**THE HIGH COURT**

**2017 No. 4429P**

**BETWEEN**

**ADRIENNE DARRAGH and DAVID DARRAGH**

**PLAINTIFFS**

**AND**

**ANNA DARRAGH**

**DEFENDANT**

**JUDGMENT of Mr. Justice Denis McDonald delivered on the 18th day of July 2018**

**The motion before the court**

1. In these proceedings (which were commenced by Plenary Summons issued on 17 May, 2017), the Defendant has brought a motion seeking the following relief:-

(a) An Order dismissing the proceedings on the basis that the Plaintiffs have no locus standi to maintain the proceedings;

(b) In the alternative, the Defendant seeks an Order dismissing the proceedings on the basis that the Plaintiffs have no reasonable cause of action;

(c) An Order is also sought setting aside all caveats, warnings and appearances entered in relation to the estate of the late Mr. Austin Darragh deceased;

(d) The Defendant also seeks an Order preventing the Plaintiffs from lodging any further caveats in respect of the estate of the deceased.

**Background**

2. The Defendant is the widow of the late Austin Darragh ("the Deceased") who died, testate, on 4 October, 2015. The Defendant married the Deceased in 1998. The Deceased had previously been married to Marie Therese (Terry) Roddy on 11 April, 1950. His first wife died on 8 August, 1992 following a long illness. The Deceased and his first wife had four children including both of the Plaintiffs in these proceedings. Prior to her marriage to the Deceased, the Defendant had previously been married and had two sons of her own, namely Colm McDonnell and Richard McDonnell.

3. By his Will made on 22 July, 2011, the Deceased made the following provisions:-

(a) In the event that the Defendant survived him for a period of 30 days, he gave the entire of his estate to her and appointed her as his executrix;

(b) In the event that the Defendant did not survive him by 30 days, he appointed Colm McDonnell and Tom McGuinness as his Executors and Trustees, and directed them to convert his Estate into money and divide it equally between his four children and two stepchildren, Colm McDonnell and Richard McDonnell.

4. Prior to the commencement of these proceedings on 17 May, 2017, the Plaintiffs had issued a motion which was listed in the Probate (Non-Contentious) List on 3 April, 2017 in which they sought the following relief:-

(a) An Order directing the Defendant in these proceedings to produce all testamentary papers;

(b) An Order directing the Defendant and her solicitors to provide for inspection "*all or any mutual Wills from in about July 2011, or as the case may be ….to swear positively that there never were then nor are now any such mutual Wills*";

(c) An Order directing the Defendant to provide an account to the court in relation to the proceeds of sale of certain property;

(d) The appointment of an independent administrator.

5. The motion in the Probate List was supported by a lengthy affidavit sworn by the Plaintiffs in these proceedings (containing 41 paragraphs). There is a dispute between the parties as to what occurred before the Probate Judge, Baker J. The Defendant maintains that Baker J. "*saw the matter for what it was*" which I understand to be a suggestion that Baker J. considered that there was no foundation to the relief sought in the probate motion. In a later affidavit sworn by the Defendant, it is suggested that Baker J. considered that the application "*had no merit*". However, the Plaintiffs dispute this. They maintain that Baker J. "*saw herself lacking jurisdiction …to deal with matters, which had become contentious …*". There is also a dispute as to whether an affidavit was to be filed by the Defendant in the course of the proceedings before Baker J. The Plaintiffs maintain that there was a failure to file such an affidavit. The Defendant maintains that no such affidavit was ever required. I am in no position to determine which of these versions of events is correct. Neither side sought to place in evidence before me the Digital Audio Recording ("DAR") of the hearing before Baker J. In the circumstances, all I can do is to note that under the terms of the Order made by Baker J., the application made by the Plaintiffs at that time was dismissed reserving the costs of the application to be determined in these proceedings. At this point, it should be noted that the present proceedings were commenced prior to the conclusion of the matter before Baker J.

**The claim made in the present proceedings**

6. Given the nature of the application currently before the court, it is essential to analyse the nature of the relief which has been claimed by the Plaintiffs in these proceedings. To date, no Statement of Claim has been delivered. This is in circumstances where, as counsel for the Plaintiffs has explained, no affidavit of scripts has yet been filed by the Defendant. The Plaintiffs rely on the provisions of Order 20, Rule 5 which provides that in a probate action, the plaintiff "*shall not be bound to deliver a Statement of Claim until the expiration of eight days after the Defendant has filed his Affidavit as to scripts*". As described in more detail in paragraph 10 below, counsel for the Plaintiffs has maintained that it is crucial that the affidavit of scripts should be delivered before the Plaintiffs deliver their Statement of Claim.

7. The claim of the Plaintiffs, as set out in the General Indorsement of Claim in the Plenary Summons, is (*verbatim*) as follows:-

> *"1. The Plaintiffs claim as the son and daughter of Austin Darragh deceased who died on the 4 October, 2015 that the Defendant widow of the deceased and who has failed to prove a purported testamentary paper of the 22 July, 2011 (produced in copy by her son Colm McDonnell to the first Plaintiff somewhat over 30 days beyond the death of the reputed testator) that she produce said original purported testamentary paper to the High Court and have same condemned or proved in solemn form of law.*
>
> *2. The Plaintiffs further claim that the said Defendant produce at the same to the High Court the mutual Will of the Defendant made in 2011, where the Defendant as respondent to a specific probate motion in that behalf has failed to deny on oath her execution of such mutual Will in 2011.*
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> *3. The Plaintiffs in the premises seek the appointment of an independent Administrator with or without Will or mutual Will annexed, as the case may be, pursuant to the inherent jurisdiction of the Court, or by special statutory grant under Section 27(4) of the Succession Act, 1965.*
>
> *4. Further or other Reliefs including injunctive Reliefs.*
>
> *5. The reception of the Plaintiffs' Affidavit of the 10th March, 2017, if necessary into these proceedings".*

8. It will be noted that insofar as the first relief in the Indorsement of Claim is concerned, no grounds are given as to why the Will should be condemned, or as to why the Defendant should be required to prove the Will in solemn form of law. In truth, while framed in terms that the Will should either be condemned or approved in solemn form of law, the Plaintiffs (as both their affidavits and the submissions made on their behalf clearly show) are seeking evidence which may assist them in a possible challenge to the Will, and in particular, which may assist them in identifying a sustainable ground on which such a challenge might be advanced.

9. In a probate action seeking to condemn a Will, one would ordinarily expect that the indorsement of claim would state in brief and general terms the basis on which such relief is sought such as:-

> (a) The Will was not executed in compliance with the statutory rules in Section 78 of the Succession Act, 1965 ("the 1965 Act"); or
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> (b) The testator did not know and approve the Will; or
>
> (c) The testator was not of sound mind, memory and understanding at the time he made his Will such as to lack the necessary testamentary capacity required by Section 77 of the 1965 Act; or
>
> (d) The execution of the Will was tainted by duress or undue influence.

10. When I raised that issue with counsel for the Plaintiffs (i.e. as to why paragraph 1 of the Indorsement of Claim was pleaded in the manner set out above), I was informed that the Plaintiffs are essentially reserving their position until after they see an affidavit of scripts from the Defendant. The Plaintiffs rely on the provisions of Order 20 Rule 5 (as set out above) and on Order 12, Rules 27-29 which envisage that in probate actions, the plaintiff and defendant are each required to file an affidavit of scripts. The Plaintiffs, here, have each filed affidavits of no scripts. They say that they are now entitled, in this action, to expect that an affidavit of scripts will be sworn by the Defendant. On receipt of the Defendant's affidavit of scripts, I was informed that the Plaintiffs will make a "*cool and calm decision*" as to whether to proceed with the challenge to the Will and, if so, to decide on the grounds of such challenge. Counsel for the Plaintiffs said that perhaps the Plaintiffs' suspicions have become "*too gothic*" and that when the Plaintiffs see the scripts, they will either be assuaged or they will take the matter further.

11. When I enquired of their counsel as to what the Plaintiffs believe an affidavit of scripts may show, his response was that it may assist in determining whether there were mutual Wills made by the Deceased and the Defendant. It was also suggested by counsel that the scripts may show that the Deceased was not fully aware of his financial circumstances, and this would assist (so it was suggested) the Plaintiffs in making a case of undue influence or in mounting a challenge to the execution of the Will. As noted in paragraph 26 below, the Plaintiffs in their affidavits filed in the course of the present application have also suggested that if the scripts show that the Deceased was not fully aware of his financial circumstances, this may assist them in making a case that he lacked the necessary testamentary capacity. The Plaintiffs rely on the following statement from *Miller on Probate*, chapter 25, at p 282 where the author says:-

> *"In several cases which have been tried, it has been found that parties have sworn to an ignorance of all testamentary papers save the one in controversy, and yet, at the hearing of the cause, the same persons, or their solicitors, have produced and given in evidence most important and manifest testamentary papers, which ought to have been lodged as scripts, and which, perhaps, if lodged and inspected by the opposite party, would have satisfied him that further litigation would be hopeless. Thus, the letters from the testator giving instructions for his will are within the rule, and yet they are seldom lodged, but always read and relied on at the hearing, and in several cases the Judges have strongly urged the necessity of preserving and lodging the envelopes in which wills, etc. are found …and their value in evidence has been frequently seen".*

12. The Plaintiffs draw attention to the wide range of testamentary papers that fall within the ambit of "*scripts*" as explained by *Miller*. The Plaintiffs clearly hope that among the documents to be disclosed in the Defendant's affidavit of scripts will be the instructions given by the Deceased, and perhaps also the notes of any meeting between the Deceased and his solicitor. Whether these would disclose any facts that might give a basis to challenge the will is a matter of speculation,

13. Counsel for the Plaintiffs also submitted that the present motion by the Defendant was a "*pre-emptive strike*" designed to avoid having to swear an affidavit as to scripts. On the other hand, in light of the considerations identified in paragraphs 8-10 above, an issue arises as to whether these proceedings can truly be considered to be a "*probate action*" requiring the delivery of an affidavit of scripts. In particular, a question arises as to whether a plaintiff is entitled to launch proceedings on the basis outlined above in the hope that evidence will emerge in the affidavit of scripts to be filed by an executor that will enable the plaintiff to formulate a case. This is an issue that I address in more detail below.

**The evidence before the court**

14. The Affidavit of the Defendant grounding this application was sworn on 14 July, 2017. In that affidavit, the Defendant suggests

that these proceedings were launched when it became clear that the Probate Judge (Baker J.) was not disposed to grant the application before her. She also suggests that the Probate Judge said there was no need for the Defendant to swear a replying affidavit to the affidavit grounding the motion brought by the Plaintiffs in the Probate List. As I have already indicated, I am not in any position to form a view on what might have been in the mind of the Probate Judge in circumstances where the present application has been heard on the basis of affidavit evidence only, neither side has supplied a transcript of the hearing before the Probate Judge, and where the parties are not ad idem as to what occurred before her.

15. In relation to the first relief sought in the Plenary Summons, the Defendant says that it is her intention to prove the Will of the Deceased in common form, but that she is currently prevented from doing so because of the caveats which have been lodged in the Probate Office. It is also contended that the Plaintiffs have no *locus standi* to pursue the claim made in paragraph 1 of the Plenary Summons in circumstances where they have no interest in the estate of the Deceased.

16. With regard to the relief sought in paragraph 2 of the Plenary Summons, the Defendant says that any matters relating to her own estate (including whether she has made a Will and the terms of any such Will) are "*entirely private matters and confidential to me*". The Defendant also refers to the affidavit of her solicitor, Brian Ó Longaigh, in which he says that the Will made by the Deceased was a "*stand alone document*", and that he was not instructed by the Deceased to make a mutual Will for him along with any other person.

17. Mr. Ó Longaigh also refers to the affidavit sworn by Elizabeth Gilmartin, one of the attesting witnesses to the Deceased's Will, in which she briefly describes the circumstances in which the Will was executed.

18. In paragraph 21 of her affidavit, the Defendant says that she did not make a mutual Will. In the same paragraph, she maintains that even if she had made such a Will, any cause of action arising from it would only accrue after her death.

19. With regard to the relief claimed in paragraph 3 of the Indorsement of Claim (where an Order is sought appointing an independent administrator), the Defendant maintains that there are no special circumstances rendering it necessary or appropriate for the court to grant representation to a person other than herself. She draws attention to the fact that she is not only the sole executrix, but she is also the universal legatee of her late husband, the Deceased.

20. In her affidavit, the Defendant also contends that the present proceedings are not being pursued in a *bona fide* way. One of the matters the Defendant advances in support of that proposition is the fact that prior to the commencement of the proceedings, enquiries were made by the Plaintiffs of her solicitors as to whether her solicitors had authority to accept service of the proceedings. Notwithstanding that her solicitors confirmed that they had such authority, the second named Plaintiff served the proceedings personally on the Defendant.

21. The question of the *bona fides* of the Plaintiffs in pursuing these proceedings is further addressed in the written submissions delivered on behalf of the Defendant. In those submissions, it is suggested that the fact that the Plaintiffs have changed solicitors on a number of occasions suggests that advice has been given to the Plaintiffs that did not suit them. This seems to me to be pure speculation and I do not have regard to it in my consideration of the issues which I have to determine. It is also suggested in the submissions that the Plaintiffs know that they have no grounds whatever for challenging the Will, and concern is expressed at the costs incurred in having to deal with these proceedings which will ultimately diminish the value of the estate which has been left by the Deceased to the Defendant, his widow. Reference is also made in the submissions to the decision of the Supreme Court in *Elliott v. Stamp* [2008] 3 IR 387 at pp 395-396 where Kearns J. (as he then was) said:-

> *"It is beyond doubt that estates can be entirely dissipated by legal proceedings brought by disappointed parties whose intention may be to force the executor into some form of settlement or to vindictively waste the assets in legal proceedings which, even if capable of being seen as properly brought at the outset, can no longer be seen as such once the full picture has been made available by those defending the proceedings. I see this as the equivalent in probate terms of a lodgment or tender made in a personal injuries action. I believe it is an approach which should be adopted whenever possible. It would represent a valuable protection for the estates of deceased persons, without in any way diluting the principles enunciated in Vella v. Morelli. Thus, while it may be reasonable to commence and bring proceedings, and to bring them bona fide, a point may arrive where, as a result of disclosure made by the defence, the further maintenance of the claim can no longer be seen as reasonable".*

However, in my view, the decision in that case is of limited relevance here. As the judgment of Murphy J in the High Court [2006] IEHC 336 at paragraph 1 makes very clear, the plenary summons in that case expressly sought declarations that the will in issue was not validly executed, the testator was not of sound disposing mind, and the will had been procured by acts of undue influence brought to bear upon the testator by the defendants to those proceedings. This is in marked contrast to the present case. Furthermore, it seems to me that the principle which emerges from the judgment of Kearns J would only be applicable where a plaintiff brings proceedings forward to trial notwithstanding full disclosure of all facts and documents by the defendants at an early stage of the proceedings which show the case not to be maintainable. The decision does not therefore seem to me to be immediately relevant to this case in which the claim is pleaded quite differently and where the issue is whether the case should be dismissed at an interlocutory stage.

22. Moreover, the Plaintiffs strongly contest that full disclosure has been made in this case. They say they need to see the scripts (which would include any note of instructions given by the Deceased to his solicitor in relation to his Will) in order to assess whether there is a basis to challenge the Will. They raise a number of issues in their replying affidavit sworn on 13 October, 2017. They also ask the court to take into account what they previously said in their affidavit sworn in support of their motion in the Probate List. That affidavit was sworn on 10 March, 2017. In that affidavit, the Plaintiffs explained that their application to the Probate Judge was essentially premised upon the footing that the Deceased and the Defendant made mutual wills in July 2011. However, it is noteworthy that there is nothing in that affidavit which provides any actual evidence that mutual wills were made in July 2011. The furthest the affidavit goes is to refer to a letter from Crowley Millar, solicitors for the Defendant, written on 15 November, 2016 in which they stated that:-

> *"We are satisfied that both Austin and Anna Darragh had full capacity and were fully aware of the nature of the Wills they made in 2011".*

In my view, that letter does not, of itself, suggest that the wills were mutual in nature. I examine in more detail below the issues that arise in relation to mutual wills and what must be established in order to make a case based on mutual wills. It is sufficient to note, at this point, that the mere fact that wills are executed at or close to the same time is not evidence that the wills are intended to be mutual wills.

23. In the affidavit sworn in March 2017, the Plaintiffs say that the Deceased was 85 years old when he signed the Will in 2011. They also suggest that he was very reliant on painkillers and anti-inflammatory medication at this time, and that he had also been drinking heavily. They do not go so far as to allege that he lacked testamentary capacity. They say that the Deceased was aware that his youngest daughter suffered with a serious bipolar disorder and that she had been hospitalised on numerous occasions since the diagnosis was made. The Deceased was also aware that one of the Plaintiffs was in poor financial circumstances, and they maintain that under earlier Wills, their father had provided for his own children. In this regard, I do not know whether it is the intention of those children of the Deceased to bring proceedings under Section 117 of the 1965 Act. However, I note that previously, in the initial letter that was sent on behalf of the second named Plaintiff on 13 November, 2015, Messrs. Early & Baldwin (his then solicitors) intimated that a claim under Section 117 might be brought. This was the only form of proceeding that was indicated at that time.

24. A number of allegations are made in the affidavit suggesting that, prior to the death of the Deceased, the Defendant sought to prevent or discourage one of the Plaintiffs from visiting his father. There are also allegations that, after the funeral, none of the Deceased's four children was invited back to the family home.

25. Much of the affidavit is concerned with a meeting which took place in the Stillorgan Park Hotel on 30 November, 2015 when Colm McDonnell, one of the Defendant's sons, provided a copy of the Will to the Plaintiffs together with a document dealing with the proceeds of sale of an asset of the Deceased apparently sold in 2006 or 2007. There is also an allegation that part of the proceeds of this asset were "*earmarked*" by the Defendant to assist her first husband who it is alleged was in financial difficulty. However, the basis for this allegation has not been set out in the affidavit. On the basis of the evidence currently before the court, it is difficult to avoid the conclusion that the allegation is based on pure speculation. Given the speculative nature of this allegation, I do not believe that it is a matter to which the court can properly have regard.

26. In the subsequent affidavit sworn by them on 13 October, 2017, the Plaintiffs reiterate that the statement of account (which they say was produced to them by the Defendant's son at the meeting on 30 November, 2015) was misleading. They also maintain that at the time of execution of the 2011 Will, their father was not correctly apprised of the extent of his assets. They rely on the Law Society (Best Practice) Guidelines issued in February 2009 dealing with the drafting of wills for elderly clients. They suggest that "*full testamentary awareness could not have been met as our father, his solicitors and his accountant did not know the quantum or whereabouts of monies he had …*". Yet, the indorsement of claim on their plenary summons makes no claim to that effect

27. The Plaintiffs say that upon receipt of the Defendant's affidavit of scripts, "*we may seek the following reliefs*" (emphasis added). For present purposes, it is unnecessary to set out all of the relief which "*may*" be sought by the Plaintiffs. It is sufficient to note that among the relief which possibly may be claimed in the future includes:-

> (a) A declaration that the Deceased was not fully apprised of the disposing effect of his Will as he did not know the extent of his assets "*amounting to undue influence or lack of testamentary capacity*";
>
> (b) A declaration that the Defendant be restrained from revoking or altering her mutual will;
>
> (c) A declaration that the Will of the Deceased dated 22 July, 2011 is "*void/voidable due to lack of appreciation by the Deceased of the extent of his assets and/or a lack of disclosure to him of the Defendant's intentions with his (extant) assets, where she continually failed to reveal her plan to financially assist her first family at the expense of step-children; amounting to lack of testamentary capacity/undue influence and/or deceit upon the Deceased*".

28. With regard to the allegation that there were mutual wills executed by the Deceased and the Defendant at the same time, the Plaintiffs say that the necessary mutuality can be inferred by a court following a "*scrupulous analysis of all of the facts, documentation, and other relevant considerations*".

29. The Defendant swore a further affidavit on 22 December, 2017 in which she says that the Plaintiffs have not advanced any ground to justify why she should have to prove the Will of the Deceased in solemn form of law. She also maintains that no grounds have been advanced for her removal as executrix. She complains that the proceedings have been brought in an effort to diminish the value of the estate available to her in circumstances where she contends that the Plaintiffs are aggrieved that she is the sole beneficiary. In response to that suggested grievance, she says she is 74 years of age and she needs the provision made for her by the Deceased in order to "*live out my life*".

30. The Defendant also says that there is no evidence to suggest that the Deceased lacked capacity. She draws attention to the affidavit evidence that is available both from Mr. Ó Longaigh and from Elizabeth Gilmartin that the Will was executed in accordance with the requirements of the 1965 Act. She says that a duly executed Will carries with it a presumption of capacity, and that the onus of proof lies on the Plaintiffs to establish any lack of capacity or any undue influence. The Defendant maintains that no evidence has been placed before the court to suggest that the Deceased was unduly influenced by anyone. In circumstances where she was married to her husband for a period of 17 years at the date of death, she suggests that the terms of the Will are unsurprising.

31. Insofar as the Plaintiffs suggest that mutual wills were executed by the Defendant and the Deceased, the Defendant says that the Plaintiffs are engaged in pure speculation, and that they have placed nothing before the court to undermine the evidence given by her and by Mr. Ó Longaigh in relation to this issue.

32. With regard to the allegation that the Deceased did not know the quantum or whereabouts of the assets the subject matter of his estate at the time he made his Will, the Defendant says that the allegations made by the Plaintiffs are "*entirely fanciful and without foundation*". She relies also on a supplemental affidavit sworn by Mr. Ó Longaigh on 8 January, 2018 in which he says that the Deceased was a very astute man and that he has no reason to doubt that the Deceased was fully conversant with his assets at the time he made his Will. For completeness, it should be noted that Mr. Ó Longaigh does not, however, exhibit any relevant note of his meeting with the Deceased or of any written instructions obtained by him from the Deceased.

33. There was a final affidavit sworn by David Darragh, the second named Plaintiff, on 29 May, 2018. In that affidavit, Mr. Darragh gives further detail about a complaint (which had been mentioned in the previous affidavit evidence) made by him to the Chartered Accountants Regulatory Board ("CARB") in respect of Colm McDonnell (the son of the Defendant) who is a chartered accountant, and therefore subject to regulation by CARB. The complaint related to the statement of account furnished by Mr. McDonnell to Mr. Darragh at the meeting on 30 November, 2015. Mr. Darragh's complaint was essentially rejected by CARB in circumstances where the relevant statement of account was not prepared by Mr. McDonnell but by Tom McGuinness, the "*family accountant*". In his affidavit, Mr. Darragh contends that the furnishing of this account by Mr. McDonnell on behalf of the Defendant was intended to mislead the Plaintiffs. While this is an issue which has occupied space in several of the affidavits before the court, the relevance of this issue to the relief now claimed in these proceedings is not immediately apparent. While the Plaintiffs have claimed in their affidavit that the

account furnished to them by Mr. McDonnell at the meeting on 30 November, 2015 was inaccurate in a number of respects, no case is made in these proceedings against Mr. McDonnell. There is, in fact, no cause of action pleaded on the basis of the alleged inaccuracies in the statement of account. Moreover, the assets of the estate will all have to be dealt with in due course in the usual Inland Revenue affidavit, and that affidavit will have to be accurate in all respects. It is at the point that the Inland Revenue affidavit is sworn that a true and accurate account will have to be given of the estate of the Deceased.

34. In the circumstances, I do not believe that it is appropriate that I should discuss in any detail in this judgment the allegations and counter-allegations that are made in relation to the statement of account and the meeting on 30 November, 2015.

**The principles to be applied**

35. As set out in paragraph 1 above, one of the principal forms of relief sought by the Defendant in this application is an Order dismissing the proceedings on the basis that the Plaintiffs have no reasonable cause of action. I was therefore surprised that, in the course of the hearing before me, neither side produced any authorities relating to the court's jurisdiction to dismiss proceedings on that ground. In those circumstances, I drew to the attention of counsel for both parties the decision of the Supreme Court in *Lopes v. Minister for Justice* [2014] 2 IR 301 and asked for their submissions in relation to the case. At this point, I should make very clear that it is not for the court to identify relevant authorities to the legal representatives of the parties. It is the responsibility of the legal representatives to place before the court the applicable authorities which are relevant to any application before the court. It is, of course, not usually necessary to place before the court every single authority on a particular issue. However, in my view, it is crucial that the legal representatives of the parties should place before the court the most relevant authorities, including any applicable Supreme Court or Court of Appeal authorities (which are obviously binding on the High Court). Where significant relief of the kind sought on this application is in issue, it is unsatisfactory that the legal representatives for the parties should proceed to argue the application without reference to the relevant authorities which set out the principles which must be applied by the court on an application of this kind.

36. In *Lopes*, Clarke J. (as he then was) carefully reviewed the case law in relation to the court's jurisdiction to dismiss proceedings and summarised the principles which must be applied. For the purposes of this judgment, it appears to me that those principles can be further synopsised as follows:-

> (a) If on the basis of the facts pleaded, a case is bound to fail, then the proceedings should be dismissed under Order 19, Rule 28.
>
> (b) In contrast, the inherent jurisdiction of the court can be invoked where it is possible to establish the facts at an interlocutory stage with clarity, and where it is possible to show (again with clarity) that those facts do not support the claim made such that the court can conclude that the proceedings are bound to fail on the merits.
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> (c) The inherent jurisdiction of the court should, however be sparingly exercised. The court should be slow to entertain an application to dismiss.
>
> (d) In responding to an application to dismiss a claim, all that a plaintiff needs to do is to put forward a credible basis for suggesting that the plaintiff may, at trial, be able to establish the facts which are asserted and which are necessary for success in the proceedings. The court should bear in mind that, in a plenary action, a plaintiff has available the range of procedures provided for in the rules to assist in establishing facts such as discovery, interrogatories and the summoning of witnesses by subpoena. Some of these steps are not available at an interlocutory stage, in the case of others, it is usually not practicable to take such steps prior to the hearing of an application to dismiss.
>
> (e) There are certain types of cases which are more amenable to an assessment of the facts at an early stage. This is especially so in cases which are wholly or significantly dependent on documents.
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> (f) Although not specifically stated by Clarke J. in *Lopes v. Minister for Justice*, it is also clear from the case law that the onus lies on a defendant in an application of this kind to demonstrate that it is very clear either that the plaintiff's claim is bound to fail or that it should be struck out under Order 19, Rule 28.
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> (g) Again, although not specifically mentioned by Clarke J. in *Lopes v. Minister for Justice,* it is also clear from the judgment of McCarthy J in the Supreme Court in *Sun Fat Chan v. Osseous Ltd*. [1992] 1 I.R. 425 (which is cited by Clarke J. in Lopes at p. 428) that if a statement of claim admits of an amendment which might, so to speak, save it and the action founded on it, then the action should not be dismissed. The same principle would, of course, apply in cases where a statement of claim has not been delivered, to an indorsement of claim. I would add that, in my view, if this principle is to be applied in any particular case, an intimation would have to be given by the plaintiff or his legal representatives that the plaintiff proposes to amend the claim.

37. When I enquired of counsel for the Defendant whether the present application was based on Order19, Rule 28 or on the inherent jurisdiction of the court, I was informed that the application was being moved on the basis of the inherent jurisdiction of the court.

38. In addition to the principles governing applications of this kind, it is also necessary to consider a number of other legal principles which are relevant to the issues which require to be considered by the court in this case. However, rather than attempting to summarise those principles at this point in the judgment, I believe it would be more helpful to consider these principles in the context of the individual issues which arise. I now turn to consider those issues.

**The relief claimed**

39. It seems to me that the appropriate course to take here is to consider, in turn, each of the forms of relief claimed in the Indorsement of Claim and to assess whether the Defendant has satisfied me that it is clear that the Plaintiffs are not entitled to succeed in relation to each such claim. I take the view in this case that it is more practicable to consider this issue first before addressing any questions of *locus standi*. Obviously, if it is clear that the cause of action fails, then any issue of *locus standi* becomes moot.

**The relief claimed in paragraph 1 of the Indorsement of Claim**

40. The terms of paragraph 1 of the Indorsement of Claim are set out in paragraph 7 above. As noted in paragraph 9 above, no grounds are advanced by the Plaintiffs for the relief sought by them in paragraph 1. As recorded in paragraph 10 above, counsel for the Plaintiffs very frankly acknowledged that the Plaintiffs propose to reserve their position until after delivery of an affidavit of scripts from the Defendant. Following delivery of that affidavit, and the inspection by them of the scripts available to the Defendant, the Plaintiffs will then make a decision as to whether to proceed with a challenge to the Will, and if so, on what grounds. This seems

to me to raise a fundamental issue as to whether a plaintiff is entitled to proceed in this way. While it is true that, as counsel for the Plaintiffs has submitted, the Rules envisage that a plaintiff, in a probate action, is not required to deliver a statement of claim until after the Defendant has delivered an affidavit of scripts, it is, in my experience, unprecedented for a plaintiff, in such an action, to plead a case in the terms set out in paragraph 1 of the Indorsement of Claim here. As noted further below, the claim made in paragraph one is self-contradictory. Furthermore, in my experience, it would be normal practice that a plaintiff, in such an action, will set out in the indorsement of claim the grounds on which such relief is claimed. Indeed, this is not peculiar to probate actions. Order 4, Rule 2 of the Rules specifically states that the indorsement of claim on a plenary summons should set out not only the relief claimed, but "*the grounds thereof expressed in general terms ….*". There is accordingly no necessity for the indorsement of claim to be detailed. However, it must, in my view, set out the basic grounds on which the relief is claimed.

41. It is unsurprising that Order 4, Rule 2 requires that the indorsement of claim on a plenary summons should set out not only the relief claimed, but the grounds for that relief (albeit expressed in general terms). In that way, the plaintiff will plead his or her cause of action. This is consistent with the basic requirements that need to be in place in order to constitute a cause of action. In order to have a cause of action, the plaintiff must not only have a desire to obtain relief, but must also have the necessary grounds to seek such relief. That is reflected, for example, in the approach taken by Lord Esher M.R. in *Read v. Brown* (1888) 22 QBD 128 at p 131 which was, subsequently, specifically approved by the Supreme Court in this jurisdiction in *Hegarty v. O'Loughran* [1990] 1 IR 148 at p 154 (in the context of deciding when a cause of action can be said to accrue).

42. Thus, for example, in a breach of contract claim, it is necessary for the plaintiff to claim not just damages but to specifically claim damages for breach of contract. Similarly, in a case alleging damages for negligence and breach of duty, it is necessary for the indorsement of claim to set that out. An indorsement of claim which simply claimed "*damages*" on its own – without describing in general terms the basis for that claim - would not disclose a cause of action. For completeness, I should make clear that this does not mean that every single paragraph in an indorsement of claim on a plenary summons must set out the grounds for the relief claimed. There are many circumstances where this is unnecessary. For instance, where a particular cause of action is pleaded, there may well be a variety of additional relief that can be sought flowing from that cause of action. For example, in a claim for a declaration that trustees are in breach of their duty as trustees or seeking a declaration that trustees have misappropriated assets of the trust, it would be common for the indorsement of claim to plead not only damages for breach of trust, but also to plead that the plaintiff seeks all necessary accounts and enquiries together with other consequential relief. The grounds for seeking such accounts or consequential relief do not have to be set out in the indorsement of claim once the relevant cause of action is pleaded earlier in the indorsement.

43. I should also make clear that, crucially, in the present case, this is not some mere pleading point. Obviously, if it were simply a case that an error had been made in pleading the Plaintiffs' claim, this could be readily remedied. The indorsement of claim could be amended. This is consistent with the approach suggested by McCarthy J. in *Sun Fat Chan v. Osseous*. However, in light of what I have been told by counsel for the Plaintiffs, and in light of what the Plaintiffs themselves say in their affidavit sworn on 17 October, 2017, this is not merely a pleading point. It is a point of real substance. The Plaintiffs, by their own admission, do not know whether or not they have a cause of action against the Defendant. They are not in a position to describe – even in a general way – the grounds on which they seek relief. It is evident from the submissions that were made to me that, at this point, the Plaintiffs are depending upon the delivery of the affidavit of scripts in order to assess whether they have any grounds on which to challenge the Will and, if so, to identify the relevant grounds of challenge. That is very evident from the exchange between the court and counsel (as recorded in paragraphs 10-11 above) and from the terms of the Plaintiffs' affidavit sworn on 13 October, 2017. Furthermore, in paragraph 28 above, I have summarised what the Plaintiffs explain in their affidavit they "*may*" seek depending upon what emerges (if anything) from the Defendant's affidavit of scripts.

44. It is clear that the Plaintiffs would like to find some ground for challenging the Will, but they are not in a position to identify what that ground is. They are trying to find some evidence to support a case based on undue influence or lack of testamentary capacity in order to identify a cause of action they might possibly rely on following which they will formulate and plead such a claim. I have to say that I do not believe that there is any proper basis on which a plaintiff can proceed in this way.

45. The Plaintiffs have not contended that they currently have a basis on which they could claim that the Deceased lacked testamentary capacity or that his Will was not duly executed or that the Will was procured through the undue influence of any person. As noted previously, they have been very frank. They have said that when they see the Defendant's affidavit of scripts, they will either be assuaged or they will take the matter further. If they take the matter further, they appear to contemplate that they might (depending on what emerges from this affidavit of scripts) seek to make a case based on undue influence or lack of testamentary capacity or they may seek a declaration that the Defendant is not entitled to revoke or alter her alleged mutual Will.

46. The Plaintiffs are essentially saying that they cannot form a view as to whether they have any cause of action against the Defendant or whether they can formulate a claim against the Defendant unless and until they see her affidavit of scripts – following which they may – or may not – be able to advance and formulate a claim. This seems to me to be equivalent to what were once known as "*fishing bills*" which have long been regarded as impermissible. It is hardly necessary to cite any authority for that proposition. To the extent that it might be said to be necessary to cite authority, it seems to me to be found in the decision of Morris J. (as he then was) in *Law Society of Ireland v. Rawlinson* [1997] 3 IR 592 (dealt with further below).

47. It is also well settled that there is no independent action for discovery save in the very exceptional circumstances described by the House of Lords in *Norwich Pharmacal v. Customs & Excise* [1974] AC 133 which was followed by the Supreme Court in Ireland in *Megaleasing U.K. Ltd v. Barrett* [1993] ILRM 497 in which the Supreme Court stressed that such a jurisdiction will only be exercised upon "*very clear and unambiguous establishment of a wrongdoing*" (see the judgment of Finlay C.J. at p 503). Save in those very particular circumstances, the correct position is, in the words of Lord Morris of Borth-y-Gest in *Norwich Pharmacal* at p 180:

> "*…..in general, the cases support the view that no independent action for discovery lies against a party against whom no reasonable cause of action can be alleged ….*".

48. In *Law Society v. Rawlinson*, Morris J. drew attention to what had been said by Scrutton L.J. in *Gayle v. Denman Picture Houses Ltd* [1930] KB 588 at p 590 where he described the plaintiff's application for discovery before delivering a statement of claim as a "daring experiment". He said:-

> *"I do not question for a moment that under the wide words of [the relevant rules of court] there is power to make such an order, but equally I think that it should not be made unless in most exceptional circumstances. A plaintiff who issues a writ must be taken to know what his case is. If he merely issues a writ on the chance of making a case, he is issuing what used to be called a "fishing bill" to try to find out whether he has a case or not. That kind of proceeding is not to be encouraged. For a plaintiff after issuing his writ but before delivering his statement of claim to say, "show me the*

*documents which may be relevant, so that I may see whether I have a case or not", is a most undesirable proceeding".*

49. That approach was followed in Ireland by Morris J. in the *Law Society Case*. While Morris J., in that case, came to the conclusion that there were exceptional circumstances which made it appropriate to direct discovery prior to delivery of a statement of claim, he did so in very particular circumstances where he was satisfied that the plaintiff there was already in possession of sufficient information to enable it to prepare and deliver a statement of claim reflecting the basic ingredients of the case which it wished to advance against the defendant. For that reason, Morris J. said that it was not impermissible to proceed in that way. The discovery was sought in that case with a view to ensuring that the plaintiff would be able to plead a concise and clear statement of claim. There is no suggestion in that case that the plaintiff had not already pleaded its cause of action in the indorsement of claim. For that reason, the proceedings could not be said to be a "*fishing bill*". Morris J. said at p 597:-

> *"….it appears to me beyond doubt that the plaintiff is already in possession of such information as would enable it to prepare and deliver a statement of claim reflecting the basic ingredients of the case which it wishes to make against the defendant. This is not a "trawling exercise" nor is it what has been described as a "fishing bill". There is a clear and concise case to make. This case would undoubtedly, when discovery had been made, require alteration and amendment so as to include in or exclude from the statement of claim various particulars. Given the complexity of the case, the nature of the plaintiff's statutory obligations to make good the solicitor's default from the compensation fund, the fact that there clearly exists a stateable case capable of being pleaded in general terms and, finally, the desirability of having a concise and clear statement of claim which will enable the defendants to know the case which they have to meet, I am satisfied that this case falls into the category of exceptional cases referred to in the authorities …."*

50. Thus, it will be seen that in contrast to the present case, the plaintiff in the *Law Society case* already had identified its cause of action as against the defendant, and simply required to see the defendant's documents in order to plead its case in a clear and comprehensive way in its statement of claim. In such circumstances, there was no element of "*trawling*" or "*fishing*" to see whether it had a case to make against the defendant. However, in contrast in this case, in light of what has been said to the court both in submissions and in the affidavits sworn by the Plaintiffs, it is clear that the Plaintiffs are not able to say whether they have any claim to make to challenge the Will or to identify any grounds on which to mount such a challenge. The Plaintiffs here are, by their own admission, trawling in the hope that an affidavit of scripts will provide them with evidence to support some form of claim against the Defendant whether based on a challenge to the Will, or based on the existence of an allegedly mutual will.

51. I fully appreciate that the well-established principles discussed at paragraphs 47-51 above arise in the context of discovery. While the Plaintiffs are not seeking discovery (as such) in order to assess whether they have a cause of action, they are (again by their own admission) demanding that an affidavit of scripts be filed by the Defendant in order to see whether it might throw up material that might possibly support a cause of action. There seems to me to be a clear parallel between the approach of the Plaintiffs in this case and the approach taken where a plaintiff (as described in paragraph 46 above) seeks discovery in order to see whether he or she has a cause of action against a defendant. If it is impermissible for a plaintiff to seek discovery in order to know whether he or she may have a cause of action against a defendant, I find it impossible to see how it can be permissible to commence proceedings in the manner which the Plaintiffs have done here on the basis that, having themselves filed affidavits of no scripts, they can then demand that the Defendant file an affidavit of scripts – all with a view to seeing whether those scripts provide them with some evidential basis on which to identify a cause of action and mount a claim. If it were permissible to proceed in that way, it would become commonplace for disaffected relations unhappy with the provision (or lack of it) made for them in a will to launch proceedings in a similar way, pleading no cause of action and filing an affidavit of no scripts in the hope that any scripts produced by the defendant executor or executrix may provide them with some basis to challenge the will which has left them disappointed.

52. It is, of course, true that the Rules envisage that it is not necessary to deliver a statement of claim prior to delivery of the defendant's affidavit as to scripts. It appears to me that the rationale underlying that rule is straightforward. For example, while a plaintiff may challenge a will on the grounds of undue influence or lack of testamentary capacity, it may well be impracticable for a plaintiff to plead his or her case comprehensively until it is known what scripts exist. If the statement of claim were delivered prior to receipt of the affidavit of scripts, this would run the danger that the statement of claim might subsequently have to be amended in circumstances where it had been delivered in ignorance of material which should properly be referenced in the statement of claim. However, in those cases, the plaintiff would have pleaded a cause of action in the indorsement of claim in relation to the relevant will. In other words, the plaintiff in such cases would identify in general terms in the indorsement of claim on the plenary summons the grounds on which he or she challenges the will. In such cases, the plaintiff would not be fishing for evidence but would have pleaded a cause of action in the indorsement of claim. That would be consistent with the approach taken in *Law Society v. Rawlinson & Hunter* where the plaintiff was able to plead its cause of action, but needed discovery in order to properly and comprehensively plead its claim in its statement of claim.

53. In my view, that is a different situation to the present case. What confronts the court in the present case is a claim in paragraph 1 of the Plenary Summons which does not, in fact, plead any cause of action at all. It is simply a claim for relief with no grounds set out for the relief claimed. As noted above, this is not some simple failure of pleading. It is as a result of the deliberate decision of the Plaintiffs to commence proceedings even though they are not in a position to identify, at this point, any cause of action they might have on the basis of which the Will could be challenged.

54. In addition, the nature of the relief claimed in paragraph 1 is inherently contradictory. On the one hand, the Plaintiffs seek to require the Defendant to prove the Will in solemn form. Yet, on the other, it is sought to have the Will condemned. In both instances, no grounds (even in the most general terms) are set out in the Indorsement of Claim to support either of these claims. I cannot see how a plaintiff could plausibly proceed in that way. It would allow them to claim victory in the proceedings whatever view the court took of the will.

55. As noted previously, the reality is that the Plaintiffs wish to find a basis to attack the will, not prove it. In addition, it must be borne in mind that the Plaintiffs are children of the Deceased. If they thought there was a case to be made that their father lacked testamentary capacity, one would expect that they should be in a position to mount that case by reference to their own evidence or by reference to the evidence of some other witness. I note, for example, that their father's housekeeper is mentioned in the affidavit evidence before the court. There must be other persons who were familiar with the Deceased at the time he executed his Will in 2011, and the Plaintiffs should therefore be in a position (if they thought they had a cause of action) to plead their case and subsequently call such persons as witnesses at the trial. In so far as any claim based on undue influence is concerned, if the Plaintiffs wished to make such a case, they would have the burden of showing that the Deceased, in writing his will, was acting under the influence of some other person. Unlike in the case of an *inter vivos* transfer (where, in certain relationships, undue influence will be presumed), there is no presumption of undue influence in probate law in the case of a will. This was re-iterated by Murphy J in *Lambert v Lyons* [2010] IEHC 29. Thus, if the Plaintiffs here wished to advance a claim of undue influence, they would have to prove it as a fact.

56. In my view, it is clear that paragraph 1 of the indorsement of claim does not disclose a cause of action. As noted above, this is not a case where there is simply a defect in the pleading. On the contrary, the Plaintiffs have candidly admitted that they do not currently have a basis for contesting the Will. In the course of the hearing of the Defendant's motion, there has been no application to amend the Indorsement of Claim in order to plead a cause of action. Instead, as noted above, the Plaintiffs have candidly admitted that they need to see such scripts as the Defendant may have before deciding on whether they have a basis for making a claim of some kind. In these circumstances, this is not simply a case where a plaintiff's indorsement of claim does not disclose a cause of action. It is a case where the Plaintiffs have, by their own admission, no cause of action at this point.

57. Furthermore, the Plaintiffs have put forward no credible basis for suggesting that they may be able to establish any facts at trial that will enable them to sustain a challenge to the Will. This is not surprising in circumstances where they are not even in a position to identify a cause of action at this stage. In the course of the hearing before me, counsel for the Plaintiffs drew attention to what was said by Clarke J. in *Lopes v. Minister for Justice* (after I had brought that decision to the attention of the parties) where Clarke J indicated that, in responding to an application of this kind, all that a plaintiff needs to do is to put forward a credible basis for suggesting that the plaintiff may, at trial, be able to establish the facts which are asserted and which are necessary for success in the proceedings. As Clarke J. observed in that case, the court, on hearing an application of this kind, should bear in mind that, in a plenary action, a plaintiff has available the range of procedures provided for in the Rules to assist in establishing facts such as discovery, interrogatories and the summoning of witnesses by subpoena. However, in my view, this presupposes that the plaintiff has, in the first instance, asserted a specific cause of action or asserted specific facts that might be said to give rise to a cause of action. In such circumstances, a plaintiff could, of course, rely on this principle and say to the court, on an application of this kind, that, although he or she is not at this point in the proceedings in a position to place direct evidence before the court in support of his or her case, the plaintiff expects that this can be done by calling appropriate witnesses who the plaintiff believes will be in a position to give evidence of the particular kind necessary for success in the proceedings in question. In my view, that is what Clarke J. had in mind when he adverted to this possibility in his judgment in *Lopes*. In such circumstances, mere affidavit evidence from the relevant defendant denying the asserted claim would not be sufficient to unseat such a plaintiff. The relevant defendant would have to go much further and demonstrate either that there was no evidence to support the plaintiff's case, or that, even with the benefit of the evidence which the relevant plaintiff suggests would be available at trial, the plaintiff would nonetheless have an unsustainable case.

58. The difficulty, however, facing the Plaintiffs in these proceedings is that they do not even get off the starting block. Not only has no cause of action been pleaded by them, but they have admitted that they currently do not have any basis to suggest that there is any evidence which might be available at a trial to support any cause of action. They are simply hoping or speculating that the scripts to be disclosed by the Defendant (in the event that the proceedings are not dismissed) will provide them with the necessary evidence. That is why – as they candidly admit - they need to see the scripts following which, as they have frankly acknowledged, they will then make a decision as to whether to pursue a case or not.

59. In my view, the Plaintiffs are not entitled to proceed in that way. I have formed that view for the reasons set out above – in particular, the reasons set out at paragraphs 51-57 above. Accordingly, I am compelled to hold that the Plaintiffs cannot succeed in the claim made by them in paragraph 1 of the Indorsement of Claim. I must now consider whether there is any other sustainable case made on behalf of the Plaintiffs in the Plenary Summons.

**Mutual Wills**

60. Before turning to the nature of the claim made by the Plaintiffs in the Indorsement of Claim in relation to mutual Wills, it may be helpful if I first briefly outline some of the applicable principles in relation to mutual Wills.

61. *Brady on the Law of Succession* explains the concept of mutual wills in the following terms (at paragraph 1.12):-

> *"The constructive trust has also been employed by the courts with respect to mutual wills which arise when two people, usually but not invariably husband and wife, make wills under each of which property is left to the survivor of them with remainder to named beneficiaries, usually their children. The essence of the mutual will is that it is made in pursuance of an agreement that it shall not be revoked without the prior agreement of the other party and such agreement must constitute a contract at law, a mere understanding or arrangement being insufficient ….".*

62. *Brady* also explains that there is a dearth of Irish case law on the subject of mutual wills. There are, however, a number of English cases on the subject. In addition, as counsel for the Plaintiffs said in the course of the hearing, the subject is extensively treated by *Biehler* in "*Equity and the Law of Trusts in Ireland*", 6th edition, 2016, at pp 272-278. At p 272, *Biehler* succinctly summarises the position as follows:-

> *"Where two people, usually although not necessarily husband and wife, make an arrangement concerning the disposal of their property and execute mutual wills which are intended to be irrevocable and the survivor subsequently alters his will, his estate will be held by his personal representatives on a constructive trust to give effect to the arrangement provided for in the mutual will. However, before such a trust will arise, there must be evidence of an agreement to make mutual wills in substantially similar form and not to revoke them. As McPherson J. stated in Bigg v. Queensland Trustees Ltd:*
>
> > *"What matters is proof that the parties made an agreement to execute their wills in that form and that, expressly or by implication, they contracted not to revoke them".*
>
> *In determining whether the necessary agreement exists, the courts will have regard to the terms of the wills but may also infer evidence of an agreement from the conduct of the parties and the surrounding circumstances. The mere fact that the wills were made simultaneously and in substantially similar terms is not of itself sufficient proof that the parties have entered into a legally binding agreement not to revoke them".*

63. The author further observes at p 273:-

> *"While the fact that the wills are made simultaneously and in the same form is not per se proof of an agreement sufficient to justify the imposition of a constructive trust, it may be a relevant factor to be taken into account in determining whether such an agreement exists. In Re: Cleaver, where a husband and wife made similar wills at the same time and subsequently altered them in the same manner, it was held that the trusts set out in these wills would be enforced….In the circumstances, Nourse J. was satisfied that there was sufficient evidence of an agreement shown by the similarity of the provisions and the fact that the changes were made simultaneously".*

64. It was suggested in paragraph 56 of the Defendant's written submissions that, to succeed in an action to prove a mutual wills

agreement, it should be clear on the face of the Wills that they are mutual. In my view, that is not the correct position. Furthermore, although *Williams on Wills*, 6th edition, is cited as authority for this proposition, I do not believe that this is borne out by a consideration of the authorities.

65. In fact, the authors of *Williams on Wills*, at pp 20-21, themselves explain that an agreement in relation to mutual wills can be put in place in a number of different ways. The authors say:-

> *"The agreement may be incorporated in the will by recital or otherwise …., or it may be proved outside the will ….It may be oral or in writing …., but it would seem that insofar as such agreement affects a disposition of land, it must be in writing ….The mere simultaneity of the wills and the similarity of their terms are not enough taken by themselves to establish the necessary agreement …., which must be established by clear and satisfactory evidence of the balance of probabilities ….Proof of the precise terms of the agreement is essential, for any subsequent imitation of the powers of disposition of any party is dependent upon the precise restriction being proved to have been agreed between the parties ….".*

66. *Biehler* and *Williams* are both therefore agreed that an agreement in relation to mutual wills does not have to be expressed in the wills themselves, but can arise in any of the ways in which a contract can be made. The authorities are clear, however, that an agreement of this kind must be proved. *Brady* at paragraph 1.12 stresses that a mere understanding or arrangement is insufficient. There must be an agreement.

67. Where there is evidence of an agreement as to mutual wills, a trust will come into effect on the death of the first testator to die (at least where the agreement is to the effect that neither testator will revoke or alter his or her respective will). In such circumstances, an immediate equitable obligation arises by operation of law for the benefit of the persons who had been intended by the testators to benefit under the wills in question. This was confirmed in the decision of the Court of Appeal in England in *Olins v. Walters* [2009] Ch. 212. In that case, the defendant and his wife (who had married in 1934) made wills in 1988 in almost identical terms. They each appointed the other and the claimant, Mr. Olins (who was their grandson and a solicitor) as executors and each left the other their entire residuary estate absolutely. Subsequently, in 1998, they executed in the presence of Mr. Olins two codicils to the wills in similar terms under which they each agreed that they would not at any time in the future seek to change the testamentary arrangements for the distribution of their estates without the other's consent, and that, after the first of them had died, no changes would be possible. Subsequently, the wife died in May 2006. By that time, relations between the surviving husband and Mr. Olins had deteriorated. Following the death of the wife, Mr. Olins contended that there was a mutual wills agreement in place between his late grandmother and her husband, the defendant. This was denied by the surviving husband who actually gave evidence at the trial. This was described by Mummery L.J. as a "*novel aspect of the case*". In all of the previous cases, both testators had died prior to the relevant trial. The husband denied the existence of any agreement as to mutual wills with his wife.

68. However, the husband's evidence was rejected by the English High Court in favour of the evidence of Mr. Olins (who, as noted above, had been present when the codicils were executed). The husband appealed to the Court of Appeal contending that there was insufficient evidence of a contract. This was rejected by the Court of Appeal. In his judgment, Mummery L.J. said at p 221:-

> *"35. In my judgment, ….[the] submissions and insufficiency of the terms of the contract …do not accurately reflect the fundamental principles of mutual wills.*
>
> *36. It is a legally necessary condition of mutual wills that there is clear and satisfactory evidence of a contract between two testators. However, the argument resting on the alleged insufficiency or uncertainty of the terms of this contract is misconceived. The case for the existence of mutual wills does not involve making a contractual claim for specific performance or other relief. The claimant in a mutual wills case is not even a party to the contract and does not have to establish that he was.*
>
> *37. The obligation on the surviving testator is equitable. It is in the nature of a trust of the property affected, so the constructive trust label is attached to it. The equitable obligation is imposed for the benefit of third parties, who were intended by the parties to benefit from it. It arises by operation of law on the death of the first testator to die so as to bind the conscience of the surviving testator in relation to the property affected.*
>
> *38. It is a legally sufficient condition to establish what the judge described as "its irreducible core" …which he analysed as a contract between two testators, T1 and T2:*
>
> > *"That in return for T1 agreeing to make a will in form X and not to revoke it without notice to T2, then T2 will make a will in form Y and agree not to revoke it without notice to T1. If such facts are established, then upon the death of T1 equity will impose upon T2 a form of constructive trust (shaped by the exact terms of the contract that T1 and T2 have made). The constructive trust is imposed because T1 has made a disposition of property on the faith of T2's promise to make a will in form Y, and with the object of preventing T1 from being defrauded".*
>
> *39. In my judgment, that is an accurate and clear statement of the equitable principle. [Counsel] accepted that. He agreed that Mr. Walters would be bound by a constructive trust, but only if sufficient terms of the contract were established to raise one.*
>
> *40. The answer to the sufficiency point is, I think, summed up in a single sentence in Snell's Equity ….: "Mutual wills provide an instance of a trust arising by operation of law to give effect to an express intention of the two testators".*
>
> *41. The intentions of Mr. Walters and the deceased were sufficiently expressed in the contract to lay the foundations for the equitable obligations that bind the conscience of Mr. Walters, as the survivor, in relation to the deceased's estate. The judge found all that he needed to find in order to hold that, contrary to the contentions of Mr. Walters, mutual wills existed. …..*
>
> *42. It had been accepted on behalf of Mr. Walters in submissions to [the High Court] that, if there was a valid contract for mutual wills, the doctrine operated by imposing a constructive trust on him as the survivor, because the deceased had performed her promise to leave her estate to him. In my judgment, the trust is immediately binding on him in relation to the deceased's property left to him on the basis of the contract. It is not postponed to take effect only after the death of Mr. Walters when the property, or what may be left of it, comes into the hands of his personal representative. …". (Emphasis in original).*

69. It will be seen, therefore, that in cases where there is evidence of an agreement by two testators to execute mutual wills for the benefit of named beneficiaries on the basis that such wills would not be revocable, an immediate constructive trust will arise in favour of those beneficiaries upon the death of the first of the testators to die. Thus, if there was evidence in the present case of the existence of an agreement as to mutual wills (expressed to be irrevocable without the consent of both parties), and if the survivor (in this case the Defendant) were to deny the existence of any trust in favour of the beneficiaries, that would give rise to an entitlement on the part of the beneficiaries (including the Plaintiffs here) to bring proceedings seeking appropriate declaratory and other relief as to the existence of a constructive trust and for orders that the survivor (in this case the Defendant) should comply with the terms of that trust and not revoke or alter the terms of her Will in the future.

70. Notably, the Plaintiffs in this case do not have evidence of the existence of mutual wills. At best, they have a suspicion that mutual wills may possibly have been written by the Deceased and the Defendant. Of course, to succeed, they would need to be in a position to adduce evidence not only that wills were executed by both the Deceased and the Defendant, but that there was an actual agreement between the Deceased and the Defendant that the wills were mutual in the sense described above and irrevocable. In my view, it is important to bear this in mind when considering the nature of the relief sought by the Plaintiffs in relation to this issue.

**The relief claimed in paragraph 2 of the Indorsement of Claim**

71. I now turn to the specific relief claimed by the Plaintiffs in paragraph 2 of the Indorsement of Claim. I have quoted the full terms of paragraph 2 in paragraph 7 above. It will be recalled that in paragraph 2, the Plaintiffs claim that the Defendant should produce the "*mutual Will of the Defendant made in 2011, where the Defendant is responding to a specific probate motion …has failed to deny on oath her execution of such mutual Will in 2011*".

72. It is noteworthy that no declaration is sought that there is any agreement as to mutual wills, or that the Defendant is now bound by the terms of any such alleged mutual will such that she is no longer entitled to revoke it or alter it. As noted in paragraph 26(b) above, the Plaintiffs in their affidavit sworn on 13 October, 2017 say that they "*may*" seek relief (following receipt of the Defendant's affidavit of scripts) in the form of a "*declaration that the Defendant be restrained from revoking or altering her mutual Will*".

73. Thus, the claim made in paragraph 2 of the Indorsement of Claim is not a substantive claim in relation to mutual wills. It simply calls for the production of the Defendant's Will. No authority has been cited for the proposition that a party in the position of the Plaintiffs here is entitled to bring proceedings demanding that the author of any alleged mutual will should make available his or her will. Paragraph 2 of the Indorsement of Claim seems to run directly counter to the authorities noted in paragraphs 47-51 above.

74. There might possibly be a basis for seeking such relief if there was some substantive relief claimed in the Indorsement of Claim relating to a mutual will or an agreement as to mutual wills. As noted above, no such claim is made. Instead, the Plaintiffs are again saying, in effect, that they reserve their position pending the receipt of the affidavit of scripts following which they "*may*" seek relief of the kind described in paragraph 26(b) above. In other words, the Plaintiffs are again seeking to establish whether there is a mutual will in existence and whether any of the instructions that may be held in respect of the Deceased's Will suggests the existence of an agreement between the Deceased and the Defendant in relation to executing mutual and irrevocable wills. This seems to me to give rise to the same impermissible "*fishing*" exercise as is already described in the case of the relief claimed in paragraph 1 of the Indorsement of Claim.

75. In light of the considerations identified in paragraphs 72-74 above, it seems to me that there is no plausible basis on which relief of the kind set out in paragraph 2 of the Indorsement of Claim can be sought. Accordingly, I have come to the conclusion that this aspect of the Plaintiffs' claim is also bound to fail.

**The Third relief claimed: the appointment of an independent administrator**

76. A significant issue arises as to whether the Plaintiffs could be said to have any *locus standi* to bring a claim of this nature. In light of the fact that the Defendant survived her husband for more than 30 days, the Plaintiffs have no interest in the estate of the Deceased. I consider the issue of *locus standi* in paragraph 86 below. However, even if it could be said that the Plaintiffs have *locus standi*, it is quite clear from the case law that a claim of this kind will not succeed unless there is very clear evidence of misconduct on the part of an executor (or in this case an executrix). The relevant principles are comprehensively explained by Lynch J. in the Supreme Court in *Dunne v. Heffernan* [1997] 3 IR 431 at pp 442-443 as follows:-

> *"An order removing the defendant as executrix (which would be made by virtue of Section 26(2) and not Section 27(4) of the Succession Act, 1965) and appointing some other person as administrator with the Will annexed by virtue of s.27(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 concern. It would require serious misconduct and/or serious special circumstances on the part of the executrix to justify such a drastic step".*

77. Lynch J. in that case criticised the approach taken by Smyth J. in the High Court who had relied on a decision in *Re: Martin Glynn Deceased* [1992] 1 IR 361. Lynch J. (at p 443) readily distinguished the decision in *Martin Glynn Deceased*. Lynch J. said:-

> *"The learned trial judge also relies on the case of in Re: Martin Glynn, Deceased [1992] 1 IR 361, as supporting an order for the removal of the defendant as executrix in this case. The circumstances of in Re: Martin Glynn, Deceased were most extraordinary. The person nominated by the testator to be his executor was convicted of the murder of the testator's sister to whom the testator had devised and bequeathed his farm as tenant for life with remainder to his executor. By the murder, for which the executor was sentenced to life imprisonment, the executor would have accelerated the vesting in possession of the remainder interest in the farm in himself, if that interest was not forfeited by his crime. The issue was whether or not the gift of the remainder interest would be forfeited and whether the question would have to be determined by proceedings between the estate of the testator and the person nominated to be executor personally. As a matter of common sense, it was held in those circumstances that a grant of probate would not be made to the nominated executor and the Chief State Solicitor was given liberty to apply for and ultimately obtain an unlimited grant of administration with the will annexed pursuant to s.27(4) of the Succession Act, 1965.*
>
> *When read in the light of its own facts, the decision in Re: Martin Glynn …has no relevance to this case. 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 s.27(4) but pursuant to s.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(4) enables the court to appoint another person as administrator with the will annexed".*

78. Obviously, in the *Martin Glynn* case, there was very strong evidence of very serious wrongdoing. The reason why an order was

made in that case can be readily understood. The Supreme Court decision in *Dunne v. Heffernan* makes very clear that it is only in cases where very serious grounds are established that the choice made by the testator (in this case the Deceased) will be overridden by the court.

79. The Defendant here has said that she wishes to act in her capacity as executrix and to prove the Will in common form, but is currently prevented from doing so by the existence of the caveats which have been filed on behalf of the Plaintiffs. The decision in *Dunne v. Heffernan* represents the law, and is binding on me and on the Plaintiffs. That decision identifies not only the very high bar that exists before the court will be persuaded to intervene, but it also makes clear that Section 26(2) is the relevant statutory provision which would have to be engaged. Even if the Plaintiffs were beneficiaries named in the Will, they would not be entitled to an Order under Section 26(2) (which it should be noted they have not sought in the Indorsement of Claim here) without proof of serious misconduct on the part of the Defendant.

80. Section 26(2) provides that the High Court will have power to revoke, cancel or call any grant of probate. Section 27(4) provides that the High Court may, by reason of special circumstances, order that administration be granted to such person as it thinks fit where this appears to the court to be necessary or expedient.

81. An example of a case where the court was prepared to remove a person as executor is to be found in the decision of Macken J. in *Flood v. Flood* [1999] 2 IR 234. In that case, applying the principles set out by Lynch J. in the Supreme Court in *Dunne v. Heffernan*, Macken J. was satisfied that the party seeking relief had shown that a very serious matter had arisen in the administration of the estate which required the removal of the defendant as executor. In that case, however, there was clear evidence that the defendant had a conflict of interest in acting as executor of his father's estate. In that case, the testator had transferred monies into a joint account in the names of the defendant and his sister. The monies were subsequently withdrawn and utilised by the defendant himself, prior to his father's death, to purchase land in his own name. There was an obvious question in that case as to whether the farm purchased by the defendant could be considered to be personally owned by the defendant or was, in truth, held as trustee on behalf of his late father's estate. The conflict of interest was apparent on the face of the evidence before the court, and it is understandable why Macken J. took the view that in those particular circumstances, an order of this kind should be made.

82. More recently, the Court of Appeal has re-emphasised the need for any person seeking relief of this nature to show that it is truly necessary. In *Dunne v. Dunne* [2016] IECA 269, the Court of Appeal overturned a decision of Cregan J. in the High Court in which he had found a "*serious and indefensible*" conflict of interest on the part of an executor who was sued by his siblings on the basis that he had failed and neglected to distribute their shares to him. In his defence, the defendant executor raised a number of defences including a claim of adverse possession as against the plaintiffs. They responded to this defence by seeking to have him removed as executor. As noted above, Cregan J. acceded to this application in the High Court. However, his decision was overturned by the Court of Appeal. In the judgment of the court given by Peart J., he referred to what had been said by Macken J. in *Flood v. Flood* (above) at pp 243-244 where she said:-

> *"A court should not remove an executor from his role, unless it is satisfied that it is necessary to do so. It is clear from the decision in Dunne v. Heffernan …that the Supreme Court considers this should only occur where the court is satisfied it must be done, and that court made it clear that it is a very serious step to take. It is not justified because one of the beneficiaries appears to have felt frustrated and excluded, but requires serious misconduct and/or special circumstances on the part of the executor to justify such a drastic step".*

83. Peart J. identified that very significant costs would arise where a legal personal representative is replaced. He said at p19:-

> *"One reason why a legal personal representative should not be replaced unless it is necessary …is that to do so imposes an extra level of expense upon the estate. Inevitably perhaps, the new independent replacement will be a professional person, or at least somebody who is not a volunteer and who will be entitled to be paid for his services. Where litigation is involved, in particular, this will lead to a considerable drain on the resources of the estate, and to the detriment of the beneficiaries. This must be avoided in all but those cases where it is necessary".*

84. In that case, the plaintiffs had argued that it was necessary to replace the defendant since they would be at litigious disadvantage or prejudice in the ongoing High Court proceedings in which the adverse possession claim had been raised in the event that the defendant remained in place as personal representative. They maintained that they had real concerns that the defendant would not cooperate in the proceedings, and that he would be incentivised not to make available relevant documents to them. Peart J. dismissed this concern in the following terms at p 21:-

> *"In my view, this particular fear is speculative only, and given the fact that it has been made clear to this court that the defendant wishes to have the issue determined by the High Court and that he will simply abide by whatever order the court may make and administer the estate accordingly, I would not accept that this could be a basis for his removal at this stage. …".*

85. In my view, while the facts of the present case are quite different to those which confronted the Court of Appeal in *Dunne v. Dunne*, the circumstances are nonetheless similar in that the concerns expressed by the Plaintiffs here are of a very speculative kind. The Plaintiffs have not pointed to the existence of any evidence – as opposed to unsubstantiated assertion - that might justify the relief claimed at paragraph 3 of the Indorsement of Claim.

86. Moreover, in circumstances where the Plaintiffs are not making any substantive claim in relation to mutual wills in these proceedings, it is impossible to see how they could be said to have *locus standi* to seek relief of this kind even if there was some evidence to give rise to some ground to unseat the Defendant from her position as executrix. Unless a claim had been made in the proceedings that the Defendant was bound by an agreement with her late husband to irrevocably make a will in similar terms to his own such as to give rise to a constructive trust on his death, there is no conceivable basis on which the Plaintiffs could be said to have *locus standi* to advance a case based on some alleged conflict between the Defendant's duties to the beneficiaries of the constructive trust on the one hand and her own interests on the other. As the decision of the English Court of Appeal in *Olins v. Walters* explains, the beneficiaries under a mutual will (where there is evidence that two testators had entered into an agreement to put irrevocable mutual wills in place) would have locus standi to enforce the constructive trust which arises on the death of the first of the testators to die. However, no such claim is advanced here. Moreover, the Plaintiffs have not identified any evidence – as opposed to pure speculation - which points to the existence of any agreement between the Deceased and the Defendant that would give rise to such a constructive trust.

87. In the absence of a sustainable claim in relation to mutual wills, the Plaintiffs have no interest in the estate of their late father or in any constructive trust arising on his death, and therefore have no basis to seek relief of this nature. In the circumstances, I

believe that the Plaintiffs have no sustainable basis to seek the relief claimed in paragraph 3 of the Indorsement of Claim.

**Conclusion**
88. For all of the reasons outlined above, I have formed the view that there is no basis on which the Plaintiffs would be entitled to succeed in the claims made by them in paragraphs 1-3 of the Indorsement of Claim on the Plenary Summons. In those circumstances, the consequential relief claimed at paragraphs 4 and 5 fall away. I therefore believe that it is appropriate to make an order under the inherent jurisdiction of the court dismissing the Plaintiffs' claim in its entirety. Furthermore, as far as the relief claimed in paragraph 3 is concerned, it would seem to me that it is appropriate to dismiss the proceedings also on the basis that the Plaintiffs have no *locus standi* to maintain a claim of that kind.

89. It would seem to follow that there should also be an order setting aside all caveats, warnings and appearance entered in relation to the estate of the Deceased.

90. The Defendant also seeks an order preventing the Plaintiffs from lodging any further caveats in respect of the estate of the Deceased. However, I have not been addressed as to the basis on which the court could now make such an order. If any such order is to be pursued, I would need to hear argument as to the basis on which such an order could properly be made.