THE HIGH COURT

[2015 No. 214SP]

BETWEEN

DEIRDRE MUCKIAN AND MARY McCANN

APPLICANTS

AND

ALBINA HOEY, JOHN HOEY, MICHAEL HOEY, PAUL HOEY AND ALBINA McCARDLE (NÉE HOEY)

RESPONDENTS

JUDGMENT of Mr. Justice David Keane delivered on the 3rd February 2017

Introduction

1. The first respondent seeks an order directing that her costs of the present action be paid out of the estate of her late husband. The applicants oppose the making of any such order.

2. The action was brought to remove the first respondent as administratrix of her late husband's estate. In a judgment delivered on the 25th November 2016, the Court granted that relief; see *Muckian v Hoey* [2016] IEHC 688.

3. The applicants and the other respondents in the action are the children of the marriage between the first respondent and the deceased. The other respondents did not participate in the proceedings.

4. The applicants seek an order directing that the costs of their successful action be paid out of the estate. The first respondent does not oppose that application. In truth, it is difficult to see how she could. The only plausible alternative to that order would be one granting the applicants their costs against the first respondent.

The first respondent's arguments

5. In seeking her costs of the action out of the estate, the first respondent submits that the successful application to remove her as adminstratrix is one properly characterised as an administration suit. The proceedings were brought by special summons and the first respondent points to Order 3 of the Rules of the Superior Courts ('RSC', as amended, whereby the classes of claims in which that procedure may be adopted include '(1) The administration of the real or personal estate of a deceased person,… save where there is a charge of wilful default….'

6. The respondent ultimately relies on the following passage from Scanlon, *Administration and Mortgage Suits* (Dublin, 1963) at p. 65:

'Executors, administrators and trustees are entitled to their costs out of the estate as a matter of course unless a charge of misconduct is established and then, and only then, do such costs become discretionary and the solicitor for a party in default is in no better position as regards costs than his client.'

7. Two authorities are relied upon by Scanlon for the proposition that an administratrix is entitled to her costs out of the estate as a matter of course unless a charge of misconduct is established against her. The first is O. LXV (65), r. 1(1) of the Rules of the Supreme Court (Ireland) 1905 ('the 1905 Rules'). That Order of the 1905 Rules deals with the issue of costs. It is cast in substantially different terms to those of Order 99 of the RSC, the rule that now addresses that issue. The second is the following passage from *Daniell's Chancery Practice*, 8th edn. (London, 1914) (Vol. II, p. 1055): 'Trustees, agents and receivers, accounting fairly, are entitled to their costs out of the estate, as a matter of course; and the same rule extends to personal representatives, to whom, as they can only obtain complete exoneration by having their accounts passed in the Court, the Court will give every opportunity of exonerating themselves by passing their accounts at the expense of the estate.'

8. In an accompanying footnote, Daniell cites, as authority for that proposition, O. LXV. 1 of the Rules of the Supreme Court, 1883 (for England and Wales), which the Chancery Division of the High Court in that jurisdiction then acted upon in dealing with the costs of executors, administrators, trustees or mortgagees 'who had not acted unreasonably or carried on or resisted any proceedings.' That rule is significantly different in material part than O. LXV, r. 1(1) of the 1905 Rules. It need hardly be said that the former rule was never in force in this jurisdiction and the latter rule was long ago supplanted by a quite different one made under s. 22 of the Courts of Justice Act 1924, itself long since repealed and replaced by s. 14 of the Courts (Supplemental Provisions) Act 1961. I do not accept that the present rules under O. 99 of the RSC, as amended, contain no provision capable of addressing the costs of an administration suit, such that, by operation of s. 14 of the 1961 Act, the jurisdiction of the Court in that regard requires to be exercised as nearly as possible in the same manner as it would have been under O. LXV, r. 1(1) of the 1905 Rules.

9. Indeed, as Scanlon acknowledges (at p. 65), even in 1963, the modern position was that '[s]ubject to any limitation by statute or rule of Court the rights to costs and the scales thereof are in the discretion of the Court.' That was the case then under O. 99, r. 1 of the RSC 1962 and it remains the case now under O. 99. r.1 of the current RSC, as amended.

10. The applicants submit that they brought their application by way of the special summons procedure under O. 3 of the RSC, as amended, to avoid the greater costs of a plenary action and point out that the first respondent did not object to that course, although she was undoubtedly entitled to do so, as her wilful default or misconduct in the administration of the estate was plainly in issue from the outset.

11. For my part, I do not accept that the first respondent could foreclose any possibility of a finding of wilful default on her part as administratrix by the simple expedient of not objecting to the use of the special summons procedure as the appropriate vehicle for seeking her removal from that position.

12. Nor do I accept that there is any absolute or inflexible modern rule whereby an administratrix is entitled to her costs of an administration out of the estate unless a finding of misconduct, expressed as such, is made against her. I do accept that there is an obvious public interest in the application of a general principle whereby, once there is a reasonable ground for litigation by an

administrator, executor or trustee, and once that litigation is conducted *bona fide*, that party should have an order for his or her costs out of the estate or trust though unsuccessful in the action. The public interest concerned is a broader manifestation of that identified by Budd J. in the narrower context of the circumstances surrounding the execution of wills in *In bonis Morelli: Vela v Morelli* [1968] I.R. 11 (at 34). That is to say, it is the wider public or community interest in the proper administration of estates and trusts generally. Administrators, executors or trustees should not be unduly deterred from seeking to have genuine problems or issues in the administration of any estate or trust judicially resolved because of the risk of a personal liability for the costs of the appropriate litigation.

13. There is another relevant principle. It is that an application which bears all of the hallmarks of a hostile *lis inter partes* – whether between beneficiaries under a will, under a trust or on an intestacy – may, depending on all of the circumstances, attract the unvarnished application of the usual rule that costs follow the event. That is the principle that I understand Herbert J. to have identified in *O'Connor v Markey* [2007] 2 I.R. 194 and Laffoy J. to have applied in *Rennick v Rennick* [2012] IEHC 589.

14. In considering the correct principle to apply to the present application, it is necessary to recall the material findings in the underlying judgment and the conclusion based upon them. The material findings are that there has been what is, by any measure, an extraordinary delay in the administration of the deceased's estate by the first respondent that has not been adequately explained (para. 19), and that the first respondent has failed in her fundamental duties as administratrix properly to gather in the property of the estate and properly to account to the beneficiaries of the estate for its assets and liabilities (para. 27). The conclusion based upon those findings is that each on its own demonstrates a want of proper capacity on the part of the first respondent to execute the duties of administratrix, amounting to a special circumstance warranting her removal from that position, which special circumstance is more evident still when they are considered in combination (para. 37).

15. On that basis, it seems to me that the second of the two principles I have just identified is the more pertinent to the determination of the application at hand. That is to say, the underlying action more clearly bears the hallmarks of a lis inter partes than it does the indicia of an action defended on reasonable grounds, and conducted *bona fide*, by the first respondent as administratrix.

16. I am buttressed in that conclusion by a consideration of the authority relied upon by Scanlon for the proposition contained in the second part of the passage already quoted, i.e. the position of a solicitor for a client in default as an administrator is no better than that of the client . The authority is *Re O'Kean* [1907] 1 I.R. 223, a decision of Barton J. in the Chancery Division of the High Court, later affirmed by the Court of Appeal. In a curious echo of the present action, the case concerned a creditor's suit for the administration of the estate of a deceased publican and trader who had carried on business in Newry, County Down. A brother of the deceased had taken out letters of administration but the creditors were dissatisfied with the manner in which the administration was conducted, hence the suit. In the course of the action, the administrator was ordered to bring in a balance of £200 due by him as administrator to the estate, but failed to do so. The administrator's solicitor afterwards moved to vary the certificate issued by the Chief Clerk (the predecessor of the Examiner of the High Court) concerning the account that the solicitor himself had been ordered to provide of the monies that he had been instrumental in gathering in from debtors on behalf of the estate. The variation sought was to allow the solicitor to retain out of those monies a sum representing his costs of the carriage of the administration suit on behalf of the defendant administrator. Barton J. observed (at 225) that a personal representative is not entitled to his costs in an administration suit while he or she is in default to the estate and that his or her solicitor cannot be in a better position.

17. For the purpose of the present ruling, the first of those two propositions is the relevant one; no issue arises here concerning any independent claim to retain monies on the part of the first respondent's solicitors. In that portion of the judgment in this case dealing with the failure of the first respondent as administratrix to collect and get in the estate (at paras. 20 – 27) , I concluded that the long overdue draft distribution account produced on behalf of the first respondent in January of last year raises as many question as it answers, and that it does not address, much less cure, the first respondent's complete failure, as administratrix, to account to each of the beneficiaries (including the applicants) for the relevant income, expenditure and interest. In light of that default, it follows that the first respondent is not entitled to her costs of the present action out of the estate on that quite separate basis also.

18. Turning from an analysis of the applicable legal principles to a consideration of the factors relevant to the exercise of the Court's discretion under O. 99, r. 1 (1) of the RSC in this case, I cannot ignore the following matters. In the face of the application to remove her as administrator, the first respondent chose to oppose it, as was her perfect entitlement. After a contested application, the first respondent was found to have demonstrated a want of proper capacity to execute the duties of administratrix, amounting to a special circumstance warranting her removal from that position, and her removal was duly ordered. One of the findings that led to that conclusion was that, over the passage of many years and without any proper excuse, the first respondent has failed to produce a satisfactory distribution account, and has completely failed to account to each of the beneficiaries (including the applicants) for the relevant income, expenditure and interest associated with the property that comprises the estate. In those circumstances, to exercise the Court's discretion to order that the first respondent's costs of the unsuccessful defence of that application should be borne by the estate (and, thus, ultimately by the beneficiaries), rather than by the first respondent, would fly in the face, not only of fundamental reason and common sense, but also of justice. Indeed, the provisions of O. 99, r. 1(4), whereby costs should follow the event, provide strong support for an award of the applicants' costs of the action against the first respondent. Happily for the first respondent, the applicants' have made no such application, perhaps in the interests of conciliation, which is, of course, very much to be desired.

19. I must therefore refuse the first respondent's application for an order that her costs of the action be paid out of the estate.