THE HIGH COURT
PROBATE

[Record No. PO 000972/2023]

[2024] IEHC 57

IN THE MATTER OF THE ESTATE OF MARY DOOLEY, LATE OF BOHERNORE, KNOCKLONG, COUNTY LIMERICK, DECEASED

AND IN THE MATTER OF THE SUCCESSION ACT, 1965

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

AND IN THE MATTER OF AN APPLICATION BY MARIE HEALY

JUDGMENT of Ms. Justice Stack delivered on the 2nd day of February, 2024.

Introduction and factual background

1. This is an application brought by one of the daughters of the late Mary Dooley, of Knocklong, County Limerick, who died on 7 February, 2020, ("the Deceased") for an order pursuant to s. 27(4) of the Succession Act, 1965 granting liberty to the applicant to extract a grant of letters of administration with will annexed in the estate of the Deceased. The Deceased was survived by her husband, Daniel, two daughters, Alice (who has taken no part in these proceedings) and Marie (the applicant), as well as two sons, Patrick and James (who are the respondents to the application).

2. In her Will dated 13 November, 2017, the Deceased nominated her husband, Daniel, to be her sole executor, but in the event that he was unable or unwilling to act, she nominated

Patrick and James as substituted executors. Daniel Dooley died on 26 June, 2021, and there is an issue in this application as to whether, in the events that have occurred, Patrick and James stand appointed as substituted executors under the terms of the Will, or whether the identity of the person next entitled to act as legal personal representative of the Deceased falls to be determined by reference to O.79 r.5 of the Rules of the Superior Courts.

3. In her Will, the Deceased left the sum of €250,000 to each of her daughters and a sum of €20,000 to each of her grandchildren alive at the date of her death, together with smaller sums to the parish priest of Knocklong parish, for the saying of masses and the repair and maintenance of the church. She bequeathed her properties known as "John Ryan's house" and "Credit Union" to Patrick and James in equal shares, and her husband is the residuary beneficiary and legatee. However, the only asset in the estate is the sum of €216,851.97 which the late Daniel Dooley agreed to pay into the Deceased's estate.

4. At the date of her death, the Deceased was registered as owner of a 20% shareholding in Dan Dooley Ltd. ("the Company") which went into voluntary liquidation on 24 May, 2021. The Company was solvent and that was a members' voluntary liquidation. Prior to any complaint being made by the applicant, the liquidator made an interim distribution to shareholders in the total amount of €329,453.00, holding back only the amount of €89,185 to meet any subsequent claims by creditors. The sum distributed to the estate of the Deceased was €65,890.74 and the maximum further amount available for distribution to the estate is €17,837. Before his death, the late Daniel Dooley, the nominated executor in the Will of the Deceased, instructed his solicitors that this sum was part of the estate. There is a dispute about whether this is so and I refer to this further below.

5. However, the point is that, even if that further sum of €65,890.74 and such further sum as may be available on final distribution form part of the estate, the assets of the estate are

considerably less than the value of the pecuniary bequests contained in the Will and those bequests will therefore be subject to significant abatement.

6. The application is one for an order granting liberty to an independent person to apply for a grant of letters of administration limited to substantiating and prosecuting proceedings intended to be brought against her brothers, the respondents herein, pursuant to s. 608 of the Companies Act, 1963. There are some additional potential claims, discussed briefly below, but it was confirmed by counsel for the applicant at the hearing that the fundamental basis upon which the application was made was to permit the institution of proceedings pursuant to section 608.

7. Section 608 (1) and (2) of the Companies Act, 2014 provides:

"The court has the following power where, on the application of a liquidator, creditor or contributory of a company which is being wound up, it can be shown to the satisfaction of the court that —

(a) any property of the company of any kind whatsoever was disposed of either by way of conveyance, transfer, mortgage, security, loan, or in any way whatsoever whether by act or omission, direct or indirect, and,

(b) the effect of such disposal was to perpetrate a fraud on the company, its creditors or members.

(2) That power of the court is to order, if it deems it just and equitable to do so, any person who appears to have —

(a) the use, control or possession of the property concerned, or

(b) the proceeds of the sale or development of that property,

to deliver it or them, or pay a sum in respect thereof, to the liquidator on such terms or conditions as the court thinks fit." [Emphasis added.]

8. The applicant says that the estate is entitled to a 20% shareholding in the Company (and is therefore a *"contributory"*) and that the section applied because respondents unlawfully enriched themselves at the expense of the Company by purchasing premises situate at 42/43 Westland Row, Dublin 2 ("the Property") from it at an undervalue. This claim is based, essentially, on the value of the Property as recorded at various times between 2008 and 2018 with the price for which Patrick and James agreed to purchase it in 2014. The Property was ultimately transferred to Patrick and James in 2018.

9. As is evident from the wording of s. 608, this is, in substance, an allegation that Patrick and James perpetrated a fraud on the Company, an allegation which is robustly denied.

10. I think it is appropriate that I should indicate at the outset of this judgment that there is absolutely no basis whatsoever for this allegation of fraud, and that no evidence in support of it has been provided. I set out below my more detailed reasons for this conclusion.

11. However, it is necessary first to decide the preliminary issue as to whether James and Patrick are in fact the substituted executors as they claim, as the Probate Officer has already refused, as I understand it, to issue a Grant to them.

Whether the respondents are the substituted executors

12. It is clear from the evidence that, while the late Daniel Dooley never extracted a Grant of Probate in the estate of the Deceased, he took steps to gather in the assets of the estate and to prepare the application for a Grant of Probate. The respondents' current solicitors previously acted for the late Daniel Dooley in his capacity as executor of the Deceased and engaged in correspondence both with the liquidator and the applicant's solicitors**.** However, he died before taking out letters of representation in the estate of the Deceased.

13. A preliminary issue arises on this application in that the Probate Office has advised the respondents that it is the personal representative of the residuary legatee, i.e., the executor of Daniel Dooley, deceased, who should extract a Grant of Letters of Administration with Will annexed: Order 79, rule 5(6)(c). The late Mr. Dooley's executor has been served with the proceedings and has indicated that he will renounce.

14. The respondents dispute this and say that the proper interpretation of the Will is that they are the substituted executors. The relevant clause provides:

> *"I appoint my husband Daniel as Executor of my Will. If my husband Daniel has predeceased me or is unable or unwilling to act, then in that event I appoint my sons James and Patrick as Executors and as Trustees of this my Will …."* [Emphasis added.]

The question is whether it can be said that the late Daniel Dooley was *"unable or unwilling to act"* in circumstance where he indicated that he was willing to act, and indeed took steps to prepare an application for a Grant of Probate. Unfortunately, he died before the application could be lodged.

15. The respondents say rely on *Re Foster* (1871) L.R. 2 P. & D. 304 for the proposition that the correct interpretation of the Will is that they are the substituted executors in accordance with the terms of the Will. In *Re Foster*, the will provided:

> *"I nominate and appoint my said wife sole executrix of this my will, and, in default of her, I nominate and appoint the said John Knowles and Richard Foster to be executors of this my will…."* [Emphasis added.]

16. The question in *Re Foster* was one of interpretation of the phrase *"in default"*, specifically, whether the substitution was to take place only in the event of the widow not acting at all, or whether *"default"* would extend to the circumstances of that case, where probate had been extracted but the executrix had died before completing it. Lord Penzance made the grant, stating (at p. 305):

> *"The Court will not construe the words of a will in a technical spirit, but will endeavour rather to carry out the real object of the testator. I think it is reasonable to hold that the testator intended that his wife should administer so long as she could, and that, in the event of her death either before or after taking probate, he substituted other persons."*

17. However, the Will of the Deceased does not refer to *"default"* but instead provides for a situation where the late Daniel Dooley was either *"unwilling"* or *"unable"* to act as executor.

18. The late Daniel Dooley was obviously willing to act as executor as he intended to take out a Grant of Probate and had proceeded to gather in the assets of the Deceased and to prepare an application for a Grant. However, the respondents say that he was *"unable"* to act as executor by reason of his death.

19. In my view, there is a material difference between *"default"* which could include the failure to complete the administration, and an *inability* to administer an estate, which refers to a lack of capacity or some practical reason which prevents an otherwise willing executor from acting as such.

20. I have very limited evidence of the steps taken by the late Daniel Dooley in his capacity as executor of the Deceased's estate. However, it is clear from emails written in November, 2020, from Messrs. Holmes O'Malley Sexton on behalf of the estate to Messrs. Eugene F. Collins (who appear to have been writing on behalf of the applicant) that the late Daniel Dooley was administering the estate and intended to take out a Grant of Probate. There is no suggestion by anyone that he was not capable of acting, notwithstanding the reference to cognitive impairment on his death certificate.

21. I understand that, when the respondent applied for a Grant of Probate in the Probate Office, they were informed that they were not the substituted executors. They have taken the

position that that is incorrect, but, notwithstanding that fact, no formal application has been made in the Probate List to determine that issue.

22. This means that it is the late Mr. Dooley's executor who is next entitled to take out a grant, but it appears that he has said that he intends to renounce. It is not clear if he has executed a renunciation, but I understand that he intends to do so. In those circumstances, the persons next entitled to take out a grant include any legatee or devisee or creditor of the Deceased. This mean that the parties to this application, together with several other people, including the Deceased's daughter, Alice, are entitled to apply to extract a Grant.

23. In those circumstances, I think it is appropriate to determine at least some of the issues raised in this application in order to give some guidance on who should proceed to administer the estate.

Allegation that the Property was purchased at an undervalue

24. By way of background, it should be noted that the Company was incorporated on 16 December, 1975. Originally, there were two shareholders, the Deceased and her husband, each holding one share. Patrick was appointed a director on 1 January, 1983, and James was appointed a director on 6 May, 1995.

25. The Company traded from the Property for many years, but its business was very adversely affected by the property and financial crash in 2008, and the company accounts which have been exhibited show very significant losses of over €6.5 million in 2008.

26. In essence, the applicant says that the timeline of the valuation ascribed to this Property in the Company accounts for the relevant period shows that it was sold at a substantial undervalue to the respondents in 2014. The abridged financial statements for the year ended 30 November, 2009 show a valuation of the Property of €3,750,850 as of 1 December, 2008. They

also show that the Property was revalued in 2009 and was ascribed a value of €3 million as of 30 November, 2009, a reduction of €750,850. It should be noted that, at this point, the Company had ceased trading and the Property required redevelopment.

27. However, the abridged financial statements for the year ended 30 November, 2011 value the Property €439,144, with an adjustment to the 2010 figure which is explained on the notes as resulting from the Company changing its accounting policy and fixed assets. This note states that fixed assets were no longer revalued and are now stated at cost.

28. The applicant also relies on the fact that, in February, 2013, the Property was put up for sale quoting €2.8 million. It was described in the Irish Times as comprising a part three and part four storey building with a total floor area of 892 square metres, the ground floor plate extending to 488 square metres, and its location was described. However, no bidder emerged at anything close to the asking price. The only offer received was one in 2012 in the sum of €800,000. Details of that offer, which was made on a confidential basis, were made known to the liquidator's solicitors in a letter dated 13 September 2021, and have been restated on affidavit. There has been no application to cross examine on that (or indeed any other) averment.

29. James states that the Property was independently valued at €900,000 in 2013 and this is not contradicted. It is true that the valuation is not exhibited and it is said that it could not be found by either the respondents, or their representatives, or indeed the valuer. Given that the valuation was apparently obtained approximately ten years ago, this is perhaps understandable.

30. However, James has exhibited a residual appraisal drawn up by Messrs. Douglas Newman Good which, as I understand it, works backwards from the likely square footage of a redeveloped building to assess its value based on the rental which would be obtainable. That appraisal assessed the development value of the Property as €921,161. This sum represented the sum remaining after construction, marketing, finance and other costs and represents both

the developer's profit and site cost. It is, of its nature, not a valuation because the lettable area cannot be fully ascertained until planning permission is obtained, and the costs are subject to market fluctuations and can only be estimated. Nevertheless, I accept that it provides a ballpark figure.

31. James has said on affidavit that in light of the appraisal, and in light of the fact that the best offer received for the Property in 2012 had been €800,000, it was agreed between all of the directors that Patrick and James had purchased property from the Company for the sum of €900,000. A contract for sale was entered into between the Company as vendor and Patrick and James as purchasers on 23 December, 2014.

32. It appears that Patrick and James hold the Property as nominees for Dooley Property Development Limited ("DPDL"). In addition to the figures presented in the 2008 and 2009 abridged financial statements of the Company, the applicant also relies on the abridged financial statements for DPDL for the year ending 30 November, 2019. These show a value for *"work in progress"*, which refers to the Property which was being redeveloped, in the sum of €4,527,364. This amount increased to €6,252,988 in the abridged financial statements for the year ending 30 November, 2020.

33. To understand these figures, it must be appreciated that Patrick and James took significant steps, between 2014 and 2019, to redevelop the Property. Planning permission was obtained on 19 October, 2017, and on 29 November, 2018, James and Patrick borrowed €4,500,000 for the purposes of redevelopment and this sum was charged on the Property. I have not seen a copy of the folio, but the Form 52 for the purposes of registration of the charge in the Land Registry has been exhibited. It seems that James and Patrick provided a further sum of €1 million from their own resources, in order to redevelop the Property.

34. They then engaged Conack Construction Ltd to carry out a major redevelopment of the Property, and this occurred between 2018 and 2020. James has exhibited a letter from that

company confirming that the contract sum was in the region of €5,311,777.54, and that the works comprised a major refurbishment of the existing protected structure, a new build (which consisted of office space to the rear with a fitout, and the construction of a link corridor). The existing building is said in this letter to have been in bad repair needing substantial construction works all to be completed under the supervision of a conservation architect and Dublin City Council Conservation Department.

35. In essence, therefore, James and Patrick appear to have paid the sum of approximately €6.2 million for the Property, with further moneys potentially payable as interest on the finance raised. There is no evidence as to whether the Property was subsequently let or sold, or what its current valuation might be, nor is anything said on affidavit as to what (if any) profit Patrick and James have made on their investment.

36. The entire claim that Patrick and James purchased the Property at an undervalue from the Company is, therefore, based on a misunderstanding of the figures relied upon. It seems to be assumed, first, that because the Property was valued at €3 million just after the financial crash, the purchase price of €900,000 was well below market value in 2014. However, this is an assumption for which no basis in evidence has been provided. The applicant says that she will furnish valuation evidence in the future s. 608 proceedings but, having decided not to tender any evidence in this application, the applicant cannot demonstrate any basis for such a claim on the part of the estate unless there is something on the face of the various abridged accounts relied upon which invites suspicion or requires further explanation.

37. However, those figures do not, in my view, require any further explanation. It is quite clear from the independent auditor's report dated 4 June, 2010, which is incorporated into the 2009 abridged financial statements, that the valuation of €3 million was somewhat speculative. They state:

> "[W]ith respect to the property having a valuation of €3,000,000, the evidence available to us was limited. Although the directors have valued the property to the best of their ability there is no active market from which we could make an assessment of the valuation provided. Owing to the unstable nature of the investment property industry we were unable to obtain sufficient audit evidence regarding the property by using other audit procedures. In forming our opinion we also evaluated the overall adequacy of the presentation of information in the financial statements."

38. The significant fall in the figure ascribed to the Property in the abridged financial statements for the year end of 30 November, 2011, as already stated, is directly attributable to the company changing its accounting policy on fixed assets. It is not a valuation.

39. The placing of the Property on the market at €2.8 million is not a valuation either. Market value is the amount which a willing purchaser is willing to offer, and a willing vender is willing to accept. The uncontroverted evidence is that the only offer received in response to that advertisement was one for €800,000. That was in 2012. In 2013 Messrs. Douglas Newman Good did a residual appraisal of the value of the site at just over €900,000. In light of those figures, the value of €900,000 in 2014 does not, as contended on behalf of the applicant at the hearing, excite any suspicion which would warrant any further investigation or interrogation.

40. The further substantial increase in value which is ascribed to the Property in the accounts of DPDL is not at all surprising in the light of the extensive moneys expended on the Property, largely funded by substantial borrowings. The applicant's claim is based on a failure to take into account this expenditure. I am fortified in this view by the fact that the liquidator, while he did correspond with Patrick and James's solicitors, did not appear to have any concern about the transaction and took no steps under s. 608 himself.

41. The basis on which it is said that the Property was sold at an undervalue is therefore without any substance and could not justify the making of an order pursuant to section 27(4).

Compliance with s. 238 of the Companies Act, 2014

42. The applicant also contends that the sale of the Property to Patrick and James was in breach of s. 238 of the Companies Act, 2014, as it was the sale to them as directors of a substantial non-cash asset of the Company and was not approved by the Company as required by the section.

43. Section 238 of the Companies Act, 2014, provides:

"(1) Subject to subsections (4) and (5), a company (the "relevant company") shall not enter into an arrangement under which—

(a) a director of the relevant company or of its holding company, or a person connected with such a director, acquires or is to acquire, one or more non-cash assets of the requisite value from the relevant company, or

(b) the relevant company acquires or is to acquire, one or more non-cash assets of the requisite value from such a director or a person so connected, unless the arrangement is first approved—

(i) by a resolution of the relevant company in general meeting, and

(ii) if the director or connected person is a director of its holding company or a person connected with such a director, by a resolution of the holding company in general meeting.

(2) ...

(3) An arrangement entered into by a company in contravention of this section and any transaction entered into in pursuance of the arrangement (whether by the company or any other person) shall be voidable <u>*at the instance of the company*</u> *unless—*

...

> *(c) the arrangement is affirmed by a resolution of the company in general meeting passed within a reasonable period of time after the date on which the arrangement is entered into and, if it is an arrangement for the transfer of an asset to or by a director of its holding company or a person who is connected with such a director, is affirmed by a resolution of the holding company in general meeting passed within a reasonable period of time after that date."*

44. The applicant contends that, while a resolution was executed by all of the shareholder of the Company on 26 July, 2018, this did not comply with s. 238(3)(c) as it was not passed within a reasonable period of the contract for sale which was signed on 23 December, 2014

45. She also questions the capacity of her mother, the Deceased, to execute the Will, given that she had been in a nursing home since 12 December, 2017.

46. Before dealing with these issues, I think it should first be emphasised that s. 238 (3) provides that an arrangement entered into by a company in contravention of s. 238 and any transaction entered into in pursuant of the arrangement shall be voidable *"at the instance of the company"*. Unlike s. 608, a shareholder has no standing to bring such an application and, since the Company is in voluntary liquidation, only the liquidator could bring such an application. He has satisfied himself as to the propriety of this transaction but, in any event, there is no point granting liberty to anyone to extract a grant of letters of administration of the purposes of bringing an action which the legal personal representative of the Deceased would have no standing to bring.

47. There was reference to the possibility of removing the liquidator but it should be noted that the Company went into solvent Members' Voluntary Liquidation on foot of a resolution passed on 24 May, 2021, and has reached the point where the liquidator, having made enquiries of all of the matters complained of in this application and satisfied himself that there was

nothing untoward about any of them, has made an interim distribution of the assets of the Company, while reserving an amount should further creditors come forward. No factual basis for removing the liquidator has been put forward and the matter has been advanced purely at the level of theoretical possibility, by reference to authority (*Re Star Elm* [2016] IEHC 666) and not by reference to any grounds on foot of which this could be done in this particular liquidation.

48. As a result, even leaving aside the issue as to whether the Deceased was the beneficial owner of the 20% shareholding registered in her name, there is no basis for saying that anyone other than the liquidator could take an action to set aside the contract and transfer in favour of James and Patrick.

49. That is sufficient to dispose of the arguments relating to the s. 238 resolution but, although my comments will be *obiter*, I think it is appropriate to say something about the grounds upon which the validity of the s. 238 resolution was challenged. I will first address the assertion that the Deceased lacked capacity as capacity issues arise quite frequently in the non-contentious Probate List.

i. Whether the Deceased had capacity at the date of the s. 238 resolution

50. There is an assertion in these proceedings that because the Deceased was of advanced years, and was resident in a nursing home on 26 July, 2018, the date the resolution for the purposes of s. 238 as executed, there were question marks about her capacity.

51. I would like to state in the clearest terms that neither the fact that a testator is of advanced years nor the fact that they may be in hospital or in a nursing home raises any presumption of lack of capacity nor is it evidence in and of itself of any such lack of capacity.

52. This does not take from the fact that it may be good practice on a solicitor's part to arrange for a capacity assessment, contemporaneously with the preparation of a will for a testator who is in hospital or resident in a nursing home, as that might help to prevent unnecessary disputes on the issue of his or her capacity after his or her death.

53. It is not unusual, for the purposes of seeking to admit wills to probate, for an estate to find that a medical opinion on a testator's capacity is required in order to apply for a grant. This frequently occurs where the death certificate refers to cognitive difficulties. The problem is that the application for a grant may occur many years after execution of the will and it can be difficult to get a medical opinion at that remove of time. There is nothing very surprising about this as a doctor may have no medical notes dating to the approximate time of execution of the will, or they may be unhappy to give an opinion when they did not examine the testator at the time of execution of the will, or the particular treating doctor who knew the testator may have retired. It is preferable, if there is a possibility that these issues may arise in the future, that a medical assessment would be done at the time of preparation of the will.

54. Perhaps more importantly, it is always good practice for the solicitor preparing a draft will to take a sufficiently detailed factual attendance demonstrating capacity by reference to the well-known threefold test in *Banks v. Goodfellow* (1870) L.R. 5 Q.B. 549. This would pre-empt or possibly resolve the many applications which now come before the Probate List where some form of dementia or cognitive difficulty is referred to on the death certificate of a testator. Furthermore, such an attendance can be drawn up without any discourtesy to an elderly or infirm testator and, in any event, there is really no good reason why solicitors' attendances should not contain these details in every case, regardless of the age or apparent state of health of the testator, as the question of calling to mind who a testator would be expected to benefit and what assets are likely to be available for distribution are matters which would naturally fall for discussion at the time of giving instructions for the drafting of a will in any event.

55. In this case, however, there is no evidence, whether by reference to the Deceased's death certificate or otherwise, of any lack of capacity and the evidence simply does not go beyond an unfounded assertion that incapacity may be assumed from the Deceased's advanced age and the fact of her residence in a nursing home at the date of execution of the resolution.

56. Indeed, as is well known, the test for capacity is a legal one and not a medical one, although medical evidence will often be helpful. Subject to the proviso that such evidence can be somewhat self-serving where there is a dispute as to capacity, family members are often well placed to give evidence on the issue by averring to the deceased's ability to manage their own personal care, daily activities, and financial affairs. It is very striking that the applicant gives no evidence whatsoever of any defects in capacity which she might have witnessed, such as forgetfulness or the like.

57. By contrast, James has exhibited a report of Dr. Michael Lynch, the Deceased's General Practitioner, dated 5 September, 2016, which states:

> *"Mentally she is in excellent health and has not signs in any way of cognitive impairment. She is mentally and always has been capable of managing all her affairs and knows clearly the extent of her assets."*

Dr. Lynch has also reviewed his notes and sworn an affidavit to the same effect, which is not controverted.

58. In addition to that, James has positively stated that his mother was able to manage her affairs and that the reason she was in a nursing home related to physical difficulties (including a lack of dexterity which is evident from her signature on some of the documents exhibited in this application).

59. The respondents also — in my view justifiably — point out that the applicant has not questioned her mother's capacity on the date of the Will, which was 13 November, 2017, although she was admitted to hospital in November, 2017, and was admitted to the nursing

home on 12 December, 2017. Furthermore, the Deceased executed a Power of Attorney on 18 April, 2019, which she could not have done unless she had capacity at that date.

60. I have no hesitation in saying that no evidence of a lack of capacity on the part of the Deceased has been put before the court and the resolution could not be invalidated on this basis.

ii. Whether resolution was executed within a "reasonable time" *of the impugned transaction*

61. In my view, there is no substance to this complaint. First, insofar as the contract dated 23 December, 2014, is concerned, James has said on affidavit that all of the shareholders in the Company agreed to the sale of the Property in 2014 and that this was recorded in a contract dated 23 December, 2014. (In fact, he refers to them in their capacity as directors but as the directors held the 100% shareholding, nothing turns on this.)

62. The respondents rely on *Kerr v. Conduit* [2011] 3 I.R. 1 for the proposition that s. 238 was not intended to displace the principle (established by the Supreme Court in *Buchanan v. McVey* [1954] I.R. 89, and reaffirmed by that Court in *Re Greendale Developments (In Liquidation) Ltd. (No. 2)* [1998] 1 I.R. 8, at 21) that a company is bound by a decision of all of its shareholders to pursue a particular arrangement or transaction provided, first, that it is honest, and, secondly, that it is *intra vires* the company. As I have already found, no evidence to question of the *bona fides* of the transaction has been tendered and there is no suggestion by anyone that it was not *intra vires* the Company. As a result, no formal resolution was required to authorise the contract.

63. So far as the Transfer dated 11 September, 2018, is concerned, the resolution of 26 July, 2018, explicitly contemplated that transfer, as it was in the following terms:

> "**THAT** the proposed acquisition of the title in the property at 42-43 Westland Row, Dublin by Pat Dooley and James Dooley and the entry into the relevant deed of transfer by the Company is hereby approved pursuant to Section 238(1) of the Companies Act, 2014."

64. As that resolution clearly predated the execution of the Transfer, there is therefore no basis for questioning the validity of the transfer of the Property to Patrick and James.

65. I note also that all of the issues raised in these proceedings were raised by the liquidator with Messrs. Holmes O'Malley Sexton, who previously acted for the late Daniel Dooley in his capacity as executor of the Deceased and now act for Patrick and James. The fact that the liquidator did not take any proceedings in response to that letter, which gives similar explanation for the matters complained of in these proceedings as was advanced on behalf of Patrick and James at the hearing of the application, must mean that the liquidator was satisfied with those explanations. I see nothing wrong with that and indeed it is my view also that the explanations given are reasonable.

66. But all of these issues are, as already stated, irrelevant because, pursuant to s.238, it is the company which brings an action in order to set aside a transaction which is not properly authorised pursuant to section 238. As a company in liquidation, that was therefore a matter for the liquidator. It seems that the liquidator satisfied himself of everything he needed to know in 2021. The applicant has not set out any cause of action which the legal personal representative of the Deceased would enjoy *qua* shareholder of the Company as against the liquidator and which would justify granting liberty to her to extract a grant. The contentions of the application on the issue of the validity of the resolution are therefore insufficient to justify granting an order pursuant to s. 27(4) of the 1965 Act.

Other transactions entered into by the Company

67. The applicant also complains of two other transactions entered into on behalf of the Company. The first of these is settlement of a dispute with the late Daniel Dooley in relation to his pension entitlements, and the second is the payment by the liquidator to James and Patrick of compensation for loss of office compensation.

68. Complaints about these transactions could not, in my view, ground an application pursuant to section 27(4). There has been no attempt whatsoever to bring the matter within the exceptions to the rule in *Foss v. Harbottle* 67 E.R. 189 and any person permitted by the Court to extract letters of administration in the estate of the Deceased would be, at best, a shareholder in the Company. Unless the action falls within one of the exceptions to the rule in *Foss v. Harbottle,* no shareholder has a right to set aside the settlement already entered into by the Company, and indeed it is notable that the liquidator appears to have been satisfied with the explanations given to them by Messrs. Holmes O'Malley Sexton on behalf of Patrick and James in relation to that transaction also and took no steps whatsoever to set aside the settlement.

69. It should be noted in any event that the applicant's claim is based on an assertion that the estate is entitled to a 20% shareholding in the Company. As the total sum paid in respect of loss of office compensation was less than €80,000, it was hard to see how this claim could justify the appointment of an administrator for the purposes of seeking its recovery, as the maximum sum recoverable by the estate, even leaving aside the significant costs and expenses which it would likely entail, would be approximately €16,000. If there is a dispute about a sum of this nature, an appropriate manner of adjudicating on it should be found without replacing or passing over the person entitled to act as legal personal representative.

Whether the estate is entitled to a shareholding in the Company

70. Finally, a significant objection was raised to the entire application by James and Patrick. They contend that the entire application is misconceived because they say that the estate had no beneficial entitlement in any shareholding in the Company. They pointed to an Agreement and Undertaking dated 14 June, 2001 which was executed by the Deceased, her late husband, Patrick and James. A Shareholder's Agreement was also executed on the same date. Both of these documents have been exhibited.

71. In the 2001 Agreement and Undertaking, the Deceased and her late husband quite clearly acknowledged that the shareholding to which they were beneficially entitled was held by them as joint tenants. This is at clause 1 of the agreement. The agreement went on to record that the Deceased and her husband agreed with Patrick and James not to execute, do or permit to be done any deed or act of severance of the aforesaid joint tenancy.

72. The Deceased and her husband also agreed with Patrick and James that they would execute respective valid wills which would contain provision bequeathing the 25 shares which they held jointly to Patrick and James as joint tenants or as tenants in common in equal shares and that they would not revoke or alter the terms of the last wills in any way so that their said wills would always have the effect of bequeathing the shareholding as thereinbefore provided.

73. The Deceased made two wills prior to the 2017 Will and after the date of execution of that Agreement. In her will dated 11 April, 2001, she specifically stated that she and her husband owned 25% of the Company jointly and that, should her husband predecease her, then on her death the 25% shareholding that they owned should be divided equally between Patrick and James. In her will dated 5 May, 2010, the same provision was made. However, there was no such provision in her 2017 Will which is her last will and testament.

74. Heavy reliance was placed on the acknowledgement by the Deceased in 2001 that she and her husband held the beneficial interest in the shares as joint tenants. In response, the applicant relied on a reconstruction agreement made 17 October, 2008. This refers to the Deceased as having a 20% shareholding in the Company and the late Daniel Dooley having a 5% shareholding.

75. This is consistent with other documents filed in the Companies Registration Office upon which the applicants relied, such as the annual return filed on 31 July, 2020, and signed by Patrick and James as director and secretary, respectively. It is also consistent with the fact that Notice of the EGM at which the resolution to wind up was passed was served on the estate in April, 2021.

76. I accept the position of Patrick and James as set out in James' second affidavit which is that the formal registration in the CRO as a member does not necessarily affect the beneficial interest in the shares which seems quite clearly to have been governed by the 2001 Agreement and Undertaking. I do not consider that the 2008 Reconstruction Agreement casts any doubt over that and reliance by the applicant on the "all agreement clause" is entirely misplaced as that relates to the negotiation and execution of the 2008 Agreement itself and not the 2001 Agreement and Undertaking. I see absolutely nothing to displace the terms of the 2001 Agreement and Undertaking which was clearly executed to protect the position of Patrick and James and to ensure that, while allowing their parents to remain as 25% shareholders during their lifetime, the full ownership of the shares would transmit to Patrick and James on the death of the survivor of them.

77. I understand, though I have not seen the will, that the late Daniel Dooley's last will does in fact comply with the 2001 Agreement and Undertaking and that Daniel Dooley left his 25% shareholding to Patrick and James. It is not clear whether the relevant bequest is worded so as to apply to the sum distributed by the liquidator in respect of that shareholding, however. That

would be a matter for interpretation of Daniel Dooley's will which is not an issue before me in this application.

78. It should be noted that the purpose of the 2008 Reconstruction Agreement was to transfer the business of the Company to DPDL. However, clause 3.2 expressly excluded the Property from that transfer. Clause 3.2 goes on to say that following completion of the Restructuring Agreement, the Property would be the only asset remaining in the Company.

79. I do not see how the subsequent gift of shares in a different entity alters the legal effect of the 2001 Agreement and Undertaking. I can see the logic of the 2001 Agreement and Undertaking being to some extent superseded by the reorganisation of the business so as to transfer it to DPDL. It might have been thought sufficient to protect the interests of Patrick and James that they would ultimately become the owners of all of the shareholding in DPDL. However, if that were the case, one would expect it to be provided for in the 2008 Restructuring Agreement.

80. It was urged upon me quite strongly at the hearing of the application by counsel for the applicant that I do not need to decide any of these matters, and I think that is correct. However, where there is an application to appoint an administrator *ad litem* pursuant to s. 27(4) of the 1965 Act, the contemplated litigation must be stateable or it could hardly be said to be either *"necessary"* or *"expedient"* to pass over the person otherwise entitled to represent the estate.

81. The key fact, in my view, in considering whether there is a stateable issue as to the beneficial ownership in the 20% shareholding registered in the name of the Deceased is vested in the estate, is the action of the late Daniel Dooley in instructing his solicitors that the interim distribution in respect of this shareholding formed part of the estate of the Deceased. It is not clear why Mr. Dooley would have done that if he had believed that the aggregate 25% shareholding which he and his wife enjoyed was held by them as joint tenants. While the evidence before me is completely insufficient for me to conclude that the parties had somehow

resiled from the declaration that this shareholding was held jointly, and there may be some other explanation for why Daniel Dooley acknowledged the estate's entitlement to it, this is a matter which I think does require further investigation.

Conclusion

82. Notwithstanding that the action of the late Daniel Dooley may cast some doubt on the entitlement of the estate to the distribution to it of the sum of €65,890.74, I do not believe that this automatically leads to the conclusion that an order need be made pursuant to section 27(4). The Court of Appeal stressed in *Dunne v. Dunne* [2016] IECA 269 that the making of such an order is not done as a matter of course.

83. Given that I have found that Patrick and James are not the substituted executors, as I think they have assumed prior to this, it is my view that the parties should now consider who should apply for a grant pursuant to Order 79, rule 5. If they can agree that, no order is necessary. Any person agreeing to act as personal representative on foot of that rule can take their own steps to ascertain the reasons why the late Daniel Dooley appears to have stated that the estate of the Deceased was entitled to the sum distributed in respect of the 20% shareholding registered in the name of the Deceased. It is possible also that the matter could be resolved by an application for directions on this particular issue, as suggested in *Dunne v. Dunne.* It does not seem to me that the sum of €65,890.74 would justify the appointment of an independent person as personal representative, as such a person is likely to be entitled to remuneration, further depleting the assets of the estate.

84. I will therefore refuse the application of the applicant as the causes of actions which she proposed are not stateable, and I will hear the parties on whether any further order should

be made or whether the matter should adjourn to permit the family to agree on who should now act as legal personal representative of the Deceased.