THE HIGH COURT

PROBATE

Record No. 2022/7761PO

[2023 IEHC 607]

IN THE MATTER OF THE ESTATE OF MARY MOORE, LATE OF BALLYTARSNA, GOREY IN COUNTY WEXFORD, A HOUSEWIFE AND WIDOW, DECEASED

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

AND IN THE MATTER OF

AN APPLICATION BY DONAL O'SULLIVAN, AS ADMINISTRATOR AD LITEM, LIMITED FOR THE PURPOSE OF SUBSTANTIATING PROCEEDINGS TO BE ISSUED BY DONAL MOORE AGAINST THE ESTATE OF THE SAID MARY MOORE, DECEASED

JUDGMENT of Ms. Justice Stack delivered on the 1st day of November, 2023.

Introduction and factual background

1. These proceedings arise from a very common type of family dispute following the death of a family member and relate to the interpretation of a High Court order of a kind which is routinely made in the non-contentious Probate list. The purpose of this judgment is to attempt to bring clarity to the meaning of those orders for the benefit of practitioners and, in particular, their clients.

2. Mary Moore, late of Ballytarsna, Gorey, County Wexford ("the Deceased") died on 10 December, 2016, intestate. She was a widow and had six children, all whom survived her: Donal, Bernadette, Seán, Rosaleen, Máire and Terence. Bernadette has taken no part whatsoever in these proceedings or the underlying plenary proceedings to which it is necessary to refer. In this judgment, I will refer to Seán, Rosaleen, Máire and Terence as "the Beneficiaries", as that is the role in which they have participated, but I do this only for convenience and it remains the case that Bernadette is also entitled under s. 67 of the Succession Act, 1965, ("the 1965 Act") to a one-sixth share in the estate of the Deceased.

3. As the Deceased died a widow and intestate, the persons entitled to extract a Grant of Letters of Administration in her estate were her children, any one of whom was entitled to act as her personal representative: Order 79, rule 5(1)(c). Usually, where there are a number of adult children who are equally entitled to extract a Grant, they cooperate in the nomination of one or more of them to take out letters of representation in the estate of their parent, and the person so nominated thereafter distributes the estate in accordance with law.

4. In this case, however, one of the deceased's children, Donal, proceeded (it would appear without consulting his siblings) to apply for a Grant and this was issued to him on 20 September, 2017. However, by November, 2018, he had decided to make a claim against the estate. This claim was based on an agreement allegedly made between Donal and the Deceased during her lifetime that, in consideration of the provision by him of maintenance, care and support of her during her life, she would bequeath all of her real property (that is, land and buildings) to him on her death.

5. As a result, his solicitors, Messrs. W. R. Joyce & Co., advised Donal that the Grant would have to be revoked and that an alternative personal representative would have to be found. In the normal course, this would be one of the other children of the Deceased. However, as the claim being made was one to which the two-year limitation period in s. 9(2) of the Civil

Liability Act, 1961, applied, it was essential that a Grant would be extracted and proceedings issued on or before 9 December, 2018.

6. The taking out of a general Grant by the persons entitled could not have been arranged in that limited timeframe and, as a result, it was decided to apply to Court pursuant to s. 27(4) to appoint a limited administrator who could be sued as representing the estate. These applications are very common in the non-contentious Probate list and, usually, an independent solicitor is appointed as administrator. Donal's solicitors therefore wrote to Mr. Donal O'Sullivan of Messrs. O'Sullivan Hogan in Arklow asking him to act as such.

7. The application to revoke the Grant which had been issued to Donal, and to appoint Mr. O'Sullivan as limited administrator, was made on 26 November, 2018, and was dealt with by consent. It is the meaning of the Order made 26 November, 2018, and specifically the doubts which have arisen as to the extent of the authority granted to Mr. O'Sullivan, which has given rise to this application.

8. The Order first records the decision of the Court that the Grant to Donal should be revoked pursuant to s. 26(2) of the 1965 Act. It also recites that the Court was of the opinion that, in the special circumstances of the case, it was expedient to appoint someone to be administrator of the estate other than the person who under the 1965 Act was entitled to a Grant. It then records the decision, pursuant to s. 27(4) of the 1965 Act, to give liberty to Mr. O'Sullivan to apply for a Grant of Letters of Administration intestate (*ad litem*) in the estate of the Deceased *"limited for the purpose of substantiating proceedings to be issued by Donal Moore against the estate of the [Deceased]"*.

9. Affidavits sworn by Seán and Rosaleen, sworn in the context of that application were exhibited in these proceedings. The principal affidavit was sworn by Seán, but Rosaleen, in her brief affidavit, says that she has read Seán's affidavit and that she agrees with it.

10. The upshot of those two affidavits was that Seán and Rosaleen said that it was they who should be the alternative personal representative and that the remaining three siblings agreed with this. (It appears, however, that Bernadette was in fact not participating as she instructions solicitors to write to the Beneficiaries' solicitors to clarify this in December, 2018.)

11. The affidavit also stated that Donal had remained in occupation and possession of the Deceased's land since the death of the Deceased, and that in light of the intended proceedings to be brought against the estate by Donal, it was Seán and Rosaleen who would be the appropriate and necessary defendants. It was specifically stated on affidavit by Seán and, by extension, Rosaleen that they would proceed to extract a general Grant of Letters of Administration themselves and would fully defend the proceedings brought by Donal.

12. In the normal way, of course, if two children of a deceased wish to extract a grant, it would not be appropriate to pass them over in favour of someone with no connection with the estate. But, because of the time pressure caused by the applicability of s. 9(2) of the Civil Liability Act, 1961, the matter proceeded on consent and Mr. O'Sullivan was appointed administrator *ad litem* in the specific terms which are set out in the Order and which are set out above.

13. Unfortunately when the Grant issued to Mr. O'Sullivan on 6 December, 2018, it was not issued in limited terms, but was general in nature and would have entitled him to administer the estate. That was never the intention of anyone who participated in the application on 26 November, 2018, and, more importantly, it was not in compliance with the Order of this Court made on that day. As a result, that second Grant was revoked and a fresh Grant issued on 10 December, 2018, limited in the terms required by the Order, that is, *"limited for the purpose of substantiating proceedings to be issued by Donal Moore against the estate of [the Deceased]"*.

14. As of 29 January, 2019, the solicitors acting for the Beneficiaries were writing to Donal's solicitors indicating that it was then their intention to apply for a general Grant and they asked for documentation which would allow them to lodge the application.

15. I have not seen the pleadings in Donal's action against the estate of the Deceased, but I am told that a plenary summons issued on 6 December, 2018, and that Mr. O'Sullivan entered an appearance on 18 February, 2019. By 12 June, 2019, the beneficiaries were writing through Messrs. McDonald solicitors complaining that they had not been kept up to date on what was happening with the plenary proceedings. Although an incomplete copy of this letter (comprising only the first page) was exhibited in this application, it is clear from that extract that it contained a most extraordinary request asking Mr. O'Sullivan to outline to them how he ended up being the solicitor that the court appointed to deal with the matter as administrator. They appear to have entirely overlooked the fact that two of their clients were former notice parties to the application before Allen J., apparently consented to it, and indeed got their costs. From Mr. O'Sullivan's reply, it appears he was even threatened with proceedings, but as I have seen only part of the letter, I cannot comment beyond saying that there appears to have been no basis for any such threat at that time, given that Mr. O'Sullivan had merely entered an appearance and was, it would appear, awaiting the outcome of negotiations between Donal and the Beneficiaries, to which he was not a party.

16. It should be noted also that, by letter dated 18 June, 2019, Donal's solicitors were expressing that view that Mr. O'Sullivan could in due course deliver a defence and the matter could proceed to plenary hearing. It is implicit in that letter that they expected that Mr. O'Sullivan would continue to defend the proceedings up to the conclusion thereof, and therefore would act in the plenary hearing itself.

17. This misunderstanding seems to have been shared by Mr. O'Sullivan himself, as he wrote to the Beneficiaries by letter dated 23 January, 2020, referring to the fact that he had

been appointed administrator *"for the purposes of defending the above proceedings issued by Donal Moore"*. While I am not convinced that there is any material difference between an Order permitting a limited administrator extract a grant for the purposes of *"substantiating"* proceedings as opposed to *"defending"* proceedings, it does point to an understanding on the part of Mr. O'Sullivan that he was to take active steps in the defence of Donal's claim. In any event, Mr. O'Sullivan pointed out that he had sought instructions (presumably from the Beneficiaries) but had not received them, and then he sought details of the assets of the estate.

18. On any interpretation, the Grant to Mr. O'Sullivan did not give him any authority to administer the estate, and it seems he was well aware of that. (Indeed, in his subsequent letter of 7 May, 2020, he pointed out that he had no authority to administer the estate.) The request for details about the assets appears to have been based on his belief that he was to fully defend the proceedings, and details of the assets would have been material to that. In any event, it was in response to this request that Donal's solicitors sent a cheque in the sum of €53,707.41 and advised Mr. O'Sullivan that Donal held estate funds in the sum of €15,500. (I would tend to agree with Mr. O'Sullivan's response that there could be no basis whatsoever for Donal holding onto estate funds, but that does not arise for determination on this application).

19. Presumably in response to the pressure coming from the Beneficiaries' solicitors, Mr. O'Sullivan issued a Notice of Motion on 30 June, 2020, seeking to dismiss Donal's claim. That motion was never heard as Donal delivered his Statement of Claim on 9 October, 2020. Mr. O'Sullivan then raised a Notice for Particulars and subsequently issued a motion to compel replies.

20. By letter dated 18 September, 2020, Messrs. Peter Connolly, solicitors, indicated that they were now acting for the Beneficiaries. The letter complains that Mr. O'Sullivan was not moving along Donal's proceedings with due expedition and it also expresses concern about the additional costs occasioned by his involvement. It concludes by reminding Mr. O'Sullivan that

he was appointed solely to deal with Donal's proceedings and requesting that he update them with the outcome of the motion. It reiterated that the Beneficiaries would proceed to extract a general Grant, but did not say when this would be done. It is clear from this letter that the Beneficiaries believed that they could sit back and let the responsibility of dealing with the litigation fall on Mr. O'Sullivan without themselves taking any proactive step to extract a general Grant, at which point the particular individuals who had become personal representatives would take over the defence of the litigation.

21. However there was not a word in the letter of 18 September, 2020, about the fact that two of the Beneficiaries had indicated that they would take out a general Grant as soon as they were in a position to do so, nor did it offer any explanation as to why they had not done so.

22. The next twist in the tale was that Donal's solicitors wrote on 15 January, 2021, indicating that they had been proceeding at that point on the basis that Mr. O'Sullivan was a general administrator and not a limited one and it appears that they may have seen the erroneous Grant which issued on 6 December, 2018, but not the amended Grant which issued a few days later. They indicated that, given the limited nature of the Grant, Mr. O'Sullivan should not have taken any steps in the proceedings beyond entering an appearance and they indicated that he should seek directions as to how to proceed.

23. I pause here to say that I do not understand how Donal's solicitors could have believed that Mr. O'Sullivan had full authority to deal with the estate, given that they acted in the application to appoint him, presumably asked him to consent to act solely on the basis of a limited Grant, and must at least have seen the Court Order which was quite obviously in limited terms. Their reaction to any general Grant should have been to recognise that it was not in compliance with the Order, and to ensure that it was amended to correctly reflect the terms in which liberty to take out the Grant was given.

24. Mr. O'Sullivan then wrote to the Beneficiaries in person (as they appeared to no longer be instructing solicitors), indicating that he would need Court directions in order to continue to act. His frustration at the position taken by Donal's solicitors some two years after they had requested him to act is palpable and, it has to be said, understandable. He took the sensible step of requesting the Beneficiaries to take out a general Grant. From then on, Mr. O'Sullivan's position was that all of the difficulties that had arisen could be resolved by one of the Beneficiaries simply extracting a Grant of Letters of Administration in their mother's estate.

25. Mr. O'Sullivan then brought an application in the plenary proceedings seeking various orders and directions as to mediation, to establish his role as administer *ad litem* and he also sought directions in relation to the estate funds (in the amount of €53,707.41) which had been sent to him by Donal's solicitors. That application came on before Allen J. in the Chancery list in November, 2021, and he refused the relief sought, as questions concerning the revocation of the Grant to Mr. O'Sullivan were matters to be dealt with in the Probate list and were outside the plenary proceedings, in which the application to revoke had been brought.

26. As a result, Mr. O'Sullivan brought this application, in which he seeks: an Order pursuant to s. 27(2) of the 1965 Act, revoking the Grant which issued to him on 10 December, 2018; directions as to extracting a Grant of Letters of Administration pursuant to section 27(4) of the 1965 Act; and directions *"as to the sum of €53,707.41 held by the Applicant on behalf of the estate"*.

27. As a preliminary point, I do not think I can give any direction as to extracting a Grant of Letters of Administration pursuant to s. 27(4) of the 1965 Act, as that Grant was extracted on 6 December, 2018, and subsequently replaced by a Grant in the correct terms on 10 December, 2018.

28. I will therefore proceed to deal with the other two reliefs sought.

Whether the Grant to Mr. O'Sullivan should be revoked

29. It is clear from the correspondence referred to above that Mr. O' Sullivan no longer wishes to act as limited administrator of the estate. This is hardly surprising given that his initial consent to act was given on the understanding that a general grant would issue shortly afterwards, relieving him of any further involvement.

30. However, that has not occurred and Mr. O'Sullivan has been caught in the unenviable position that he cannot obtain instructions from the Beneficiaries, while receiving correspondence berating him for not progressing the proceedings — all against a background where it was never anticipated that he would remain as administrator other than for a very short time and in a token role. Mr. O' Sullivan has, as far as I can tell, been forced into a role to which he never in reality consented.

31. I should add that the Beneficiaries appeared in court in person, as they are no longer legally represented, and stated that they were no longer willing to extract a Grant and indeed expressed fear of Donal's reaction should they act in that role. I am not in any position to comment on whether those fears are well-founded but if they are, it may be understandable that they would not proceed to administer their mother's estate. However, that does not mean that they can simply impose the burden on a third party who consented to act only on a temporary basis. Neither does Mr. O'Sullivan appear to have been aware of any such concerns prior to giving his consent. Unfortunately, that is a problem for the family and not for Mr. O'Sullivan.

32. This is compounded by the fact that the party who first sought Mr. O'Sullivan's consent to act, solely for the purposes of issuing proceedings prior to the expiry of the limitation period, for over two years proceeded on the basis that Mr. O'Sullivan was acting within the scope of his authority, while now asserting that he is exceeding it. This is difficult to understand, given

that he applied himself for the limited Grant and his current solicitors acted for him in that application.

33. It is quite clear to me that Mr. O'Sullivan, insofar as he exceeded the extent of the Grant, did so with the full encouragement of both Donal and the Beneficiaries, until Donal, through his solicitors, first began to question his authority in January, 2021.

34. Although no one has exhibited the consent of Mr. O'Sullivan given in support of Donal's application in late November, 2018, to appoint an administrator *ad litem*, it seems that Mr. O'Sullivan consented to a limited role and never indicated that he would take out a general Grant, and that, insofar as he may have misinterpreted the nature of the steps he was obliged to take, there was no objection from anyone for several years. Notwithstanding this, he apprehends that he is being accused by Donal, through his solicitors, of exceeding his powers and he seems to have been threatened with proceedings by the Beneficiaries also. Understandably, he wishes to have no more to do with the matter.

35. In those circumstances, it seems to me that the only fair decision is to accede to Mr. O'Sullivan's application and to revoke the Grant pursuant to s. 27 (2) of the 1965 Act. If Donal wishes to pursue his proceedings, he will have to cite the Beneficiaries to take out a general Grant and, if they fail to do so, he will have to find someone else who is willing to act. It will not be possible to get an order binding the estate in the absence of the appointment of either a general administrator or another person who is willing to *"substantiate"* the proceedings, the meaning of which I discuss below.

36. I do not think it is appropriate to give directions to a limited administrator for the conduct of the proceedings, as suggested by Donal's counsel. The court has no role in the conduct of the litigation and the extent of the administrator's authority should appear from the Grant. Which in turn is determined by the terms of the Order limiting the Grant to certain purposes.

37. It is not in fact necessary to determine the issue in this application, as I am in any event revoking the Grant to Mr. O'Sullivan. However, given the frequency with which such Orders are made and the confusion which has arisen in this case about what exactly is meant by *"substantiating"* the proceedings, I think it is advisable to make some comments on the meaning of that phrase, and, consequently, the Order of 26 November, 2018, and the Grant which issued to Mr. O'Sullivan on 10 December, 2018.

Effect of a grant limited to "substantiating" proceedings

38. While I am told by counsel that this form of Order was revived in relatively recent times, it is clearly of very considerable vintage. The term is used in Mongey, *Probate Practice in a Nutshell*, 2nd ed. (Dublin, 1998) and is the subject of a separate section in the discussion of limited grants in *Miller's Probate Practice*, (1st ed.) at pp. 390-393 where it is stated (at p. 390) that: *"[a]nother species of limited grant, frequently applied for and granted, is one to substantiate proceedings in Chancery or in some other Court."*

39. There is in fact no doubt that the term dates at least from the nineteenth century as it appears throughout the caselaw of that century: an early example is *Re the Goods of Elector of Hesse* (1827) 1 Hagg. Ecc. 93, where the Elector of Hesse was permitted to have his nominee appointed as administrator *ad litem* in order to recover a debt from the estate of the late Prince of Wales.

40. While it has not been possible, for obvious reasons, to conduct a comprehensive review of all earlier editions of leading textbooks in their ancient area of law, it does seem that the term was abandoned in England and Wales by the mid-twentieth century as it is used in *Williams on Executors*, 11th ed., Vol. 1, (London, 1921) at pp. 422 *et seq.* whereas *Tristam and Coote's Probate Practice*, 19th ed., (London, 1946) does not use the term, and instead discusses

grants limited *"to the proceedings in the Chancery Division"*: see page 275. Similarly, *Williams, Mortimer and Sunnocks on Executors, Administrators and Probate*, 16th ed., (London, 1982) (being the 16th edition Williams on Executors and the 4th edition of Mortimer on Probate) speaks of grants *"constituting a party to an action"*, citing *Re Simpson; Re Gunning* [1936] P. 40 where the grant was made to the Official Solicitor, limited to defending the proceedings.

41. All of this is, of course, only of current interest insofar as it assists in understanding the meaning of the term *"substantiating the proceedings"*. In general, there is no great discussion in the nineteenth century authorities of what the term means: it is assumed that the term is well understood and the cases turn on whether a general grant is necessary for the action in question, as the orders which can be obtained against an administrator *ad litem* are limited, so as to exclude orders which amount, in substance, to the administration of the estate. I return to that issue below.

42. The first point to note is that it appears from the older authorities that Grants *"to substantiate proceedings"* appear to have issued in much more detailed form than has been the modern practice in this jurisdiction.

43. For example, in *Davis v. Chanter* (1848) 2 Ph. 544, the grant was the following terms:

> *"limited for the purpose only for the grantee to become and be made a party to the said original bill, and to attend, supply, substantiate, and confirm the proceedings already had, or that shall or may hereafter be had in the said suit … and to obey and carry into execution all orders and decrees of the Court relating to the said cause, until a final decree shall be had and made therein, and the said decree shall be carried into execution."*

44. Similarly, *Williams on Executors*, 11th ed., states (at p. 425) that the usual form of letters of administration limited to substantiate proceedings in Chancery was:

"limited for the purpose only to attend, supply, substantiate, and confirm the proceedings already had or that may be had in the cause, in the High Court of Chancery, or any other cause which may be commenced, touching the matters at issue in the cause, and until a final decree shall be made therein, and the decree carried into execution, and the execution thereof fully completed."

45. Notwithstanding that those appear to be the usual terms on which grants limiting to *"substantiating"* proceedings were traditionally granted, I do not think it follows, merely from the use of the word *"substantiate"* in an order pursuant to s. 27(4) of the 1865 Act and in any grant issued on foot thereof, that the plaintiff could execute any judgment obtained.

46. While it has been accepted since *Davis v Chanter*, *supra*., that a limited grant in those standard terms would result in an Order which binds the estate and the general administrator when subsequently appointed, as otherwise they would serve little purpose, an administrator acting under a limited grant is not vested with any assets of the estate nor is he or she entitled to administer the estate. As James L.J. put it in *Dowdeswell v. Dowdeswell* (1878) 9 Ch. D. 301:

"It was not only the practice, but it was established by authority, that for a general administration a general administrator is required. Exceptions were allowed in certain particular cases in which a limited administrator was allowed to represent the estate; but in all those cases he was allowed to represent it for the purpose of having a particular question in which that estate was interested determined so as to bind the estate in the hands of a general administrator when appointed." [Emphasis added.]

In that case, orders which amounted in substance to ascertaining the deceased's next of kin were held not to be orders which could be obtained against an administrator *ad litem.*

47. It also seems to have been accepted in England and Wales that, after judgment is obtained against an administrator *ad litem*, a creditor's grant would be required to actually

administer the estate (which would include, for example, discharging a judgment obtained against the estate): see *In re Knight* [1939] 3 All E.R. 928 where the Official Solicitor was content to be appointed administrator *ad litem* to defend a personal injury action against a deceased driver's estate, but indicated in argument (see p. 930) that a successful plaintiff would have to apply for a creditor's grant (that is, a general grant to a creditor, passing over those primarily entitled) in order to satisfy the judgment.

48. Given that the assets of the estate are not vested in the limited administrator, I think that must be correct. As it is well established as a matter of law that a limited administrator has no assets, it must follow that the order obtained in the proceedings in question is then enforceable against the administrator when appointed. And if the persons entitled do not proceed to extract a grant, whether because the estate is insolvent or because they wish to avoid the effect of the order, then the plaintiff who has succeed in obtaining an order can apply under s. 27(4) for a general grant and proceed to administer the estate on the basis that the order is enforceable. A common historical example of this is where a creditor obtains a grant so as to pay the monies due over to himself or herself.

49. There are instances, including in this jurisdiction, of limited grants where the orders ultimately obtained in the proceedings to which the administrator *ad litem* was a party could be executed by the limited administrator without the need for a general grant, but in those cases, the order appointing the limited administrator specifically included that in the purposes for which liberty to extract the grant was given.

50. For example, in *In Re the Goods of William Byrne, decd.* (1910) 44 ILTR 192, an administrator *ad litem* was referred to as having *"substantiated"* proceedings in a Workmen's Compensation Act claim in which the plaintiff had applied to appoint an administer *"limited to the purpose only to become and be made a party to proceedings to be commenced … by [the plaintiff] against [the administrator ad litem] in pursuance of the provisions of the Workmen's*

Compensation Act, 1906, and to carry the decree (if any) … into effect, but no further or otherwise": see the report of the earlier application at (1910) 44 ILTR 98.

51. By contrast, the execution of the order was not specifically mentioned in the order made in *In re Hogan* [1957] Ir. Jur. Rep. 69, where the grant was *"limited to the purpose of the proposed proceedings under the Fatal Injuries Act, 1956"*. In that case, as in *Re Simpson; Re Gunning* in England and Wales, there was no concern about a limited administrator requiring access to the assets of the estate in order to comply with the judgment or order ultimately made in the proceedings, as the purpose of the grant was to recover against the deceased's insurer.

52. I think there would be practical difficulties if an order in terms only that the limited administrator should *"substantiate"* the proceedings were to be assumed to have authority to take steps to give effect to the order obtained, notwithstanding what might, at first glance, be regarded as introducing an unnecessary layer of administration for a plaintiff in obtaining relief to which they are entitled. However, that seems to flow from authorities such as *Dowdeswell v. Dowdeswell*, already cited above.

53. In this case, although I have not seen pleadings, the object of Donal's plenary proceedings is presumably to obtain an assent of real property in his favour. I do not think anyone could argue that Mr. O'Sullivan could execute such an assent – he clearly could not – and therefore Donal, if he is ultimately successful in his claim, will have to ensure that a general grant is extracted.

54. Of course, matters had not reached that stage when Donal's solicitors began to object to Mr. O'Sullivan's approach to the proceedings. The issue in these proceedings was whether Mr. O'Sullivan had any authority to threaten or issue a motion to dismiss for want of prosecution when Donal failed to deliver a Statement of Claim as required by the Rules, or to raise particulars of that claim and issue a motion to compel replies.

55. It should be noted that these are not only routine steps in litigation (or in the case of the motion to dismiss, at least not unusual), but they are steps which could have had no prejudicial effect on the estate or those entitled to succeed.

56. Donal argues that Mr. O'Sullivan was simply a nominal defendant and was not authorised to do anything other than accept service of the proceedings, and presumably the Statement of Claim. It is clear that Mr. O'Sullivan and the Beneficiaries did not believe that Mr. O'Sullivan's authority was constrained in that way.

57. Again, there is no guidance in the authorities so the matter has to be decided from first principles. The starting point, in my view, is that Mr. O'Sullivan, not being vested with any of the assets of the estate and not enjoying the power of a general administrator to gather in assets, to sell real property, and so on, could not have any meaningful obligations to the estate or to the Beneficiaries.

58. The usual circumstances in which these applications are made must be recalled. There are applications almost every Monday in the non-contentious Probate list by financial institutions who wish to sue estates of deceased persons within the limitation period and apply for that reason to have solicitors appointed for the limited purpose of substantiating the proceedings. Very frequently, those applicants know very little about the identity of the persons entitled to a share on intestacy, and, save in the case of a surviving spouse, civil partner, or qualified cohabitant who might be found at the deceased's last address, it would be difficult to get contact details for the persons so entitled.

59. In addition, the applicants do not know, and have no way of finding out, if there is a Will, so as to identify any executor. The most that these applicant can establish is that no Grant of Probate or of Letters of Administration has been extracted because they can ascertain that by search in the Probate Office.

60. Having appointed a limited administrator for the purposes of *"substantiating"* proceedings, one has to ask what such a person, who has no connection with the estate and is the nominee of the intended plaintiff, who is often a creditor, could do to defend the proceedings which it is intended to bring. As in this case, he or she could not obtain meaningful instructions as to any defence that might be available to an estate and has no general authority over the estate itself. As he or she is not the general administrator, he or she has no access to the deceased's personal papers and records (including their digital records such as emails) , and therefore no way of ascertaining whether the estate has a defence to the action. Even where an issue on the statute appears on the face of the proceedings, it would be difficult, if not impossible, for such an administrator to deal with factual matters relating to the date of accrual of the cause of action in a particular case or whether, for example, a debt had been acknowledged.

61. As a result, they can have no substantive duties or obligations to the estate or Beneficiaries. It is, therefore, in my view open to them not to take active steps in the defence of the proceedings so as to impose an obligation to defend the proceedings in any substantive way that would impose duties on them which they could not, in all probability, fulfil. The result is that many orders will be obtained against these administrators, effectively in default (though it should be remembered that many judgments in default including any such judgment in Donal's case as he seeks equitable relief, would require the plaintiff to tender evidence to a court in order to obtain the orders sought).

62. The apparent unfairness of allowing a plaintiff to proceed in this way is tempered by the fact that many of these orders are made so as to prevent a person, with a cause of action against the estate of a deceased, from being thwarted in exercising his or her legal rights by virtue of a decision by the person or persons entitled to take out a Grant to refrain from doing so as to deprive the plaintiff (who is often a creditor) of their cause of action. In addition, at

least some of the estates in which these applications are made are insolvent, with the result that those entitled would have no incentive to extract a Grant. (See the discussion in *Williams on Executors*, 11th ed., at p. 423, on the likelihood that, where a general grant is not extracted by those entitled, there are no assets to be gathered in.)

63. However, there will be other cases, of which this is one, where there are assets in the estate and the appointment of a creditor's nominee to represent the estate for the purposes of the proceedings could result in an order in those proceedings which is contrary to the interests of those entitled to succeed. It is for this reason that it is necessary to ensure that, before such an administrator is appointed, appropriate steps are taken by an applicant for a limited grant to identify those entitled to extract a grant and to notify them in good time of the intention to make the application, if a grant is not extracted in sufficient time to allow the proceedings to be brought before the relevant limitation period expires.

64. However, I think the fact that it is the nominee of the *plaintiff* who is usually appointed gives the greatest guidance as to what is intended by these limited grants. While usually the appointee is an independent solicitor, they will, nevertheless, be unconnected with the affairs of the deceased and will not – as the facts of this case demonstrate – be in receipt of instructions from those best placed to give them. It is difficult to see how such a person could meaningfully engage in the proceedings or do anything other than file a defence which is a full traverse and therefore merely puts the plaintiff on proof. There is little or nothing between this and permitting judgment to be entered in default save that, as already stated, in many proceedings where judgment is obtained by default, some evidence is required to actually obtain the relief sought.

65. In those circumstances, a grant limited for the purpose of *"substantiating"* certain proceedings simply provides to a plaintiff a defendant who may be sued such that any order obtained or the determination of any point arising in the action will bind the general

administrator if and when he or she is appointed, but without imposing an obligation on the person appointed as limited administrator to take active steps in defence of the action. As a result, in order to satisfy a court that it is *"necessary and expedient"* that such an administrator be appointed, an applicant should be in a position to demonstrate that they took all reasonable steps to identify the persons entitled to extract a grant and gave them adequate time to do so.

66. There was therefore, no obligation on Mr. O'Sullivan to take active steps to defend the proceedings. I think when the purpose of these orders is reflected on, the inevitable conclusion is that the administrator so appointed is, in essence, a nominal defendant. He or she is appointed simply to allow the proceedings to be brought and for no other purpose.

67. I think it follows from those issues that an administrator appointed to *"substantiate"* proceedings is not to be regarded as having authority to take active steps in the defence of the proceedings. As a result, I think it follows that Mr. O'Sullivan was not obliged to issue motions or to raise particulars. Whether he had authority to do so I think would turn on whether he had access to the funds of the estate in order to pay the costs associated with taking those steps. In this particular case, however, it is clear that those steps were taken at the insistence of the Beneficiaries. That I think introduces particular considerations surrounding the payment of those costs and expenses which means that Mr. O'Sullivan's position is not governed by the usual rules and it is unnecessary to consider further the entitlement of an administrator *ad litem* to recover any costs incurred.

68. I would stress that Mr. O'Sullivan acted at all times at the behest of the Beneficiaries and indeed at their insistence. In no sense, therefore, could he be said to have acted improperly and this may be material to his entitlement to the costs of this application and to his remuneration.

Conclusion

69. It is appropriate to revoke the Grant extracted by Mr. O'Sullivan on foot of the Order of 26 November, 2018. His initial consent did not envisage that he would continue to act for several years, as he assumed a general grant would follow to relieve him of his position as administrator *ad litem*. Furthermore, he has been placed in an impossible position by both sides of the family dispute. I will therefore make an order pursuant to s. 27(2) of the 1965 Act, revoking the Grant of 10 December, 2018.

70. Although that is sufficient to dispose of the proceedings, it is important to note that the purpose of giving liberty to an intended plaintiff's nominee to extract a Grant of Letters of Administration limited to *"substantiating"* proceedings is to provide that plaintiff with a defendant so that the intended action can be properly constituted and so that an order can be obtained which will bind the estate for all purposes thereafter. Given that the administrator is not vested with any assets of the estate and is not subject to the duties imposed on a general administrator, I do not think there is any obligation on such an administrator to actively defend proceedings, and the circumstances in which such administrators are usually appointed is such that they simply would not have access to the instructions necessary to do so. Such limited instructions as Mr. O'Sullivan obtained in these proceedings were given by the Beneficiaries on the mistaken understanding that Mr. O'Sullivan's authority was much wider than was in fact the case

71. I think it is likely that an undertaking from Mr. O'Sullivan to hold the estate funds on trust until a general grant would be extracted, and thereafter to pay those funds and any interest earned thereon over to the personal representative of the Deceased is sufficient to deal with the monies which were incorrectly transferred to Mr. O'Sullivan. I think it is likely that Mr. Donal

Moore would be subject to similar obligations in respect of the estate funds held by him but I am not asked to decide that issue in this application.

72. I will list the matter in early course for the purpose of making final Orders and for dealing with costs and with Mr. O'Sullivan's renumeration.