[2020] IEHC 21

THE HIGH COURT

PROBATE

[2019/4790]

IN THE MATTER OF THE ESTATE OF MARY ANN (OTHERWISE MAUREEN) HORAN DECEASED

AND IN THE MATTER OF SECTION 27 (4) OF THE SUCCESSION ACT, 1965

JUDGMENT of Mr. Justice Denis McDonald delivered on 24 January, 2020

The application before the court

1. This is an application to pass over Mr. Dermot Horan, the executor of the above estate, and to give liberty to the applicant to apply to extract a grant of probate with will annexed. It is important to note that the application is made pursuant to s. 27 (4) of the Succession Act, 1965 (*"the 1965 Act")* in advance of the issue of any grant of probate to Mr. Dermot Horan as the executor appointed by the above-named deceased under her last will. In fact, one of the principal bases on which the present application is made is that Mr. Dermot Horan has failed to take out a grant of probate.

Relevant facts

2. The above-named deceased (who I shall refer to as Mrs. Horan) died, testate, on 19th April, 2018. At the time of her death, she was a ward of court having been admitted into wardship by order made by Kearns P. on 31st August, 2015. The order in question was made on foot of a petition brought by one of Mrs. Horan's four children namely Stephen Horan who is also the applicant in these proceedings. It is clear from the petition which led to the order admitting Mrs. Horan to wardship that she had been suffering from dementia since 2012. According to the affidavit of Mr. Stephen Horan (who I shall refer to as "*the applicant")* the wardship application was opposed by his brother, Mr. Dermot Horan (who I shall refer to as "*the executor*") who refused to accept that Mrs. Horan was incapable of managing her own affairs. Notwithstanding his opposition, the executor was unable to produce a report from any doctor indicating that his mother had capacity. In those circumstances, the order sought by the applicant was made by Kearns P.

3. In early 2016, Mrs. Horan commenced living in a nursing home. According to the affidavit of the applicant, there was ongoing difficulty between the nursing home and the executor which led to litigation. However, I do not have any direct evidence in relation to this issue and I therefore do not believe that it is a matter to which I should have regard for the purposes of this judgment.

4. As outlined above, Mrs. Horan died on 19th April, 2018. At the time of her death, she had four surviving children namely the applicant, the executor, and two daughters Ms. Josephine Horan and Ms. Yvonne Reynolds. One child, namely Ms. Delma Horan had died previously in 1999 without issue.

5. In her last will dated 16th June, 2006, the late Mrs. Horan appointed Mr. Dermot Horan as her executor and trustee of her will. She made a specific bequest of all of her interest in a transport company called Westwood International Transport Ltd ("*Westwood*") to the executor. She also left her dwelling house (together with its contents) in Blanchardstown to the executor.

6. One of Mrs. Horan's most significant assets is an industrial property known as 40 Fonthill Industrial Park. Under clause 3.1 of her will, Mrs. Horan left that property to her trustee to hold "*in trust for sale*" and she gave the executor as her trustee the following powers and directions:-

> *"3.2 To pay the net income arising from the property after deduction of all outgoings and taxes to the beneficiaries hereinafter specified and to postpone the sale for ten years from the date of my demise.*
>
> *3.3 The Beneficiaries shall mean my sons Dermot Horan and Stephen Horan and my daughters Josephine Horan and Yvonne Reynolds.*
>
> *3.4 Subject to the provision as to postponement at Clause 3.2 above I direct that the proceeds of sale will be divided among my beneficiaries in the following shares.*
>
> *3.4.1 As to 1/4 ... for my son Dermot for his own use and benefit absolutely ....*
>
> *3.4.2 As to 1/4 for my son Stephen for his own use and benefit absolutely...*
>
> *3.4.3 As to 1/4 ... for my daughter Josephine Horan for her own use and benefit absolutely*
>
> *3.4.4 As to 1/4 ... for my daughter Yvonne Reynolds for her own use and benefit ...".*

7. The late Mrs. Horan dealt with the residue of her estate in clause 4 of her will which provided that, subject to payment of debts and expenses, the residue should be paid to her trustee *"upon trust to sell call in and convert the same into money and to distribute as hereinbefore provided for in relation to the trust for sale at Clause 3".*

8. Under Clause 5 of the will, Mrs. Horan made clear that the executor, in his capacity as trustee, for the purposes of dividing the estate between those entitled to it, might in his absolute discretion adopt such method of division or valuing of her estate or any part of it as he might think fit, his decision to be conclusive.

9. Under Clause 6, Mrs. Horan declared that her executor or trustee should not be personally liable for any breach of trust:

> *"...unless it shall be proved that at the time of his doing or suffering such breach ... such act or default was done or suffered by him mala fide.*

10. The estate of the late Mrs. Horan is substantial. In para. 8 of the grounding affidavit sworn by the applicant, he explains that, at the time of the wardship petition, the gross value of the estate was of the order of €5,105,942. This included the family home valued at €400,000; the Fonthill industrial unit valued at €1.85 million; a property in Mulhuddart owned by Westwood valued at €1 million; and money standing to the credit of various bank accounts amounting to over €1.8 million.

11. On 14th August, 2018, the solicitors acting for the applicant and his two sisters wrote to the executor calling upon him to lodge the necessary papers in the Probate Office to extract a grant of probate and administer Mrs. Horan's estate. The letter explained that a caveat had earlier been lodged in the Probate Office pending receipt of a copy of Mrs. Horan's will but that this had now been removed so that the executor would be free to take out a grant of probate.

12. On 11th September, 2018, the applicant's solicitor received a telephone call from the executor advising him that the executor could not take out a grant of probate until he first received a dismissal order from the Wards of Court Office discharging the late Mrs. Horan from wardship. Thereafter, the applicant's solicitor spoke with the General Solicitor for Minors and Wards of Court ("*the General Solicitor")* who made it clear that she had already advised the executor that a dismissal order was not required and that he could proceed to take out a grant. In those circumstances, the applicant's solicitor wrote again to the executor on 19th September, 2018 reiterating the request to extract a grant of probate and proceed with the administration of the estate of the late Mrs. Horan. Regrettably, there was no response to that letter. In those circumstances, the solicitors for the applicant wrote again to the executor on 4th January, 2019, 18th February, 2019 and 13th March, 2019. In the letter of 4th January, 2019, the solicitor for the applicant also raised a query in relation to the collection of rent from a tenant of the Fonthill Industrial Premises. This query was repeated in the letter of 18th February, 2019. That letter also sought confirmation that the executor had renewed the building insurance on the Fonthill premises. No substantive response was ever received to any of this correspondence (other than the very limited response that took place in the course of the telephone call described in para. 13 below).

13. Ultimately, the letter of 13th March, 2019 prompted a telephone call from the executor on 29th March, 2019 in which he indicated to the applicant's solicitor that he wished to see copies of all of the correspondence previously sent to him. That correspondence was made available under cover of a letter of 1st April, 2019 from the applicant's solicitor. Subsequently, on 3rd April, 2019 the executor emailed Ms. Reynolds requesting PPS numbers of all of the beneficiaries. Those numbers were supplied under cover of a letter dated 9th April, 2019 from the applicant's solicitors.

14. Thereafter, nothing further was heard from the executor. In those circumstances, a further letter was sent by the applicant's solicitor on 14th May, 2019 warning that if confirmation was not received within ten days that the necessary paperwork had been filed in the Probate Office to extract a grant of probate, an application would be made to remove the executor from his role. A search was subsequently carried out on 30th May, 2019 in the Probate Office to ascertain whether an application had been made to extract a grant. This confirmed that no such application had been made.

15. In the circumstances described above, the present application was subsequently brought by the applicant under s. 27 (4) of the 1965 Act seeking an order giving the applicant

liberty to apply to extract a grant of probate with will annexed in the estate of the late Mrs. Horan.

16. That application came on for hearing before me on 22nd July, 2019. At that point, the executor was unrepresented but he attended in person and sought an adjournment in order to respond to the applicant's affidavit. In light of the length of time which had elapsed since the original request made in August 2018 (as described above) I was concerned to ensure that any affidavit should be delivered promptly and I adjourned the matter to 31st July, 2019. On that occasion, the executor was represented by solicitor and counsel. He swore an affidavit on the same day in which the following matters were canvassed:-

(a) In the first place, he apologised for the delay in administering the estate. He indicated that he had hoped to make a personal application for a grant of probate but the process had *"proven more difficult than I expected"*. He also said that he was hospitalised for a period of one month following the death of Mrs. Horan and was unable to return to work for a period of five months thereafter. This hospitalisation was caused by a foot injury which he sustained, in his own words, *"during an altercation with a neighbouring landowner who annexed a portion of the Westwood International Transport Ltd's land."*

(b) He indicated that he had made an appointment with Cronin & Co. Solicitors on 24th July, 2019 and had signed an authority for them to extract a grant of probate and to take carriage of the administration of the estate;

(c) He also alleged that there had been delay caused by the applicant in lodging a caveat in May 2018 which was not removed until August 2018. However, this does not explain the delay which occurred subsequent to August 2018.

(d) He drew attention to payments which had previously been received by the applicant and by his two sisters during the lifetime of the late Mrs. Horan.

(e) He contended that the application is premature and that the applicant could have availed of the citation procedure provided for in Order 79. He also indicated that he had been advised that applications pursuant to s. 27 (4) are usually made in circumstances where the executor named in a will is unable to extract a grant due to incapacity or death or in circumstances where there is no person to extract a grant of representation.

(f) The executor also indicated that his view is that, under the terms of his mother's will, any distribution of funds to his siblings is to be postponed for a period of ten years. According to the executor:-

> *"I am aware from conversations with my late mother that it was her wish that the assets of the estate should be preserved intact for as long as possible and this wish extended to the cash in the estate. I believe the true*

construction of Clause 4 of my mother's Will should be determined by this Honourable Court in due course".

(g) He also indicated that he had been advised that if the applicant wishes to remove him as executor, a "*full probate action will be required, which will incur unnecessary costs and an added financial burden on the estate, particularly where I am prepared to fulfil my obligations as the executor* …".

17. By order made by me on 31st July, 2019, I adjourned the matter for mention to 8th October, 2019 with a view to fixing a hearing date at that point. I also directed that the applicant should reply to the affidavit of the executor by 14th September, 2019 with any response from the executor thereafter by 28th September, 2019. The executor also gave an undertaking (which is recorded in the order) that he has authorised Cronin & Co. Solicitors to write on his behalf to two firms of solicitor seeking the transfer of all forms and files relating to the rental income collected in respect of the Fonthill industrial premises on behalf of the late Mrs. Horan during her wardship and following her dismissal from wardship.

18. A replying affidavit was duly sworn by the applicant on 9th September, 2019. In that affidavit, the applicant outlined the following:-

(a) With regard to the suggestion made by the executor that the applicant had delayed matters as a consequence of the entering of a caveat in the probate office, the applicant explained that he and his sisters had been concerned about the validity of any will that the late Mrs. Horan may have made given that she was suffering from dementia for several years before she died. He explained that, at the time of entering a caveat, they had no information about when the will was made or what it contained. In those circumstances, they were advised that, in order to protect their position, a caveat should be lodged. However, once a copy of the will was furnished by the executor in June 2018, the caveat was removed. This was in circumstances where, following receipt of the copy will, it was clear that the will had been made in 2006, long before Mrs. Horan suffered from dementia;

(b) The applicant drew attention to a difficulty which was encountered by Giles J. Kennedy & Co. Solicitors who had acted (on the instructions of the general solicitor) for the estate of the late Mrs. Horan during the wardship process. According to the applicant, despite numerous requests by Giles J. Kennedy & Co., the executor would not furnish them (or the tenant of the Fonthill property) with account details into which rental payments should be made following the death of Mrs. Horan. In circumstances where the relevant details were not provided, this resulted in a sum of €69,600 being returned to the tenant in January 2019.

(c) The applicant also highlighted difficulties which arose for the executor arising from a number of property disputes. However, as this section of the applicant's affidavit is based solely on newspaper articles, I do not believe that I can take this aspect of

the affidavit into account. I do not have any direct evidence of the property disputes in question;

(d) In para. 12 of his affidavit, the applicant says that his relationship with the executor has been acrimonious and difficult for many years and that his relationship with the executor has irretrievably broken down. The applicant also says that the relationship between his sisters and the executor has likewise broken down.

(e) At para. 13 of his affidavit, the applicant states:-

> *"…I have no doubt that the Respondent wants to maintain control over the administration of the estate however we believe he is not capable of doing so efficiently or properly and puts the assets of the estate at risk and we have lost all trust and confidence in his ability to do so properly. He requested our PPS numbers one year after the date of death of the Deceased and only under the threat of removal as Executor. Despite immediately furnishing him with same … he has still not prepared an Inland Revenue Affidavit".*

(f) In para. 15 of his affidavit the applicant explains that in 2000 he received a gift from his late mother. In 2001 and 2003, Mrs. Horan gave his sisters the same gift. The applicant also says that in 2001 a similar gift was offered by the late Mrs. Horan to the executor who declined to accept it.

(g) In para. 21 of his affidavit, the applicant draws attention to the fact that the executor was a director of Westwood prior to Mrs. Horan being made a ward of court in August 2015. At that time, she was elderly and suffering from dementia and unable to manage her own affairs. During this period, the applicant says the executor failed to make annual returns. This resulted in Westwood being struck off the register of companies. Subsequent to Mrs. Horan being admitted to wardship, an application had to be made by the general solicitor to have the company restored to the register. This order was made on 18th July, 2016.

(h) In the same paragraph, the applicant says that the executor subsequently failed to pay the rates due by Westwood to Fingal County Council despite repeated requests. This resulted in a judgment being obtained against Westwood on 31st July, 2018. The applicant says that:-

> *"…this mismanagement and wilful neglect and dereliction of his duties supports our belief he is unfit to be an Executor. We have seen nothing to assuage our concerns in this regard. In fact, we are more concerned than ever about his inability to manage the affairs of the estate".*

(i) In response to the suggestion made by the executor that the application is premature, the applicant stressed that it was not brought until fourteen months after the date of death of Mrs. Horan in circumstances where all of the beneficiaries (with the exception of the executor) had significant concerns regarding the estate.

The applicant drew attention to the failure of the executor to respond to correspondence and the failure to take any proper steps in that fourteen-month period to administer the estate.

(j) With regard to the contention made by the executor in relation to the interpretation of clause 4 of the will (as summarised in para. 16 (f) above) the applicant says in para. 24 of his affidavit:-

> *"This is the first time the Respondent has expressed this interpretation. Several months after the Deceased died, the Respondent advised me that the Will provided that the rental income was to be paid each year to the four beneficiaries and that the proceeds of sale from the property would be distributed between them following its sale after ten years. This is the first time the Respondent has indicated that he has a different view and is sadly an example of his obstructive nature and if he continues to adopt this position, I am advised litigation will be inevitable thus exposing the assets of the estate to a risk on costs which is not what our mother intended".*

19. Notwithstanding the order made on 31st July, 2019, no affidavit was sworn by the executor in response to the affidavit of the applicant sworn on 9th September, 2019. The matter next came before the court on 8th October, 2019 when a hearing date of 5th November, 2019 was fixed. No indication was given on 8th October that the executor had any intention to swear a replying affidavit in response to the affidavit of the applicant sworn on 9th September, 2019. However, after the matter was called on for hearing on 5th November, 2019, counsel for the executor indicated, for the first time, that the executor wished to adjourn the application in order to put in a replying affidavit. After hearing argument from counsel for the executor and counsel for the applicant, I refused that application. I took that course in circumstances where (a) there had already been a significant period of inactivity on the part of the executor in administering the estate; (b) an order had been made on 31st July fixing a time for filing any replying affidavit which had long since elapsed; and (c) no explanation was given by the executor as to why it had not been possible to deliver a replying affidavit within the time fixed by the court on 31st July.

Preliminary issue

20. At the outset of the hearing on 5th November, 2019, counsel for the executor sought to argue, as a preliminary point, that the application under s. 27 (4) of the 1965 Act must fail *in limine.* Counsel argued that an application of the kind brought by the applicant here is plainly inappropriate in the non-contentious probate list. He argued that the appropriate procedure to be used for the removal of an executor normally takes the form of a probate action commenced by special summons under O. 3.

21. Counsel for the executor drew attention to what was said by Baker J. in *Re. Charles Gillespie Deceased* [2015] 3 I.R. 46 at paras. 17-19 where she observed:-

> *"17. This matter comes before me as a motion on the Monday Probate List. That list is intended to deal with so called 'non contentious' probate motions, and although that description is clearly a misnomer in that many applications are contested, the purpose of the list is administrative and it operates to adjudicate on disputes which may be resolved on affidavit, or determined on matters of law. It is possible, although unusual, that a motion in this list would throw up contested facts that would require to be resolved following cross examination of the deponent of an affidavit. The Monday Probate List is not a substitute for a full probate action, or an action with regard to the validity of a will, nor can an application in the List normally resolve a contested question of testamentary capacity, or an assertion that a deceased had executed a purported testamentary document as a result of undue influence or duress which resulted in a lack of true understanding of the will or intention to execute a will in that form.*
>
> *18. Section 36(3) of the Succession Act 1965 allows the court to adjudicate with regard to doubts or questions that arise in the administration of an estate and the Monday Probate List is primarily a list by which the High Court exercising its probate jurisdiction may give directions to the Probate Registrar with regard to certain matters in the probate jurisdiction.*
>
> *19. While the distinction between the class of matters which is suitable for the Monday Probate List is not one in respect of which I wish in this judgment to make a definitive statement, I consider that a good starting point for the purposes of determining the issue in dispute in this case, is whether the issue is one that may be resolved on affidavit, or is properly speaking a matter in respect of which a full plenary hearing is required."*

22. While I do not exclude the possibility that the present application is one which could be pursued by way of special summons under O. 3 RSC, it is noteworthy that the forms of relief available under O. 3 RSC predate the enactment of the 1965 Act. Order 3 RSC does not specifically address the relief which is sought here under s. 27 (4) of the 1965 Act. Moreover, it is clear from the case law that the court has entertained contested applications in the non-contentious Probate List in which s. 27 (4) has been invoked. These include the decision of Baker J. in *Re. Siobhan O'Callaghan Deceased* [2016] IEHC 668 and in *Re. James Patrick Hannon Deceased* [2018] 3 I.R. 402. Moreover, Keating in "*Probate Motions & Actions Relating to Wills and Intestacies*", 2017, (1ST ed., Round Hall, 2017) at para. 2-27 also confirms that:

> *"...where the removal and replacement of an executor or administrator is sought...the appropriate procedure is a motion on notice".*

23. In those circumstances, I made an *ex tempore* ruling on 5th November, 2019 that I did not believe that it would be appropriate to determine, on a purely preliminary basis, that the present application is misconceived. I took the view in the circumstances that it was appropriate to allow the hearing of the application to proceed. In taking that course, I made it clear to the parties that, having regard to the observations of Baker J. in the

Gillespie case, it would still be open to the executor, in the course of the substantive hearing of the present application, to persuade me that, on the particular facts of this case, it was not appropriate to make an order under s. 27 (4) purely on the basis of a motion heard on affidavit in the non-contentious list. I could not, however, reach that view on a preliminary basis. I could only determine the issue as to the appropriate procedure after a full consideration of the affidavits and the arguments of counsel.

The substantive issue

24. It is therefore necessary to consider whether, on the basis of the affidavit evidence before the court, this is an appropriate case in which to make an order under s. 27 (4) of the 1965 Act. It will also be necessary to consider whether it is appropriate to make any such determination at this stage or whether the issue is one which requires to be addressed on oral evidence. Before attempting to consider the evidence, it is important to have regard to the provisions of s. 27 (4) and to the relevant authorities which give guidance as to the application of s. 27 (4). Section 27 (4) of the 1965 Act provides as follows:-

> *"Where by reason of any special circumstances it appears to the High Court ... to be necessary or expedient to do so, the Court may order that administration be granted to such person as it thinks fit."*

Relevant case law in relation to s. 27 (4)

25. As McCarthy J. explained in the Supreme Court in *Re. Martin Glynn Deceased* [1992] 1 IR 361 at p. 365, s. 27 of the 1965 Act is an enabling provision effectively replacing (although not formally repealing) s. 78 of the Probates and Letters of Administration Act (Ireland) 1857 ("*the 1857 Act*"). Under s. 78 of the 1857 Act, an order could only be made to pass over an executor appointed under a will or a person entitled by law to extract a grant of administration where certain pre-conditions were satisfied. In *Glynn*, McCarthy J., at p. 366 summarised those pre-conditions as follows:-

(a) Where the deceased had died intestate;

(b) Where the deceased had died testate but without having appointed an executor willing and competent to take out a grant of probate;

(c) Where the executor was resident out of the jurisdiction; and

(d) In any of the cases outlined at (a) to (c) above, where it was shown to be necessary or convenient to make the appointment, by reason of the insolvency of the estate of the deceased or other special circumstances.

26. In *Glynn*, McCarthy J. contrasted the relatively rigid requirements of s. 78 of the 1857 Act with the provisions of s. 27 (4) of the 1965 Act and said, at p. 366:-

> *"This is in marked contrast to the provisions of s. 27, sub-s. 4 of the Act of 1965 where the discretion is not made expressly subject to any pre-condition; indeed, the determination of the grantee of letters and administration is made expressly subject to sub-section 4. In my view, the sub-section should be given a liberal*

construction. Since the applicant was prepared to undertake the administration and is supported by Michael Donoghue, a pecuniary legatee and a creditor of the estate, who has renounced his right to a grant, and Michael Concannon another pecuniary legatee, not opposing this application, in my view the appeal should be allowed and the grant of letters of administration not limited to calling in the estate but be a grant in the ordinary form".

27. It is true that the facts of that case are far removed from the facts of the present case. In *Glynn*, the testator, under his will, left his farm to his sister as life tenant with a remainder interest to vest in Michael Kelly who was the respondent to the s. 27 (4) application. The will also named Mr. Kelly as executor of the testator's estate. By a codicil to the will, Mr. Concannon (mentioned in the judgment of McCarthy J. in the passage quoted above) also took a pecuniary legacy. The testator died on 15th November, 1981. On the same day, his sister was murdered. Two years later, Mr. Kelly was convicted of her murder and sentenced to life imprisonment. In the particular circumstances of the case, the Chief State Solicitor sought letters of administration to the estate. In the High Court, Gannon J. made an order granting administration to the Chief State Solicitor but limited his power to taking in and preserving the assets of the deceased. The limitation on the grant was appealed to the Supreme Court which ordered that a full grant of administration should be issued. In light of the very particular facts of the *Glynn* case, counsel for the executor argued that it could readily be distinguished from the present case. I fully agree that the facts are wholly different. However, it is noteworthy that, in its judgment, the Supreme Court did not seek to limit its liberal approach to the construction of s. 27 (4) by reference to the particular facts. The observations of McCarthy J. in relation to the interpretation of the subsection were of a general nature and could not, in my view, be construed as applicable only to cases with such extreme and unusual facts as those which arose in the *Glynn* case. That said, the ultimate decision in *Glynn* was undoubtedly influenced by the facts of that case. The subsequent case law (discussed in more detail below) shows that there are still a number of hurdles which must be surmounted before the court will be prepared to pass over an executor under the provisions of s. 27; (4) of the 1965 Act.

28. It is also important to bear in mind that an application to pass over an executor by seeking a grant of administration under s. 27 (4) is treated quite differently to an application to revoke or cancel a grant of probate which has already been issued. The approach taken in such cases was described by Lynch J. in the Supreme Court in *Dunne v. Heffernan* [1997] 3 IR 431 at pp. 442-444 as follows:-

> *"An order removing the defendant as executrix (which would be made by virtue of s. 26, sub-s. 2 and not s. 27, sub-s.4 of the Succession Act, 1965) and appointing some other person as administrator with the will annexed by virtue of s. 27, sub-s. 4, is a very serious step to take. It is not justified because one of the beneficiaries appears to have felt frustrated and excluded from what he considered his legitimate concerns. It would require serious misconduct and/or serious special circumstances on the part of the executrix to justify such a drastic step...*

When read in the light of its own facts the decision in re Martin Glynn Deceased has no relevance to this case. When an executor is appointed and proves the will and thus accepts a duty of administering the testator's estate he or she can be removed, not pursuant to s. 27, sub-s. 4, but pursuant to s. 26, sub-s. 2 of the Act of 1965, but there must be serious grounds for overruling the wishes of the testator. If such an order is made then of course s. 27, sub-s. 4 enables the court to appoint another person as administrator with the will annexed.

Where the person nominated to be executor renounces, or where no executor is appointed, or on an intestacy, the right to administration is determined by the rules…in O.79 r.5. In such a case, the person entitled to the grant of administration may be passed over more readily and someone else appointed pursuant to s. 27, sub-s. 4 and where an executor is appointed and accepts the appointment by proving the will when weighty reasons must be established before the grant of probate would be revoked and cancelled pursuant to s. 26, sub-s. 2 and the testator's chosen representative thereby removed, and someone else not chosen by the testator appointed pursuant to Section 27 sub-s. 4 of the Act of 1965". (emphasis added).

29. Crucially, in *Dunne v. Heffernan*, the sole surviving executrix of the estate of the deceased had extracted a grant of probate. It was only after the extraction of the grant that an application was made by the plaintiff in those proceedings seeking the removal of the executrix. As Lynch J. observed in the extract from his judgment quoted above, the executor in that case had taken out a grant of probate and had thus accepted the duty of administering the testator's estate. The courts have been very reluctant to remove an executrix or executor to whom a grant of probate has issued. The test for the grant of such relief laid down by the Supreme Court in *Dunne v. Heffernan* has had the result that it is very difficult to succeed in such an application. Examples of that difficulty can be found in the decisions of Macken J. in *Flood v. Flood* [1999] 2 IR 234 and the decision of Keane J. in *Muckian v. Hoey* [2016] IEHC 688.

30. However, the test laid down by the Supreme Court in *Dunne v. Heffernan* is not applicable to an application under s. 27 (4). This was made clear by Baker J. in *O'Callaghan* where, in an application under s. 27 (4) she expressly distinguished such an application from applications to revoke a grant under s. 26 (2). At para. 28 of her judgment she said (with regard to the case law under s. 26 (2) of the 1965 Act):-

"Certain matters are to be observed with regard to this case law. Each of the three cases mentioned were applications to revoke a grant under s. 26(2)…. This is not such and it is one brought under s. 27(4), and is properly characterised as an application to pass over the right of the executor to extract a grant. As a general principle in respect of both classes of application a court must respect the wishes of a testator that his or her estate be administered by the person chosen to take on that task. However, the combined effect of ss. 27(1) and (4) of the Act of 1965 is that the High Court may grant administration with or without will annexed of the

estate of a deceased limited in any way that it thinks fit. The court has a power to pass over the executor named in a will and permit another person to extract a grant, but the authority of the person thus permitted may be limited in several ways. …".

31. At paras. 29-34, Baker J. expanded on the differences between cases where a grant has already been taken out, and cases where an applicant seeks to pass over an executor. In para. 30 of her judgment, she rejected the argument of counsel for the executor in that case that *Dunne v. Heffernan* was authority for the proposition that an executor will only be removed where the executor is shown to be in a position of conflict or where the conduct of the executor has been such as to warrant a finding that he is not in a position to administer the estate. In para. 31, Baker J. also rejected a submission that the only circumstances in which the court may pass over a named executor and permit administration to be granted to another person is where it is "*necessary*" to do so. Baker J. drew attention, in this context, to the use of the word "*expedient*" in s. 27 (4). The subsection makes clear that necessity and expediency are alternatives. She then continued at paras. 32-34 as follows:-

"32. The case law relied on by both parties…suggests some of the factors that the Court may take into account in making an order under s. 27 (4), but there is a significant difference legally and practically between the removal of an executor who has already extracted a grant, and the revocation of a grant by which that executor is deprived of all powers derived under the will and the grant, on the one hand, and where the Court grants administration limited for a purpose or purposes to another person. In the latter case the rights of the executor may be maintained and do not require to be abrogated. Another difference of a practical nature is that the costs of extracting a grant and costs incurred on the administration of the estate will generally not be unnecessarily wasted.

33. The Court … in [Dunne v. Heffernan] was influenced by the fact that the likely litigation between the family members will be more costly as a result of the interposition of another party, i.e. an independent person appointed as personal representative under s. 27 (4) after the grant to the proving executor was revoked, and while the Court … considered that a third party personal representative in the litigation would not add anything to the dispute, and would not have any direct evidence or argument to make, which would be in addition to, or even different from that which would emerge in the course of the action between the family members.

34. I reject the argument of counsel for the executor that the reason why that Court … rejected the application was that the administrator had confirmed that he would be bound by any order of the Court. A person extracting a grant of probate or administration intestate swears on affidavit that he will administer the estate in accordance with law. The Court … recognised that a legal obligation and burden exists on a personal representative, whether executor or administrator of an

intestate estate, and the personal representative is obliged by his oath to lawfully perform the solemn task undertaken. It is incorrect to characterise the executor in the estate of … Dunne deceased as having expressed a 'willingness' to be bound by any order of the court, and it was the general obligations arising under the oath that persuaded the Court … that the proving executor would perform the task vested in him." *(emphasis added).*

32. It is also important to note that, in *O'Callaghan*, the judgment of Baker J. was concerned with an application made in the non-contentious list to pass over an executor. The application was strongly resisted by the executor. It is clear that there was a significant dispute between the parties. Nonetheless, the application was heard and determined in the non-contentious list. In that case, the executor had previously retained a solicitor who had claimed a lien for unpaid fees and costs over the documents of the executor. The application was unusual because it was made not by a beneficiary or creditor of the estate as such but by a judgment creditor of both the executor and the principal beneficiary of the estate. It was not alleged that the executor was in conflict with the estate. The allegation was that the executor would be unlikely to administer the estate in a way that would sufficiently protect the interests of the judgment creditor in enforcing his debt against the principal beneficiary.

33. Notwithstanding that the solicitor acting for the executor confirmed on affidavit that he had instructions to administer the estate as swiftly and efficiently as possible, Baker J. was prepared to pass over the executor. She did so on the grounds that the executor was unwell and that his solicitor had an unresolved dispute with the estate (in respect of which he was claiming a lien). Baker J. limited the grant to the taking of all steps necessary to extract the grant and deal by sale or otherwise with the assets of the estate with a view to realising those assets so as to discharge the judgment debt to the applicant. It was not appropriate in that case for the executor to be passed over *"for all time"* because it was clear that there would be a residual value in the estate after discharge of the judgment debt in favour of the applicant.

34. Again, the facts in the *O'Callaghan* case are quite different to the facts which arise for consideration in this case. Nonetheless, the decision, consistent with the approach taken by the Supreme Court in *Glynn*, illustrates the broad scope of s. 27 (4) of the 1965 Act. The decision also illustrates the ability of the court to hear and determine an application under s. 27 (4) in the non-contentious probate list.

35. Baker J. revisited the scope of s. 27 (4) in her subsequent decision in *Re James Patrick Hannon Deceased* [2018] 3 I.R. 402. In that case, the deceased executed a will in 2014 in which he bequeathed the residue of his estate to the Roman Catholic Archbishop of Dublin for his charitable purposes. The deceased had earlier executed a will in 1999 in which he bequeathed the remainder of his estate to his surviving sister. There was a doubt as to the testamentary capacity of the deceased to execute the 2014 will and an application was made to Baker J. in the non-contentious probate list for an order admitting the 2014 will to proof in common form of law. In January 2017 Baker J.

declined to admit the will as she did not have sufficient evidence of the capacity of the deceased at that time. However, the matter was adjourned to allow discussions to take place between the parties. Later a compromise was reached between all relevant parties under which it was agreed, with a view to avoiding litigation in relation to the testamentary capacity of the deceased, that the estate of the deceased (which was valued at €317,000) should be distributed equally between the persons entitled under both the 1999 will and the 2014 will. It was also agreed that Ms. Susan Halpenny, a solicitor, should be appointed as administratrix of the estate. An application was then made to Baker J. under s. 27 (4) for a full grant of administration to be issued to Ms. Halpenny. In her judgment, in considering that application, Baker J. carried out a very careful and comprehensive review of the law in relation to s. 27 (4) and came to the following conclusions:-

(a) In the first place, having regard to the decision of the Supreme Court in *Glynn*, the limitations contained in s. 78 of the Act of 1857 are no longer part of the law, and Baker J. observed that the court enjoys a "*wide enabling jurisdiction under s. 27(4) of the Succession Act to grant administration, should special circumstances be shown to exist*";

(b) Nonetheless, the provisions of s. 27 (4) will only be engaged where, as the language of the subs. makes clear, there are "*special circumstances*" to justify the grant of relief;

(c) The task of the court is to ascertain whether circumstances exist which may be described as special and whether, in those circumstances, it has been shown to be either necessary or expedient to give liberty to extract a grant;

(d) Having regard to the language of s. 27 (4) the court should exercise its discretion under the subsection in a cautious manner having regard to the requirement that "*special circumstances*" must be shown to exist;

(e) On the other hand, for circumstances to be "*special*", they do not have to be extraordinary or highly unusual;

(f) Consistent with the approach taken by her in *O'Callaghan*, Baker J. also reiterated that it is not a requirement that "*necessity*" should be demonstrated – so long as special circumstances have been shown to exist and that it is expedient to make the order. In this context, it must be shown that the making of the order would be worthwhile or appropriate having regard to all of the circumstances;

(g) Baker J. also rejected the submission of counsel in that case that the sole basis on which a court may permit a grant to issue to a person other than an executor is where the executor is shown to be in conflict with the estate or where the executor, for whatever reason, is not in a position to administer the estate.

(h) At the same time, Baker J. acknowledged that, as found by Laffoy J. in *Re The Estate of Rhatigan Deceased* [2012] 2 I.R. 286 it may well be expedient to pass over the person entitled to extract a grant of probate where the executor or executrix has a conflict of duty or conflict of interest.

36. In light of the very comprehensive consideration given by Baker J. to s. 27 (4) in *Hannon*, it seems to me to be unnecessary to consider any of the remaining case law in which the subsection was considered. However, it is useful to note that in Rhatigan (mentioned in para. 35 (h) above), Laffoy J. ultimately found that both the executor in that case and the party seeking to pass over the executor were in a position of conflict and that in those circumstances the only appropriate order to make was to grant administration of the estate to a wholly independent person. At pp. 314-315, Laffoy J. explained the position as follows:-

"52. While I have come to the conclusion that the plaintiff, who was chosen as executor by the Testator, has a conflict of duty and would have a conflict of interest if probate issued to her, I have also come to the conclusion that the defendant, who was not chosen by the Testator to administer his estate, has a conflict of interest, which precludes her acting in the administration of the … estate.

53. Therefore, I have come to the conclusion that the administrator should be a professional person who is wholly independent of the beneficiaries of the estate assets and of the beneficiaries of the non-estate assets. Given the complex issues which are likely to arise in the administration of the estate and, in particular, the fact that the Revenue investigation is ongoing, I have come to the conclusion that the ideal situation would be that the personal representative is an accountant by profession. I do not, however, consider that it would be appropriate to appoint a person who has had any previous professional relationship with either the defendant or her children or a connection with a firm which had such relationship. I propose to adjourn the proceedings for a short period in the hope that the parties can reach agreement on the choice of a suitable person, who is willing to act.

54. When an appropriate administrator has been identified, and evidence as to his or her suitability to act as administrator is put before the court, I propose making an order under s. 27(4) … granting that person administration of the Testator's estate with the Will annexed".

The application of the relevant principles to the facts of this case

37. Having set out the applicable principles, it is now necessary to consider how those principles should be applied in the present case. In this context, it was argued by counsel on behalf of the applicant that there were special circumstances in this case which made it not only expedient but necessary to pass over the executor and to make an order pursuant to s. 27 (4) giving the applicant liberty to apply to extract a grant of probate with will annexed. In this context, counsel for the applicant drew attention to the following matters:-

(a) In the first place, counsel drew particular attention to the failure of the executor to respond in any meaningful way to the correspondence sent on behalf of the applicant and his sisters in the period between August 2018 (when the first letter was written to the executor calling upon him to lodge the necessary papers to extract a grant of probate) and 13th May, 2019 (when, having ascertained that no application had been made to extract a grant, the applicant decided to make the present application). Counsel argued that this was not just a case of delay on the part of the executor but a complete failure to address the concerns of the applicant and his sisters. He argued that the approach taken by the executor suggested that he had no proper appreciation of his role as executor and, in particular, his duty to administer his late mother's estate;

(b) Counsel highlighted what was said in para. 21 of the applicant's replying affidavit (summarised in para. 18 (h) above) that the executor had been a director of Westwood prior to Mrs. Horan being made a ward of court in August 2015. During a period when his late mother was suffering from dementia and unable to manage her own affairs, he, as the remaining director of Westwood, failed to make annual returns which ultimately resulted in Westwood being struck off the register of companies. It therefore became necessary for the General Solicitor, subsequent to Mrs. Horan being admitted to wardship, to bring proceedings to have Westwood restored to the register of companies. While the applicant has no interest under the will in the shares in Westwood, counsel suggested that this behaviour on the part of the executor, while acting as a director of Westwood, was consistent with his attitude to the administration of the estate and his failure to address perfectly reasonable correspondence sent on behalf of the applicant in the period between August 2018 and May 2019;

(c) A further significant concern voiced by counsel for the applicant arose from the failure by the executor to pay rates due by Westwood to Fingal County Council despite repeated requests. As noted in para. 18 (i) above, this resulted in a judgment being obtained against Westwood on 31st July, 2018. Again, while the applicant has not suffered personally as a result of the failure to pay rates, counsel argued that this behaviour on the part of the executor was a further illustration of his propensity to delay and of his inability to properly address his obligations and responsibilities. A similar issue arose in relation to the failure to furnish account details to Giles J. Kennedy & Co. Solicitors with the necessary account details to enable rental payments to be made by the tenant of the Fonthill industrial premises which resulted in a sum of €69,600 being returned to the tenant in January 2019.

(d) Counsel for the applicant also drew attention to the contents of the affidavit sworn by the executor on 31st July, 2019 in which he admitted that he had suffered injury during the course of an altercation with a neighbouring landowner. Counsel suggested that this also pointed to the unsuitability of the executor acting in the administration of the estate here. Counsel suggested that an altercation of the kind

described by the executor in his affidavit was not the appropriate way in which to settle a legal dispute in relation to property.

(e) Counsel also expressed concern that the executor had not, in his affidavit sworn on 31st July, 2019, addressed a very pressing issue raised in the applicant's affidavit sworn on 31st May, 2019 in para. 24 where the applicant had said:-

> *"In particular, we have grave concerns about the management of the Fonthill property, which is rented to the NCT Centre. It is imperative that the insurance for this building is renewed, that the rent is collected and that any income tax in relation to such rent is discharged properly and within time".*

Notwithstanding the importance of that issue, it was not specifically addressed by the executor in his replying affidavit sworn on 31st July, 2019. Counsel also drew attention to para. 19 of the affidavit sworn by the applicant on 9th September, 2019 in which he stated:-

> *"...the respondent... was withdrawing funds from [Mrs. Horan's] account when he shouldn't have. In 2014 I had to write to both EBS and KBC bank asking them to freeze the deceased's accounts as she appeared to no longer have capacity. This was because it appeared that the Respondent was withdrawing significant sums of money from these accounts. Thankfully, the accounts were frozen at my request. ... it is with regret that I have to say this conduct by our brother gave rise to serious concerns on our behalf and it was a serious breach of trust and as a result we have lost all trust and confidence in him".*

In this context, counsel also highlighted that, as stated in the grounding affidavit of the applicant, he drew attention to the fact that at least two of the accounts held by the late Mrs. Horan were in joint names namely a post office savings account and an account with KBC bank. Counsel suggested that there was an obvious conflict for the executor in relation to any joint accounts of that kind;

(f) A further issue highlighted by counsel was the suggestion made by the executor in his replying affidavit where he contended that any distribution of funds out of the estate is to be postponed for a period of ten years. Counsel submitted that this raises an issue as to the proper interpretation of the will which would inevitably create a point of conflict between the executor, on the one hand, and the applicant and his sisters, on the other;

(g) Counsel for the applicant also sought to raise a number of other matters relating to the conduct of the executor (in particular his past conduct). However, as these were not matters in respect of which any admissible evidence was given on affidavit I ruled that these were not matters that could be weighed in my consideration of the issues which arise in the context of this application under s. 27 (4);

(h) Finally, counsel for the applicant suggested that the relationship of trust and confidence between the applicant and the executor had entirely broken down and that in those circumstances, it was inappropriate that the administration of the estate should be left in the hands of the executor.

38. In his submissions, counsel for the executor, made a number of points including the following:-

(a) Although this is not addressed in any affidavit delivered on behalf of the executor, counsel said that, since the matter had last been before the court in July 2019, a huge amount of work had been done. Counsel indicated that he understood that the Inland Revenue affidavit (which had been prepared by the executor's solicitor retained since July 2019) was ready to be sworn. He also submitted that the executor has no desire to frustrate matters and that if he is allowed to take out a grant of probate, he will faithfully administer the estate.

(b) Counsel, very helpfully, accepted that the present application is best characterised as an application to pass over the executor. However, he suggested that the test was that set out in *Dunne v. Heffernan* and that there was no sufficient evidence before the court to substantiate the existence of any serious grounds for overruling the wishes of the late Mrs. Horan as expressed in her will. I do not believe that counsel is correct in his submission that the appropriate test is that laid down in *Dunne v. Heffernan*. In light of the approach taken by Baker J. in her judgments in *O'Callaghan and Hannon*, it is clear that *Dunne v. Heffernan* does not apply where a grant has yet to be taken out;

(c) Even if the test is a lower one than that laid down in *Dunne v. Heffernan*, counsel submitted that there was no urgency in this case to administer the estate. Counsel argued that the fourteen-month period which had passed since the letter sent in August 2018 was "*quite short*". He submitted, in the circumstances, that it was neither necessary nor expedient that the executor named in the will should be passed over.

(d) Counsel also argued that there was no evidence in this case that the executor has caused any loss to the estate;

(e) Counsel further submitted that the appointment of a person to administer the estate in place of the executor would lead to a significant increase in cost. The work done by the executor's solicitor would have to be duplicated and accordingly he submitted that the entire application was counter-productive and would increase costs for both sides;

(f) Counsel emphasised that there is no evidence that the executor is incapable or lacking capacity to administer the estate;

(g) Counsel also submitted that the allegations made against the executor were of a speculative kind and fell far short of establishing that there were special circumstances. Counsel referred in this context to my decision in *Darragh v. Darragh* [2018] IEHC 427 where I struck out a claim in which the plaintiffs sought that an independent person should be appointed as administrator of their father's estate on the grounds that the concerns expressed by the plaintiffs were of a "*very speculative kind*". At para. 85 of my judgment in that case I said:-

> *"...The Plaintiffs have not pointed to the existence of any evidence – as opposed to unsubstantiated assertion – that might justify the relief claimed...".*

(h) Counsel also drew my attention to the fact that in *Darragh v. Darragh*, I had indicated that the relevant standard was that set out by the Supreme Court in *Dunne v. Heffernan*. However, while a grant had not issued in that case, it is clear that the defendant executor in that case had made every effort to obtain a grant but was prevented from doing so by the caveat filed on behalf of the plaintiffs. My decision must be seen in that light. While the executor in this case has contended that he was delayed by the filing of a caveat by the applicant, there is no substance to that suggestion in circumstances where the caveat was immediately removed once the applicant was provided with a copy of his late mother's will.

(i) Counsel also argued that the present application would achieve no purpose in circumstances where, even if the application was successful, the executor would remain as trustee under the terms of Mrs. Horan's will.

(j) Finally, counsel argued that the applicant had signally failed to demonstrate that there were special circumstances sufficient to justify the intervention of the court under s. 27 (4).

Discussion

39. Notwithstanding the case made by counsel for the executor, it seems to me that the present application can, quite properly, be determined on the basis of the affidavit evidence before the court. In my view, a plenary hearing is not necessary. While there is some level of conflict, on the affidavits, between the parties, it seems to me to be possible to resolve this application by reference to those aspects of the evidence which are not seriously in dispute. Insofar as these (largely uncontested) aspects of the evidence are concerned, I do not believe that there is any basis to suggest that any of these matters are of a speculative kind. As noted above, I have excluded any consideration of matters which have no proper evidential basis.

40. Among the matters which emerge from the affidavit evidence and which I believe to be relevant are the following:-

(a) The executor has delayed for a significant period in taking out a grant of probate;

(b) No satisfactory explanation has been provided for the delay in taking out a grant of probate;

(c) The executor, inexplicably, failed to answer quite reasonable correspondence from the solicitors for the applicant over a prolonged period of time, notwithstanding the obvious interest which the applicant has in the proper and timely administration of his late mother's estate;

(d) It is particularly noteworthy that, while the executor was the only director of Westwood capable of making decisions, he failed to make annual returns resulting in Westwood being struck off the register of companies. This necessitated an application being made by the general solicitor to have Westwood restored to the register of companies. This raises a serious concern about the executor's understanding of his legal obligations and of the consequences of not fulfilling those obligations. While the events relating to Westwood did not arise in the context of the administration of the late Mrs. Horan's estate following her death, the failure to take the basic step of ensuring that appropriate annual returns were filed on behalf of Westwood raises a serious question about the suitability of the executor to administer his mother's estate;

(e) The failure to pay rates due by Westwood to Fingal County Council also raises similar concerns. As noted in para. 18 (i) above, this resulted in a judgment being obtained against Westwood. While, under the will of the late Mrs. Horan, the executor is the sole beneficiary in respect of the shares in Westwood, the fact that he allowed a situation to occur where rates were left unpaid and judgment was obtained by the local authority against Westwood raises, more generally, a further serious question about his suitability to properly administer Mrs. Horan's estate;

(f) An additional area of concern relates to the failure of the executor to provide details of an appropriate account into which rental payments could be made by the tenant of the Fonthill property. No explanation has been provided as to why these details were not provided. This had a significant consequence in that a sum of €69,600 had to be returned to the relevant tenant. This is an asset of the estate. It is a basic duty of an executor to gather in the assets of the deceased so that the executor will be in a position to administer and distribute the estate in a timely and comprehensive way;

(g) No sufficient explanation has been provided by the executor to why he erroneously informed the solicitors for the applicant in September 2018 that he could not take out a grant of probate until he received a dismissal order from the Wards of Court Office discharging the late Mrs. Horan from wardship. It is clear from the applicant's affidavit (and this has not been seriously contested by the executor) that the applicant's solicitor was informed by the general solicitor that she had already advised the executor that a dismissal order was not required and that he could proceed to take out a grant of probate. This was an issue that was raised in the applicant's solicitor's letter of 19th September, 2018 and, again, in para. 13 of

the applicant's affidavit sworn on 31st May, 2019. Yet, when the executor came to respond to that affidavit on 31st July, 2019, he did not provide any explanation for the manifest inconsistency between what he told the applicant's solicitor, on the one hand, and what he had previously been advised by the general solicitor, on the other;

(h) Furthermore, as noted in para. 37 (e) above, the executor failed to address, in his replying affidavit, the very material concern raised in para. 24 of the applicant's affidavit sworn on 31st May, 2019 in relation to insurance of the Fonthill property. Nor did he deal with the question of the collection of rent in respect of that property or with the question as to whether the appropriate tax was being paid by the estate on any rents which are in fact being received. In this context, I do not believe that it can plausibly be suggested that the concerns raised in para. 24 of the applicant's affidavit are purely speculative. In light of the evidence that was given in relation to the failure to furnish account details to Giles J. Kennedy & Co. (described elsewhere in this judgment) there was clearly a proper basis for the concern raised by the applicant in his first affidavit and which, in my view, required an appropriate response from the executor;

(i) The executor has also, in his own affidavit, described the injury he sustained following an altercation with a neighbour over a boundary dispute. While little detail is given by executor in his affidavit of this incident, I believe that counsel for the applicant was correct to draw attention to this issue as a further source of concern about the executor's suitability to administer the estate of the late Mrs. Horan. Boundary disputes are not to be resolved by physical altercation;

(j) It is also clear from the executor's affidavit that there is now a significant point of conflict between his interpretation of clause 4 of the will and the interpretation taken by the applicant (and apparently previously shared by the executor himself). Given the extent to which trust and confidence has clearly broken down as between the executor and the applicant, this point of conflict as to the proper interpretation of clause 4 has the potential to create very substantial difficulty going forward and could well embroil the estate in expensive litigation to resolve the issue. In those circumstances, it is particularly important that there should be an independent person administering the estate who will be in a position to take independent advice on the issue and to follow that advice.

41. As noted by Baker J. in *Hannon*, the task of the court is to ascertain whether there are "*special circumstances*" to justify the grant of relief. While the court must proceed cautiously, it is clear from the judgment of Baker J. that the relevant circumstances do not have to be extraordinary or highly unusual. In every case, the circumstances must be considered in the round. The court is required to form a view as to whether, on the basis of the evidence and material before it, there are sufficiently weighty matters of concern that make it either expedient or necessary to intervene under s. 27 (4).

42. I have come to the conclusion that the circumstances here are sufficiently special that it is expedient and also necessary that a person other than the executor should be appointed to administer the estate of the late Mrs. Horan. It seems to me that the matters outlined in para. 40 above, in combination, amount to special circumstances. In particular, it seems to me that the behaviour of the executor as summarised in para. 40 (d), (e), (f), (g), and (i) raise a very serious question as to his suitability and capability to properly and comprehensively administer the estate of the late Mrs. Horan in a full and fair way. I draw attention to the executor's failure to ensure that annual returns were delivered on behalf of Westwood at a time when he was the only director of that company capable of giving instruction. Of equal concern is his failure to ensure that rates were paid by Westwood to the local authority in respect of the Fonthill property. A similar issue arises in relation to his failure to ensure that appropriate details were given to the tenant of the Fonthill premises to enable the rents to be paid. I fully appreciate that, as his counsel strongly urged, the executor has now said, through counsel, that he has no desire to frustrate matters and that, if he is allowed to take out a grant of probate, he will faithfully administer the estate. I am prepared to accept that this submission was made in good faith, and that the executor genuinely believes that he is ready to proceed with the administration. However, if the executor did not carry out these basic obligations in the past, one could not be confident that he would carry out the basic obligations and fulfil the duties of an executor in the administration of his mother's estate in the future. In short, his past conduct (which has never been adequately explained or justified) is such as to give rise to special circumstances which make it both necessary and expedient to make an order pursuant to s. 27 (4) of the 1965 Act. A further relevant factor arises from the conflict that now exists between his interpretation of clause 4 of the will, on the one hand, and the interpretation taken by the applicant. Given this conflict, it is clearly expedient that a neutral party should be appointed to administer the estate of the late Mrs. Horan in place of the executor. In this regard, it also seems to me to be inappropriate that the applicant be given liberty to apply to extract a grant. Given the conflict between the parties as to the interpretation of clause 4 of the will and given the breakdown of trust and confidence between them, it seems to me that the only appropriate course to take is to follow the precedent established by Laffoy J. in *Rhatigan* and to order that the grant should be made to a wholly independent person.

43. I had considered whether, in circumstances where counsel for the executor has explained that Cronin & Co. Solicitors have undertaken a significant amount of work since their appointment by the executor in July 2019, it would be appropriate that a member of that firm should be appointed. However, in light of the approach taken by Laffoy J. in *Rhatigan*, I do not believe that it is open to me to take that course – at least in the absence of consent of both parties. Absent such consent, as Laffoy J. observed, in para. 53 of her judgment in *Rhatigan*, it would not be appropriate to appoint a person who has had any previous professional relationship with either of the parties. I therefore propose to adjourn the proceedings for a short period in the hope that the parties can reach agreement on the choice of a suitable person, who is willing to act. Like Laffoy J., I propose that, when an appropriate person has been identified, and evidence as to his or her suitability to act is available, an order should be made under s. 27 (4) empowering

that person to take out a grant in respect of the estate of the late Mrs. Horan with will annexed.

44. For completeness, I should make clear that I have, of course, given consideration to the argument made by counsel for the executor that the making of an order under s. 27 (4) would serve no useful purpose in circumstances where it would leave the executor in place as trustee appointed under the late Mrs. Horan's will. I fully acknowledge the force of that submission. However, as noted in para. 40 (h) above, one of the fundamental obligations of an administrator of an estate is to gather in the assets of the estate. That task falls on the executor rather than on the trustee. The matters summarised in paras. 40 (a) to (j) above are all relevant in the context of the role of an executor and they, in my view, give rise to special circumstances as to why an order should be made in this case under s. 27 (4). I express no view as to whether there might be any basis to challenge the executor's appointment as trustee. That is not an issue which is before me. It is sufficient to record that, in my view, the circumstances in this case are sufficiently special to justify the intervention of the court under s. 27 (4) insofar as the administration of the estate of the late Mrs. Horan is concerned.

Conclusion

45. I therefore believe that the case has been made out for the grant of an order under s. 27 (4). However, I will postpone making any formal order in order to give the parties an opportunity to consider who might be appointed for this purpose and to place appropriate evidence before the court as to the suitability of that person to act.