to other siblings over her property appeared to me more specific, credible and persuasive than the second defendant's more generic references to being left "the farm", which found little or no support elsewhere.

The opinion of Mr Orr KC

[61] The second defendant is critical that the plaintiff, as the person who took the instructions of the deceased and drafted the will, did not himself stick by his initial view. Rather, he sought the opinion of senior counsel to (in the second defendant's submission) "act as a substitute for the role of this court". He submitted that the court should disregard Mr Orr's advice since it was merely the expression of opinion on a legal issue which was not admissible in the dispute.

[62] As I indicated in the course of the hearing, I accept the thrust of the second defendant's objection in this regard. The proper construction of the will which is at issue in this case is a matter of law for the court. With great respect, at *this* point Mr Orr's view of the matter is neither here nor there. Nor, for that matter, is the executor's initial view upon which the second defendant relied. I have approached the dispute on that basis.

[63] However, in fairness to the plaintiff, it seems to me that he did not seek Mr Orr's opinion in order simply to back up his own view, nor that it might be relied upon in court (and nor has he sought to do so). Rather, he appears to have done so

in the hope that an independent view may resolve the matter without the need for costly and time-consuming proceedings to be issued. That has not proven possible.

[64] I can also add that, as it happens, I have reached the same view as did Mr Orr in relation to the result in this case, for some of the same reasons, albeit not on the basis of identical reasoning.

Conclusion

[65] For the reasons set out above, I find in favour of the first defendant and am prepared to grant the relief sought in the schedule to the construction summons, namely to declare that, on the true construction of the deceased's will, the portion of land comprising the dwellinghouse, gardens, outbuildings and property at 19 Rossmore Road, Dungannon, as outlined in red on the map appended to the summons, is devised and bequeathed to Pamela Kidd.

[66] If I have correctly understood the position of the parties, the second defendant was concerned that, if the first defendant's interpretation was correct, he may have been impeded from accessing his Field No 5 by means of an access which runs along the south side of his property at No 19a; but the portion of ground sought by the first defendant does not in fact do so. Rather, it extends just to the back of the outbuildings. I will allow some time for the parties to seek to agree the position in light of the above resolution of the central issue by the court.

[67] I will hear the parties on the issue of costs and, as necessary, any consequential issues of relief.