

**THE HIGH COURT**

**PROBATE**

[2023] IEHC 643

Record No. 2022/7810PO

[2022] IEHC

**IN THE MATTER OF THE ESTATE OF THE LATE BERNARD CASEY,  
DECEASED, LATE OF THREADNEEDLE ROAD, SALTHILL, GALWAY**

**DECEASED,**

**AND IN THE MATTER OF THE SUCCESSION ACT, 1965, AND**

**IN THE MATTER OF SECTIONS 27(4) OF THE SUCCESSION ACT**

**AND IN THE MATTER OF AN APPLICATION BY JOHN CASEY, BRAMLEY,**

**ORANMORE, COUNTY GALWAY**

**BETWEEN**

**JOHN CASEY**

**APPLICANT**

**AND**

**YVONNE CASEY AND MICHELLE CASEY**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Stack delivered on the 10<sup>th</sup> day of November, 2023.**

*Introduction*

1. This is an application pursuant to s. 27(4) of the Succession Act, 1965 (“the 1965 Act”) to pass over the respondents who are named as Executors in the Will of their father, Bernard

Casey, late of Threadneedle Road, Salthill, Co. Galway (“the Deceased”) and to appoint instead an independent person to act as legal personal representative in the estate of the Deceased.

2. The Deceased died on 24 November, 2020, leaving a Will made 15 September, 2015. His wife predeceased him only a short time earlier, on 25 September, 2020, having also made her will on 15 September, 2015.

3. Pursuant to the Will, the Deceased appointed his daughters, the respondents herein as Executrices of his estate. Along with the applicant, they are beneficiaries under the terms of the Will, which contained the following specific bequests:

- a. the family home of the Deceased and his wife was left to Yvonne and Michelle as tenants in common, with Yvonne to enjoy a three quarters share and Michelle to enjoy a one quarter share (“the Salthill Property”);
- b. a commercial property at 22/25 Quay Street, Galway, together with the yard at the rear, was left to John (“the Quay Street Property”);
- c. a holiday apartment in Clifden, County Galway, which was left to the Michelle (“the Clifden Property”).

The residue was left to Yvonne, Michelle and John in equal shares. (For clarity, throughout this judgment I will refer to the parties by their first names, though where appropriate, I will refer and Yvonne and Michelle together as “the Executrices”.)

4. John in his grounding affidavit estimates the values of those properties at €1.4m, €1.2m, and €400,000, respectively. They have been valued for probate purposes, though neither the SA2 nor the valuations have been exhibited. Nothing turns on the values other than that on the face of it, this perhaps suggests that the Deceased was attempting to divide the various properties equally between his children. However, if that was his intention, it may not in fact be achieved, as the monies used to buy the Quay Street property were borrowed from AIB and

those monies were secured by way of charges over both the Quay Street Property and the Clifden Property. As of May, 2020, a sum of over €700,000 was owing in respect of this debt.

5. It is common case that no grant was extracted within the “*executor’s year*”, that is, during the year from the date of death, but it was exceeded only by a number of days as papers were lodged in the Probate Office on 30 November, 2021. Nevertheless, the Grant has still not issued because John wrote through solicitors on 2 December, 2021, making serious allegations against Yvonne and Michelle and suggesting that an independent person be appointed. He then lodged a caveat on 22 December, 2021, which has the effect of preventing the Probate Office from issuing the Grant. Yvonne and Michelle were only informed of the existence of the caveat on 21 June, 2022, when the Grant was due to issue, and they served a warning to the caveat on 29 June, 2022. The applicant entered an appearance on 15 July, 2022, and this motion then issued.

6. The Deceased’s death certificate states that he suffered from dementia for a period of six years prior to his death, and both he and his wife had previously executed enduring powers of attorney in favour of the Yvonne and Michelle. Unfortunately, it is necessary to say something about the application made to the President of the High Court in 2018 to register Yvonne and Michelle as attorneys of the Deceased, as the affidavits filed in that application were placed in evidence in these proceedings.

7. Essentially, John objected very strongly to the registration of Yvonne and Michelle as attorneys before ultimately withdrawing his objection and allowing the registration to be effected without contesting it. The basis of his initial objection is material to this application as his affidavit objecting to the registration of the power of attorney was put in evidence in this application and, in that affidavit, John made a litany of allegations of misappropriation of funds against both Yvonne and Michelle.

**8.** Clearly, had there been a basis for such allegations, they would have been entirely unfit to act as attorneys of their parents and there would be, to say the least, very significant question marks as to their fitness to act as executrices of the estate of the Deceased.

**9.** For good practical reasons, the exhibits to the affidavits filed in the 2018 application have not been put in evidence. However, in his first affidavit, John asserted that the sale proceeds of a considerable number of properties had been misappropriated by Yvonne and Michelle. One of these was an investment property in the form of student accommodation in Galway. It was asserted, without giving any details whatsoever, that Yvonne and Michelle had helped themselves to the rental income from this property, resulting in a default and consequent sale at the behest of the bank, and had then misappropriated the proceeds of sale also.

**10.** Yvonne replied to that affidavit, pointing out that the loan used to purchase that property was “*interest only*” until 2012 and, for that period, the rent covered the mortgage repayments. But once the loan repayments reverted to full repayments, the rental could no longer cover the mortgage and it had to be sold. The bank, unsurprisingly, requested that the proceeds of sale be used to repay the loan. This is, of course, entirely normal and, while this is not on affidavit, the usual conveyancing practice is that a lending institution usually protects itself by only consenting to the sale and discharge of the security by insisting on a solicitor’s undertaking to utilise the net proceeds to discharge the loan. The proceeds of sale were not in fact sufficient to pay off the loan and the Deceased and his wife were left with a small repayment to discharge that balance. Yvonne has also stated on affidavit that she had used €4,500 of her own money to pay the legal fees and some of the auctioneer’s fees. In the context of that sale, that freed up €4,500 to discharge the loan and gave ready money to the Deceased and his wife to pay the transaction costs.

**11.** That is just one example but I think it is fair to say that it is telling that John ultimately withdrew his objection to the registration of Yvonne and Michelle as attorneys which he would

hardly have done if he had been in a position to back up the extremely serious allegations he had initially made. These amounted to no less than systemic fraud and abuse of their parents by Yvonne and Michelle over a number of years for their own financial gain. Had even one of the very many serious allegations he made been well-founded, any responsible son would surely have maintained his objection. While he now reserves the right to insist that those allegations were true, in this as in so many other things, actions speak louder than words, and the inference that must be drawn from his action in withdrawing his objection is that, despite having felt free to make the most serious of allegations against his sisters with the benefit of the absolute privilege which attaches to court proceedings, he was unable to substantiate them in any way.

**12.** For their part, Yvonne and Michelle averred in that application that they were of the view that the motivation for John's behaviour was that the Deceased and their late mother had promised to pay €2,000 a month to John after the Deceased's own business in the Quay Street property, and where John had worked as a chef, had closed. Yvonne and Michelle were of the view that this payment was to have been interim to "*tide John over*" but by reason of the increasingly strained financial position of the Deceased and his wife, and the substantial care costs which then needed to be incurred to look after them, and which even in 2018 it was envisaged would rise considerably, they were of the view that the payments had to be stopped as the monies were required to look after their parents. I understand that John has since opened his own business and presumably makes a living from that.

**13.** To return to this application, John now applies to have an independent person appointed to extract a Grant of Letters of Administration with Will annexed in place of Yvonne and Michelle as executrices. That is an application pursuant to s. 27(4) which entitles this Court to pass over a person otherwise entitled to become personal representative, including persons named by the Deceased as their Executors, where it is "*necessary or expedient*" to do so.

**14.** Because Yvonne and Michelle have yet to extract a Grant of Probate, there is a dispute between the parties as to the correct legal test which applies where the persons sought to be passed over have been chosen by the Deceased himself as executrices, I will first deal with that issue, but it should be noted that the factual bases on which John contends that Yvonne and Michelle should be passed over are, in essence:

- a. That they have delayed in extracting a Grant of Probate;
- b. That they have failed to protect the assets of the estate, notably the Quay Street Property, to which John is entitled under the Will;
- c. That they are unfit persons to be executrices as they misappropriated significant funds from the Deceased and his wife during the period in which they acted as attorneys.

**15.** A number of allegations are made under the latter heading including: that during the lifetime of the Deceased, Yvonne purchased two motor vehicles with the Deceased's money for her own benefit; that a sum of €30,000 was withdrawn from the Deceased's bank account after his death and retained by the Executrices for their own use; and that very significant cash sums have been expended both before and after the death of the Deceased and his wife which cannot be accounted for and which, again, John asserts were used by the Executrices for their own benefit.

**16.** Given the very serious nature of the allegations, I feel bound to say immediately that he has failed to substantiate them in this application, but, before dealing with them in more detail, I will first deal with the appropriate legal test where an application pursuant to s. 27 (4) would have the effect of removing an executor appointed by a valid will, as the parties differed on their view of the what this test should be.

*The relevant legal test*

17. If a Grant of Probate had already issued, an application to remove Yvonne and Michelle from their role as executrices would be brought pursuant to s. 26 (2) of the 1965 Act. However, as no grant has yet issued, this application is brought pursuant to s. 27(4) of the 1965 Act. John submitted that, as a result, the high threshold imposed by the Supreme Court in *Dunne v. Heffernan* [1997] 3 I.R. 431 did not apply and he was only required to show “*special circumstances*” which demonstrated that it was either “*necessary*” or “*expedient*” to pass over the nominated executrices and appoint some one else as general administrator. By contrast, Yvonne and Michelle contended that the test in *Dunne v. Heffernan* had to be satisfied, not least because the only reason they had not taken out a Grant of Probate, in which case s. 26 (2) would undoubtedly apply, was because John had prevented them from doing so by lodging a caveat.

18. Section 27 provides (in material part):

*“(1) The High Court shall have power to grant administration (with or without will annexed) of the estate of a deceased person, and a grant may be limited in any way the Court thinks fit.*

*(2) The High Court shall have power to revoke, cancel or recall any grant of administration.*

*(3) Subject to subsection (4), the person or persons to whom administration is to be granted shall be determined in accordance with rules of the High Court.*

*(4) Where by reason of any special circumstances it appears to the High Court (or, in a case within the jurisdiction of the Circuit Court, that Court) to be necessary or expedient to do so, the Court may order that administration be granted to such person as it thinks fit.*

*(5) On administration being granted, no person shall be or become entitled without a grant to administer any estate to which that administration relates.*

*(6) Every person to whom administration is granted shall, subject to any limitations contained in the grant, have the same rights and liabilities and be accountable in like manner as if he were the executor of the deceased.”*

**19.** The Supreme Court confirmed in *In re Martin Glynn, deceased* [1992] 1 I.R. 361 that this provision can be used to pass over the executor named in a will. In that case, McCarthy J. contrasted s. 27(4) with s. 73 of the Probates and Letters of Administration Act (Ireland), 1857, which provided for an executor to be passed over in certain circumstances which appear to have been limited to the situations where an executor was either unwilling or incompetent to take out a grant or where he or she was resident outside of the then United Kingdom of Great Britain and Ireland. McCarthy J. stated (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 of 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.”*

**20.** It must be remembered that the facts of *In re Martin Glynn, deceased*, were truly exceptional as the executor had in fact been convicted of the murder of the deceased’s sister who had been left a life estate in a property in which he was to succeed to the interest in remainder, thereby benefitting from the death. In those circumstances, it is not surprising that

the Supreme Court felt free to override the wishes of the testator as regards the identity of the executor.

**21.** While McCarthy J. contrasted s.27 (4) with its precursor, s. 73 of the Probate and Letters of Administration (Ireland) Act, 1857, which permitted an executor to be passed over only in certain circumstances, such as where he or she was unwilling or incompetent to take out a grant or where he or she was resident outside of the then United Kingdom of Great Britain and Northern Ireland, and pointed out that s. 27(4) authorised the court to exercise a broad discretion, the circumstances justifying exercise of the discretion in that case do not support a view that a court will lightly disregard the testator's wishes as to who the personal representative should be.

**22.** Yvonne and Michelle submitted to me that the relevant test for this application was that in *Dunne v. Heffernan*, where Lynch J., in the course of an application pursuant to s. 26(2) of the 1965 Act to revoke a grant issued to the sole surviving executrix, stated (at p.p. 442-443):

*“An order removing the Appellant 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.”* [Emphasis added.]

**23.** Lynch J. went on to say (also at p. 443-444):

*“When an executor is appointed and proves the will and thus accepts the duty of administering the testator's estate he or she can be removed, not pursuant to section s. 27 sub-s. 4, but pursuant to section 26(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 of the Superior Courts in O. 79 rule 5. In such a case the person entitled to the grant of administration maybe passed over more readily and someone else appointed pursuant to s. 27 sub-s. 4 than 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 s. 27 sub-s. 4 in the Act of 1965.”*

**24.** In that case, of course, the grant had been taken out, so the court did not have to consider the position of an executor who had not yet taken out a grant and whether the test might be different from that under section 26 (2).

**25.** In considering the caselaw, I think it is appropriate to recall a number of matters. First, s. 26 (2) itself contains no criteria by reference to which a Grant of Probate may be revoked, but – like s. 27 (4) – is in very general terms which on their face would not prevent the court exercising a wide discretion. Notwithstanding that fact, the Supreme Court have stated that a Grant of Probate should not be revoked under that subsection unless serious misconduct or other serious reasons are shown to have occurred or be present.

**26.** Secondly, an executor’s appointment does not depend on the Grant of Probate being extracted and his or her authority derives from the will. Section 10 of the 1965 Act provides that the assets of the deceased vest in an executor immediately on the death of the deceased. Furthermore, and as discussed further below, an executor, provided he or she has indicated an intention to accept the appointment, may sue and be sued even prior to the issue of a Grant of

Probate. This position may be complicated by a challenge to the validity of a will, but that does not arise here.

**27.** That being the case, there cannot be a very material difference between the circumstances in which a Grant of Probate will be revoked, on the one hand, and those in which an administrator will be appointed despite the existence of a valid will appointing an executor who has survived the deceased and is both willing and able to act, on the other. It is notable that the Supreme Court, in *Dunne v. Heffernan*, drew a distinction between an executor who had proved the will and a situation where there was no surviving executor who was willing and able to act. They did not suggest that a validly appointed executor who was willing to act – as is the case here – would be “*more readily passed over*”. That makes good practical sense as to impose materially different tests depending on whether a willing and able executor had happened to take out a grant or not would risk creating an unjustifiable distinction in law where different legal tests were applied to situations which were substantially the same.

**28.** That is in fact exemplified by this application as the only reason why Yvonne and Michelle have not extracted a Grant of Probate is because John has lodged a caveat and entered an appearance to their warning to it. However, he has lodged no challenge to the validity of the Will (which is the purpose of lodging a caveat) but has now sought to rely on that delay created by the lodgement of the caveat for the proposition that he should more easily be able to remove his sisters as executrices, contrary to the wishes of the Deceased.

**29.** In *Darragh v. Darragh* [2018] IEHC 427, McDonald J. stated that the test in *Dunne v. Heffernan* would apply in all cases leading to the removal of an executor and, subsequently, in *Re Mary Ann Horan, deceased* [2020] IEHC 21, he pointed out that *Darragh v. Darragh* was a case where only the lodgement of a caveat had prevented the executor from obtaining a grant. McDonald J. seemed to be of the view that there was no difference in substance between a situation where a Grant of Probate had issued and one where an executor had been prevented

from extracting a grant by means of a caveat lodged by an applicant who sought to have him replaced, and I would agree. Where that arises, the test for passing over the executor on the basis of lack of fitness to act is that in *Dunne v. Heffernan*.

**30.** The question of passing over an executor who has failed to take out a grant was at issue more generally in *Re Siobhán O'Callaghan, deceased* [2016] IEHC 668. That was an unusual case where the application pursuant to s. 27(4) was made by a creditor of the executor, who apprehended that the executor (who was also the principal beneficiary) would administer the estate in a manner calculated to deprive his creditor of payment. It was confirmed that the relevant provision was s. 27(4), but the question of replacing the executor with a general administrator did not in fact arise as Baker J. resolved the difficulty which had arisen where an executor was not in a position to proceed with the administration of an estate by appointing a limited administrator.

**31.** As a result, Baker J. did not expressly address the grounds on which an executor would be removed for all purposes by the taking out of a general Grant of Letters of Administration by another. Her consideration (at para. 32) was limited to a situation where a limited grant under s. 27(4) was sought. In fact, insofar as Baker J. referred to a situation where an executor would be removed by the making of an order pursuant to s. 27(4) permitting another to extract an unlimited grant, she stated (at para. 28):

*“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.”*

**32.** I find it difficult to read this as anything other than a statement that there should be no difference in substance in the court's approach to an application designed to prevent an executor from acting as such. Whether the application is made pursuant to s. 27(4) or s. 26(2), the starting point is that the court should respect wishes of the deceased and that an order which

would result in another person being appointed as personal representative should not lightly be made.

**33.** The facts of the cases where the passing over of an executor appointed by a will, the validity of which is not challenged in a probate suit, all demonstrate that a court should not act to defeat that appointment unless there are very good reasons for doing so. If I could hazard an attempt at summarising those, it must be shown either that the executor is not fit to act, has a material conflict of interest with the estate, or is unable or unwilling to act. The latter, as occurred in *Re Mary Ann Horan, deceased*, is often demonstrated by delay in taking out a grant, which indicates that the executor does not intend to discharge his duty to carry out the wishes of the deceased. And even where there is a material conflict with the estate, the solution may be to issue a limited grant to an administrator, as opposed to removing the executor for all purposes: see *Flood v. Flood* [1999] 2 I.R. 234, [1999] IEHC 232.

**34.** None of this, of course, would prevent a court from appointing a general administrator to act in place of an executor where the executor lacked capacity or was otherwise unwilling or unable to act. It was also useful in *Re Hannon, deceased* [2018] 3 I.R. 402, [2018] IEHC 482, where it was sought to appoint an administrator pursuant to s. 27(4) in order to implement a settlement between the persons entitled under the most recent will, which had been challenged on the grounds that the deceased had not had capacity to make it, and those entitled under a previous will. Baker J. was satisfied that the public interest in resolving litigation was sufficient to override what might be the deceased's wishes.

**35.** The essential position, taking all of those authorities into account, is that what is required to pass over an executor pursuant to s. 27(4) may not differ in substance from the circumstances in which a Grant of Probate will be revoked pursuant to s. 26(2), as in either case a high bar has to be met. The "*special circumstances*" which require to be shown under s. 27 (4) must be sufficiently serious in nature to justify departing from the testator's wishes

and, in particular, where it is alleged that the executor is unfit to act, the threshold set by the Supreme Court in *Dunne v. Heffernan* must be met.

*Application to the facts*

**36.** By way of introduction to the factual basis on which John contends that Yvonne and Michelle should be passed over, it should first be noted that his allegations against them are both numerous and serious. These include: delay in taking out a grant, failure to preserve the assets of the estate, and an allegation that they have been guilty of misconduct in their past role as attorneys for the Deceased and his late wife and therefore, in essence, cannot be trusted to act properly as executrices. The misconduct alleged is misappropriation of funds and conversion of the assets of the Deceased and his late wife for their own uses.

**37.** All of these allegations, but in particular the last one, are comprehensively denied by the Executrices who question the motives of the applicant in making this application. In particular, the last allegation, which amounts to a very serious allegation of dishonesty, is hotly contested. I propose to consider each of the bases for the application in turn but think it is appropriate to state at the outset that I am not satisfied that the applicant has demonstrated any dishonesty on the part of his sisters. In fact, I am satisfied that he has had no basis for alleging misappropriation of funds at any point.

**38.** Having made that clear, I now turn to consider the particular basis on which this particular application pursuant to s. 27(4) is made and to set out in more detail my reasons for rejecting it.

*i. Delay*

**39.** As set out above, the application for a Grant of Probate was made shortly after the elapse of the “*executor’s year*”, that is, the 12-month time period now provided for in s. 62 of the 1965 Act. The significance, of course, of the “*executor’s year*” is that no beneficiary can bring proceedings to compel distribution within the period of 12 months from the death of the Deceased. This is not an action to compel distribution, but an entirely different type of application.

**40.** In any event, s. 62(1) provides that “*proceedings against the personal representatives in respect of their failure to distribute*” do not create any absolute requirement to distribute within that time period. Indeed, the general obligation in s. 62 is to “*distribute [the] estate as soon after [the] death as is reasonably practicable having regard to the nature of the estate, the manner in which it is required to be distributed and all other relevant circumstances*”. This is clear from *Shaughnessy v. Shaughnessy* [2016] 1 I.R. 239, [2016] IEHC 303, where Gilligan J., citing a variety of leading textbooks and authorities of persuasive effect, held (at para. 28) that the obligation on an executor pursuant to s. 52 was not an absolute one which required the distribution of the assets of the estate within a year of death but was an obligation to exercise due diligence.

**41.** I do not believe that reliance on the “*executor’s year*” justifies removal of the Executries in this case. Apart from the fact that the application for a Grant of Probate was not particularly late, especially in the context of what appears to be a relatively complex estate, it must be recalled that there were a number of factors which operated to prevent the application being lodged expeditiously.

**42.** First, the Executrices, like their brother, lost both of their parents in a matter of weeks in November, 2020. For most of that winter – other than the “*meaningful Christmas*” of 2020

– the country was in quite severe lockdown. While restrictions of varying severity were imposed from March, 2020, right up to February, 2022, the entire country was in “*Level 5 lockdown*”, the highest level of restrictions, from January, 2021, to May, 2021.

**43.** Yvonne lives in Cork and she has deposed that she was not able to travel to Dublin to meet their solicitors until 28 January, 2021. The Executrices’ solicitors informed the various banks in which the Deceased held accounts by letter dated 10 March, 2021, that he had died. While I will return below to the notification of the banks of the death of the Deceased and his wife, in general, the ability of ordinary people to conduct their personal and business affairs during the pandemic and the degree to which this caused delays has been a common theme in litigation since 2020, and this application is no exception.

**44.** Secondly, throughout 2021, it appears that Yvonne and Michelle prepared the application for the Grant of Probate, which included arranging valuations of the various properties. They also took specialist legal advice on the issues raised by the fact that the Quay Street Property and the Clifden Property are subject to charges to secure the same loan.

**45.** Given the complexity of the estate and the fact that the application was nevertheless lodged shortly after expiry of the “*executor’s year*”, I am satisfied that there was no undue delay in lodging the application and that Yvonne and Michelle have not shown themselves reluctant to discharge their duties as executrices.

**46.** It remains the case that most of the delay which has occurred is now due to the lodgement by John of a caveat, just before Christmas 2021, and the issue of this application on 15 July, 2022. Indeed, it should be noted that this application did not issue in a timely fashion and was only made after the Executrices had become aware of the caveat and issued a warning to it. It is, in my view, John’s own actions which have prevented the administration of the estate in a timely fashion.

*ii. Failure to protect the assets of the estate*

**47.** Although this overlaps to at least some degree with the allegation of delay, it is in reality a distinct allegation made in relation to the Quay Street Property with which John is, obviously, particularly concerned.

**48.** The Property is a commercial property which have been let to MBCC Foods (Ireland) Ltd, trading as Costa Coffee, on a lease for twenty years from 13 August, 2013, at a rent of €90,000 per annum. The tenant apparently has the benefit of a break clause on the tenth anniversary, but the exercise of that break clause is not material to this application. I have not seen the lease but apparently it is a full repairing and insuring lease, as would be the norm for a commercial property.

**49.** When the first lockdown commenced in March, 2020, the tenant closed its doors and ceased paying rent. By August, 2020, it became apparent that the tenant would not resume paying rent and was claiming that the COVID-19 pandemic had frustrated the lease to the extent that the landlord and tenant relationship was at an end. The tenant has instituted proceedings in the Galway Circuit Court to obtain a declaration to that effect and unless the tenant succeeds in obtaining such a declaration, the likelihood is that at least three years' rent – a very substantial sum of money – will be owed by the tenant to the estate. The tenant may also be liable for the disrepair of the Property and to reimburse insurance paid on it by the Executrices, as it appears that the tenant may not have complied with its insuring obligations.

**50.** The matter of the extent to which the tenant is liable to the estate for these matters is not for me to decide, and will no doubt be decided in the existing Circuit Court proceedings or such other proceedings as the Executrices may take in due course. Any liability which is found to exist will not be affected by the exercise of the break clause (if it has been exercised) and would not appear to be statute-barred.

**51.** Yvonne and Michelle have confirmed on affidavit that they regard the Circuit Court proceedings as doomed to fail, that they intend to defend them, and that they intend to pursue the tenant for the rent which is due and owing. It should be noted that it is implicit in the averments of both sides to this dispute that the tenant is solvent.

**52.** Since closing, the Property appears to have fallen into disrepair. However, as the Executrices correctly point out, given that there is a full insuring and repairing lease, the obligation to put and keep in repair falls on the tenant, not on the estate.

**53.** John has asserted on affidavit that the premises are vacant and has complained that Yvonne and Michelle have not taken control of the property and secured it. In this, John appears to misunderstand the respective rights and duties of the tenant and the estate under the lease. Were the personal representatives to enter and secure the property, the tenant would no doubt contend that the lease had been determined by the re-entry of the landlord, a position which would be directly contrary to John's stated interest in ensuring that the tenant would be compelled to comply with its obligations under the lease.

**54.** The parties disagree whether, as a matter of law, the Executrices could commence proceedings for non-payment of rent and breach of the covenant to repair and insure the premises against the tenant, and indeed whether they could defend the proceedings apparently instituted by the tenant in Galway Circuit Court claiming that the lease has been terminated by frustration due to the COVID-19 pandemic. John says that there was nothing to stop the Executrices suing or being sued, as property vests in an executor from the date of death of the Deceased, unlike an administrator, who only becomes vested with the property when the letters of administration are extracted.

**55.** This arises from s. 10 of the 1965 Act which provides that both the real and personal estate of a deceased person shall on his death, notwithstanding any testamentary disposition, devolve on and become vested in his personal representatives.

**56.** By contrast, the Executrices say that the grant is necessary in order for them to prove their title in court and also that it would be foolhardy for them, in these specific circumstances, to have undertaken action for the defence of an action on behalf of the estate when it seemed likely that the applicant would object to their acting as executrices. Obviously, they have proved right in that apprehension, as a caveat was filed by the applicant preventing the Executrices from taking out a Grant of Probate on 22 December, 2021, a period of just over a year from the date of death.

**57.** That, of course, was more than a year after the death of the Deceased, but it should also be noted that what appears to have been a fairly fraught family meeting between the parties to this application and their respective spouses took place in the Salthill Property on 16 January, 2021. John followed this up with a letter to his sisters dated 23 January, 2021, saying that he had “*questions to ask*” about transactions, investments, and any borrowings in the Deceased’s name later years, which appears to be a reference to the Executrices’ conduct as attorneys. He was also asking to have independent witnesses present when he met his sisters and indicating that “*[i]f this way forward is not acceptable to you both there are other options open to me*”. This seems to have been a threat of litigation.

**58.** Against a background where John had previously, but without any apparent basis, accused his sisters in the High Court of serial fraud against their ageing parents during their lifetimes, it is hardly surprising that the Executrices would wish to have the protection of a Grant of Probate before taking steps for which John might threaten to hold them liable personally. In such a situation, caution on their part was advisable.

**59.** Furthermore, I find it very difficult to see how John can now seek to criticise his sisters for not proceeding to sue in advance of the issue of a Grant of Probate when he is in any event maintaining (without any basis) that they are not fit persons to act as executrices. His position is utterly contradictory and only serves to justify the approach of Yvonne and Michelle which

was to have their position as executrices confirmed and protected by the Grant of Probate before they engaged in litigation on behalf of the estate.

**60.** It should be said that the general position of the right of an executor to sue seems to be well-settled. In *Finnegan v. Richards* [2007] 3 I.R. 671, [2007] IEHC 134, McKechnie J., who was considering the materially different position of an administrator who took out a grant only after proceedings had issued, stated (at para. 12):

*“An administrator derives his title solely from the grant of administration, quite unlike an executor upon whom the real and personal estate of a deceased person vests immediately upon the death of the testator: see Woolley v. Clark (1822) 5 B. and Ald. 744 and Chetty v. Chetty [1916] 1 A.C. 603. A grant of probate is necessary only to confirm the authority of the executor or otherwise to offer formal proof of his status: see In Re Crowhurst Park [1974] 1 W.L.R. 583.”*

**61.** The position is very clearly stated as a matter of English law in Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate*, 21<sup>st</sup> Ed., (Sweet and Maxwell, 2018) at pp. 59-61. Para. 5-10 appears to be directly on point:

*“Although an executor cannot maintain actions before probate unless he is in actual possession, he may commence an action before probate, and he may continue it until the production of the probate becomes necessary. It will be sufficient if he obtains the probate in time for that exigency. Thus, even before probate, an executor can commence proceedings seeking payment of rent falling due to the estate after the death of the testator. If it becomes necessary for him to prove his title by executorship (because, for example, the defendant puts his title in issue), it will be sufficient if he obtains probate in time to produce it in evidence at the trial.*

*In order to protect the defendant in such cases, the court, on being shown that the person who claims as executor has not obtained probate, will stay proceedings until*

*probate has been taken out and a reasonable time has elapsed after it has been submitted to the inspection of the defendant.*

*The same principles apply to all proceedings whether in the Chancery Division, or elsewhere including bankruptcy petitions and winding-up petitions.” [Emphasis in original.]*

**62.** As regards defending proceedings, such as those brought by the tenant to obtain a declaration that the lease of the Quay Street Property had been determined, the authors say (at para. 5-12):

*“If an executor has elected to administer, he may, before probate, be sued at law or in equity by the deceased’s creditors, whose rights are not impeded by his delay, and to whom, as executor de jure or de facto, he has made himself responsible. So an action may be commenced against an executor before probate by a residuary legatee or devisee for an account of the estate and effects of the testator, and to have the assets secured, and for disclosure in respect of the estate of the testator, though an action is pending respecting the validity of the will. But a creditor of a deceased debtor cannot sue a person named as executor in the will unless that person has elected to administer by intermeddling or proving the will.”*

**63.** Those passages from Williams, Mortimer and Sunnucks seem to accurately summarise the legal position in this jurisdiction also. Indeed, it is based at least in part on authorities such as *Chetty v. Chetty* which have not only been cited with approval by McKechnie J. in *Finnegan v. Richards*, but were good law in this jurisdiction prior to independence and appear to have been brought over into our law thereafter.

**64.** On the facts of this case, therefore, it would appear that it was open to the Executrices to institute proceedings to seek to enforce the covenants to repair and insure and to recover the arrears of rent which they say are due and owing from the tenant. In view of the steps taken to

administer and preserve the assets of the estate prior to applying for the grant, such as valuing the various properties forming part of the estate and insuring the Quay Street Property (the documentation relating to which refers to “*the Executors of [the Deceased]*”), I think it is also the case that they had authority to defend the proceedings brought by the tenant.

**65.** The Executrices cited *Bank of Ireland v. Matthews* [2020] IECA 214 in support of the proposition that they could not have acted prior to extracting a Grant of Probate, but that judgment dealt with an entirely different situation and I do not think it is of assistance in this application.

**66.** In that case, the issue was whether a woman claiming to be the partner of the deceased and to be the executrix named in his will, as well as the person entitled to the property which was subject to a prior charge in favour of the bank, was the “*mortgagor*” for the purposes of s. 3 of the Land and Conveyancing Law Reform Act, 2013. That issue was relevant to the question of whether the proceedings should have been brought in the Circuit Court.

**67.** Having initially asserted her status as executrix, as well as her entitlement to succeed to the deceased’s interest in the lands the subject of the application for possession, it appears from the judgment that the will upon which her status as executrix depended was never in fact produced. She had also resiled from her initial position that she would take out a Grant of Probate and indicated that she would not in fact do so, but she proposed to continue living in the house which was the subject of the possession proceedings. In those circumstances, her alleged status as executrix was very much in doubt.

**68.** There is a distinction here between becoming vested with the estate or interest in land and showing one’s title to the land, that is, proving the estate or interest: see Williams, Mortimer and Sunnocks, *loc. cit.* at para. 5-08. A Grant of Probate provides that evidence, that is, the title of the executor, because it shows that the will has been admitted to probate, but the executor has capacity to act as such from death.

**69.** In this case, there is no doubt that the Executrices were appointed as such by the Will of the Deceased and I do not think that *Bank of Ireland v. Matthews* is authority for the proposition that an executor whose appointment by a valid will is not in doubt has no entitlement to act prior to issue of a Grant of Probate. That was a case where the point had been reached in the litigation that the Grant of Probate, or at the very least the will of the deceased, had to be produced because the other party to the litigation required proof of the defendant's status as executrix.

**70.** In the circumstances of this case, where the tenant was attempting to sue the estate for a declaration that the lease had been frustrated, it may have been that the tenant would not have raised any issue about the Executrices' authority to act as such, that is, a Grant of Probate would not have been required. However, the bringing of this application would have altered that as the tenant would need to get an order against the personal representative and this application put the status of the Executrices in doubt.

**71.** However, it must be remembered that this question of proof of title is primarily a matter for the other party to the relevant proceedings which is, on the facts of this case, the tenant of the Quay Street Property. It is very difficult to see how any of these matters can be raised by John in circumstances where he accepts that his sisters were appointed Executrices of the Deceased's estate in the Will of the Deceased, but is attempting to remove them. Given that John is now contending that the Executrices should be removed from their position, it is very difficult to see how he can complain that they have not proceeded to take the steps that they would be entitled to take had he not questioned whether their authority to act.

**72.** The position of the Executrices in this case appears to have been driven by the apprehension – which has proven to be well-founded – that John would challenge their executorship and it was therefore imprudent to take any action prior to the issue of a Grant of Probate. From receipt of John's letter of 23 January, 2021, it seems to me that this was a

sensible approach to take. The action of the applicant in filing the caveat then prevented them from taking out a Grant which in itself caused difficulties for the tenant as it had no defendant for its proceedings.

**73.** In my view it is quite clear on the facts of this application that it would have been extremely foolhardy for the respondents to institute or indeed to defend proceedings. The history of animosity between the parties will become more apparent when I turn to consider the allegations of misappropriation of funds, but suffice it to say at this point that, even by the standards of internecine conflict which one tends to see in the Probate List, this case stands out as being particularly remarkable.

**74.** In my view, the actions of the Executrices in relation to the Quay Street Property do not constitute “*special circumstances*” which would warrant their removal as executrices, nor are they guilty of any delay which would justify such removal.

*iii. Alleged misappropriation of funds*

**75.** There are very serious allegations by the applicant that his sisters, both during their parents’ lifetime and since their deaths, misappropriated monies belonging to their parents and subsequently to the estate. While some of the allegations relate to payments in a total amount of €75,202 in 2019 and €92,364 in 2020 which the Executrices say they spent on nurses and carers who were providing 24-hour care to both of their elderly parents for a period of approximately 90 weeks from March, 2019, until their respective deaths, there are a wide variety of allegations.

**76.** I will deal first with the allegations of misappropriation as they relate to discrete issues or smaller amounts.

- *Withdrawal of €30,000 from Deceased's bank account after death*

77. The Executrices did not in fact notify the Deceased's banks of his death until March, 2021. Shortly after his death, a sum of €30,000 was withdrawn from one of the Deceased's bank accounts and lodged in what the Executrices say was a dedicated account which was then used by Michelle to defray the expenses of the estate as they arose. While the Executrices concede that this may not have been the wisest way to proceed, given that they already apprehended that John would initiate some form of court proceedings against them, they say the need to take this step arose from their apprehension that they might not have any access to estate funds (which would usually follow in the issue of a Grant of Probate) to deal with incoming expenses. This has in fact occurred as the lodgement of a caveat has prevented them from extracting a Grant of Probate and consequently from obtaining access to any balances in the accounts of the Deceased.

78. The sum of €30,000 has been vouched to Browne Murphy Hughes the Forensic Accountant retained by the Executrices to defend themselves against allegations of misappropriation and the sums expended on behalf of the estate have been set out in Appendix 8 of their final report. The sum of €18,709 has been expended with a balance of €11,294 (including a sum of approximately €3 which previously stood to the credit of the account) remaining. The sums, which have been vouched to the satisfaction of the forensic accountants, include legal fees of €5,268, which appear to relate to the dispute with the tenant of the Quay Street Property, the sum of €5,797 of funeral expenses in relation to the Deceased (which does not seem excessive, even taking into account the additional cash items relating to the funeral which are discussed further below), and the sum of €2,011 to AXA, which appears to relate to the insurance due on the Quay Street Property and payable in September, 2011.

**79.** The Executrices say on affidavit that the sum withdrawn has not proven to be enough to pay the expenses of the estate as they fall due. A schedule of the items of additional expenditure incurred by Yvonne for the benefit of the estate, and for which she has paid from her own money, has been exhibited to the Executrices' replying affidavit of 2 February, 2023. This shows an overall spend of €22,387.26 which is made up of items such as planting of the graves, security measures (which seem to relate to the Salthill Property), house insurance, utilities and maintenance expenses (again presumably for the Salthill Property) as well as over €10,000 in legal fees for the solicitors retained by the Executrices to handle the dispute with the tenant of the Quay Street Property.

**80.** John has specifically objected to the expenditure of a relatively small portion of the sum of €30,000 on the Clifden Property, speculating that this was done in order to preserve the asset bequeathed to Michelle at the expense of his own inheritance. Not only does this overlook the payment of insurance on the Quay Street Property, but the sums paid in respect of the Clifden Property comprised of the expenditure of modest sums on emergency repairs (€403 on tiling and €175 on plumbing), together with the sum of €1,000 on the management fee payable on the Clifden Property, which is an apartment.

**81.** I assume that the tiling was necessitated by the plumbing repairs and, on the face of it at least, there is no repair to any property more urgent and more necessary to its preservation than a plumbing repair. The management fees would quite obviously require to be paid and, in any event, as the Executrices point out, the estate is currently indebted to the management company in the sum of €6,500. It is not clear why the balance on the dedicated account opened by Michelle has not been used to pay it, but this may be because this application has forced the Executrices to cease any payments to do with the estate if they can possibly be delayed. I am not entirely clear on that.

**82.** I am satisfied that the steps taken to have access to funds in advance of the Grant of Probate were explicable on the very specific facts of the case and, more importantly, that there is no basis for John's allegation that these monies were simply misappropriated by the Executrices for their own use as they are able to account for the monies. It would in fact appear that the estate is in fact now liable to Yvonne for a sum in excess of €20,000.

- *Alleged use of funds of Deceased to purchase two motor cars for benefit of  
Executrices*

**83.** It has been alleged that the Executrices, during the Deceased's lifetime, used the Deceased's money to purchase two motor vehicles, one of which has a 181-registration number and one of which has a 182-registration number.

**84.** The car with the 182-registration is a Mercedes Benz which was registered in the Deceased's name. However, the Executrices have exhibited the invoice from the car dealership where it was purchased, and this demonstrates that it was paid for mainly by way of a trade-in with the shortfall being made up of payments from Yvonne's personal bank accounts. Proof of payment by Yvonne from her accounts has also been demonstrated. It acknowledged that the car was registered in the name of the Deceased, but John has not put forward any basis for his assumption that the attorneys used the Deceased's funds or that of their late mother to pay for this car.

**85.** Why the car with the 181-registration number was raised remains a complete mystery. The Executrices say in their replying affidavits that they have no knowledge of this car. In response, John has provided no detail about it. Notwithstanding this, in his last affidavit, John continues to refer – inconsistently – to both vehicles. However, he never clarifies why he has mentioned the car with the 181-registration number or said what it has to do with any member

of the family. The only clear averment is that of the Executrices that they simply know nothing about this car.

**86.** This obviously is a completely unsubstantiated allegation and, on the evidence at present, appears to be a complete error on John's part. No evidence of ownership or use of this car has been produced.

**87.** I am satisfied that John has not provided any basis for his allegation of misappropriation of funds in relation to either car.

**88.** I will now turn to the allegations relating to the considerable monies spent on the care of the Deceased and his wife in their final years.

- *Monies spent on nursing and care of the Deceased and his late wife*

**89.** The allegation of misappropriation of funds during the lifetime of the Deceased and his late wife relates to the expenditure by the Executrices over a period of almost two years (from March, 2019, to November, 2020) of considerable sums on 24-hour nursing care for the Deceased and his late wife in their final years. The respondents say that these monies were legitimately spent in their capacity as attorneys for their parents and not, as asserted by the applicant, for their own personal benefit.

**90.** It should be noted that these very large sums are made up of a series of much smaller amounts, paid in cash to five nurses and carers over the period of 90 weeks. The respondents say that each person was paid by the hour, with different hourly rates payable depending on whether the hours worked were during the day or at night. A total sum of €167,566 was spent on nursing during the 90-week period, with €75,202 being paid in 2019 and €92,364 being paid in 2020.

**91.** The issue has arisen because the sums were paid mostly in cash, with no invoices raised and receipts issued by those who were paid. The exception to this is that one carer, Ms. Valerie Healy, was paid €360 per week by way of standing order from March, 2019, to the first week of April, 2020. There is a dispute between the parties as to whether she was paid additional sums in cash, and I return to this issue below.

**92.** The Executrices say that, at the end of every four-week period, Ms. Helen Morris, a retired nurse who cared for the Deceased and his late wife during this time, wrote out in longhand the hours worked by each nurse and carer. Rates of pay varied depending on the qualifications of the individual involved (nurses being paid a higher rate), or whether the carer was retained through a care company (in which case the hourly was higher). It also varied according to whether the hours in question were worked during the day or at night.

**93.** Using those notes as drawn up by Ms. Morris, the amounts due to each individual were calculated and the monies were then withdrawn from the accounts held by the Deceased and his late wife by writing cheques or withdrawing money from the accounts at ATMs. The appropriate cash amount was then placed in an envelope for each nurse or carer and handed to them.

**94.** Ms. Morris's notes were provided to the Forensic Accountants, who reconciled them with the cheques and ATM withdrawals. It was from this process that the figure of €167,566 was calculated.

**95.** It is important to note that these records of the relevant rosters and hours worked were drawn up by a retired nurse, Ms. Helen Morris, and not by Yvonne or Michelle. There is, therefore, independent evidence of the extent of care arranged for the Deceased and his late wife from which it is possible to calculate how much was spent. Ms. Morris has sworn an affidavit which states that she commenced providing nursing care to the Deceased and his wife in 2018. She also confirms that as their respective conditions deteriorated in the months leading

up to their deaths, both parents needed more care by qualified nurses. (This is material as the hourly rate for a nurse was higher than for a carer.)

**96.** Importantly, she also confirmed in her affidavit that her practice was to draw the note of the hours worked by each nurse or carer. This included the hours worked by Ms. Healy. Ms. Morris also confirmed Yvonne's practice of then calculating the hours, the applicable rates, and the sums due to each nurse and carer, and the practice of placing cash in envelopes for each individual.

**97.** It must be recalled that this is a motion brought in the non-contentious Probate List. It is well-established that disputes of primary fact cannot be resolved in this list: see *Re Estate of Charles Gillespie* [2015] 3 I.R. 46, [2015] IEHC 462 at paras. 17 to 19. It is not open to me to resolve this dispute without, at the very least, cross-examination of the deponents and no application to cross-examination was made.

**98.** The allegation of misappropriation of funds is made purely on the basis that there is no record, such as a receipt from those receiving the cash, of what the monies were spent on. There is, therefore, an issue of fact as to how the money was spent and there is a clear conflict in the affidavits on this point or, at the very least, there is a conflict between Yvonne and Michelle and Ms. Morris on the one hand, and Ms. Healy on the other hand.

**99.** John himself can give no evidence as to what occurred as he was not involved in any of these arrangements and his statements on affidavits are either bare assertions or hearsay. As such, they really have no probative value.

**100.** Ms. Healy has sworn an affidavit which is in very robust terms, accusing Yvonne and Michelle of "*total misrepresentation*" and in which she states that the total figure said to have been paid to her is "*almost twice as much as I actually received*". She claims she got only €300 to €400 a week, which seems to reflect the sum of €360 which was paid to her each week by

standing order from March, 2019, to the first week of April, 2020. If paid €360 a week, that would be a total of €32,400 over 90 weeks.

**101.** It should be noted that Yvonne has said on affidavit that Ms. Healy is recorded on the rosters drawn up by Ms. Morris as having worked 3,215 hours in 2019 and 3,228 hours in 2020. Yvonne says that she will not speculate as to the reasons why Ms. Healy says she did not receive the sum in question, but points out that, on the basis of the hours which Ms. Morris has recorded Ms. Healy as having work, Ms. Healy's claim to have received only €300 to €400 a week would result in her having only received €5.50 an hour.

**102.** The Executrices points out that other carers were paid €14 per hour and that if hired through a care company, the higher rate of €24.95 was payable. She deposes that if, as shown by the reconciliation process conducted by the Forensic Accountants by reference to the rosters, Ms. Healy was indeed paid a total of €71,200 for 2019 and 2020, then she was paid an average sum of €11.05 which is much more probable. Ms. Healy does not say in her affidavit how many hours she worked or give any estimate of this, nor does she identify the hourly rate she was paid. Neither was there any reply to these quite specific averments by the Executrices, so the only evidence before me as to the hours worked is that of the first respondent.

**103.** I have no evidence as to the normal rates of payment for nurses and carers doing this type of work, either now or at the relevant time, but it seems highly improbable that anyone would work for €5.50 an hour in 2019 or 2020.

**104.** In any event, there is at best a conflict of evidence on the affidavits which could only be resolved after an oral hearing or at the very least cross-examination on the affidavits. However, John did not seek leave to cross-examine the Executrices or Ms. Morris who has sworn an affidavit in support of them. As he has asserted that the monies were misappropriated, he bears the onus of proof on that issue. As a result, the conflict must be resolved against him,

and the assertion rejected as not having been proven. It is therefore completely inappropriate to make any finding against Yvonne and Michelle arising out of the cash payments to carers.

**105.** I would point out that it does not appear to be disputed that there was a team of five nurses and carers providing 24-hour care to the Deceased and his late wife from March, 2018. No evidence has been tendered as to the likely cost of that care but, given that it was one-on-one care, provided in the Deceased's own home, and for most of that period for two people, the cost was always going to be substantial and it is not apparent to me that a sum of €167,566 is an unreasonable figure.

**106.** Unfortunately, as with the other allegations, John has taken the wholly impermissible approach of simply making a high-level allegation of a global nature, essentially suggesting that because this figure is (other than the standing order payments to Ms. Healy) described by the Forensic Accountants as "*advised*", that is, they were relying on the information given by Yvonne and Michelle as to the use of this money, it therefore necessarily follows that Yvonne and Michelle simply misappropriated this money. That does not follow as it was inevitably the case, as I have said, that significant sums of money were spent on the provision of this type of care over a period of 90 weeks.

**107.** Any further interrogation of this issue could only take place in the context of a plenary hearing which would allow, for example, the dispute of fact between Ms. Healy and the Executrices to be fairly litigated. It is completely inappropriate to advance such serious allegations in this manner. Where misconduct of this nature is alleged, a court will require cogent evidence of the misconduct before it will make a finding. There is no such evidence here.

*Conclusion on allegations of misappropriation*

**108.** In my view, the approach to the making of these allegations is fundamentally misconceived. It was assumed that any cash payments were automatically suspicious, even some of them seem to have been entirely predictable. For example, it has been asserted that all of the money spent in supermarkets is automatically questionable because it was paid for by Laser card and individual receipts for what is bought are not available. However, it is not in dispute that the Executrices were, in their capacity as attorneys, responsible for ensuring the upkeep of the Deceased and his late wife. There is no forensic analysis on John's part which would necessarily give rise to any suspicion that the monies were not spent for the benefit of the Deceased.

**109.** One discrete example I think is illustrative. The sum of €2,100 was paid in cash on the Deceased's funeral. This included the sum of €150 for a singer and cash for the priest. The grave diggers were paid €100. I do not think it can be suggested that the sums were unreasonable or that receipts should be available. Nevertheless, it is asserted that these monies are questionable because they are described as "*advised*" in the Forensic Accountant's report.

**110.** The largest amount comprised in the sum of €2,100 is €700 spent in John's restaurant on the funeral lunch (it being recalled that Covid restrictions at the time would have limited the number of those present). Although he has not denied that this money was spent in this way – in fact he has not referred to it at all in his affidavit – it is nevertheless included in a high-level assertion that all cash payments were suspicious. This is a clear example of the lack of any attention to detail in the manner in which these very serious allegations have been made. No forensic analysis of the sums in issue has ever been conducted by John or anyone acting on his behalf and this is an entirely inappropriate way to approach the making of such allegations.

**111.** In fact, it is potentially an abuse of process to make generalised allegations of fraud on affidavit in this way without utilising the proper procedures – that is, a plenary hearing and possibly the discovery procedure – in order to substantiate them. Even then, they can only be made if there is a cogent basis for them.

**112.** As already stated, the applicant unfortunately seems to have a history of making unfounded allegations against his sisters, which is very sad to see. His approach, in essence, is to make the allegations and then place the onus on Yvonne and Michelle to disprove them. For good reasons, that is, to discourage the abuse of the privilege attaching to court proceedings, the courts do not allow allegations of fraud to be made in this way but instead require cogent proof which is entirely lacking here.

*Allegations which have been dropped*

**113.** I think it is appropriate to refer to just some of the allegations which have been made by John in these proceedings for which he appears to have no evidence, and which have been dropped.

**114.** First, the grounding affidavit asserts, with no detail whatsoever, that advancements to Yvonne and Michelle, made during the lifetime of the Deceased, would not be taken into account in administering the estate and reliance was placed on s. 63 of the 1965 Act. However, there is nothing beyond the barest of assertions for this allegation and it could not justify the removal of the Executrices chosen by the Deceased.

**115.** Secondly, in the grounding affidavit, it was asserted that 50% of the shareholding of the Deceased in Aqua Beauty Clinic Ltd., a business based in Dublin and run by Michelle, formed part of the estate but might not be treated as such. In her replying affidavit, Yvonne

exhibits a Declaration of Trust signed by the Deceased on 31 October, 1999, which makes it clear that Michelle is the sole beneficial owner of this business. This allegation was therefore not pursued.

**116.** Thirdly, it was alleged in the initial affidavit that the principal of the tenant company had told John that Yvonne had told him that the Quay Street Property had been left to her. It was said that an affidavit from the individual concerned would be forthcoming, but no such affidavit was ever produced. The allegation has been denied in full by Yvonne. Yet again, it was entirely improper to make such an allegation on a hearsay basis and I think it is very telling that no direct evidence to support it was ever produced.

### *Conclusion*

**117.** Having considered the evidence, I am satisfied that no impropriety on the part of the Executrices has been shown. There are no "*special circumstances*" within the meaning of s. 27(4) which would justify overriding the Deceased's wishes as to who his personal representatives should be.

**118.** In fact, I think it is imperative that the Executrices are now permitting to get on with the task of gathering in the assets of the estate and proceeding to administration of it, without further interference.

**119.** I will therefore refuse the application and I will list the matter in early course to hear from counsel as to the appropriate orders which should be made in light of this judgment and also to deal with costs.