

THE HIGH COURT

2010 12 CA

BETWEEN

CATHERINE COLEMAN

PLAINTIFF

AND

FRANK MULLEN

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 3rd May, 2011

1. This is an appeal against the decision of Her Honour Judge Linnane dated 29th January 2010 whereby she awarded the plaintiff the sum of €25,000 against the defendant in his capacity as the executor of the estate of the late Elizabeth O'Keeffe. Ms. O'Keeffe was a widow with no children who died on 27th November 1999. The net issue in this appeal is whether the plaintiff is entitled to maintain a *quantum meruit* claim in her respect of the various services which she voluntarily supplied to Ms. O'Keeffe during her lifetime.

2. The net value of Ms. O'Keeffe's estate came to IR£263,184. By will dated 2nd November, 1994, Ms. O'Keeffe left a number of specific bequests to named individuals, including the sum of IR£8,000 to the plaintiff. She left her house and contents to the defendant, who was also constituted the residuary legatee.

3. The (largely uncontested) evidence shows that Ms. Coleman befriended Ms. O'Keeffe shortly after her husband died in 1990, although they had known each other prior to that date. They were (relatively) close neighbours who lived within 1km. of each other in Dalkey. From about 1993 until 1998 – at which point Ms. O'Keeffe moved into a nursing home – Ms. Coleman was her constant companion. She attended to all Ms. O'Keeffe's daily chores. Ms. Coleman further drove and escorted her while she attended to her business in the Dalkey area. Ms. O'Keeffe was regularly provided with meals and company in Ms. Coleman's own house nearby. Ms. Coleman furthermore cleaned Ms. O'Keeffe's house and attended to matters such as laundry and cooking. Even when Ms. O'Keeffe entered the nursing home, Ms. Coleman visited her regularly, attended to her laundry and personal hygiene and generally looked after her house. All in all, Ms. Coleman estimated that she worked about 20 hours each week for Ms. O'Keeffe's benefit during this period. While the extent of this work is disputed to some extent by the defendant, it has not really been suggested that Ms. Coleman's contribution was not very considerable over a long period or that, if the claim were valid in law, €25,000 would not represent a fair recompense for the plaintiff.

4. There was also a very clear bond of friendship between the parties. The evidence shows that Ms. O'Keeffe doted on Ms. Coleman's three young children and, in one sense, more or less informally adopted them as "her" own "grandchildren." While Ms. O'Keeffe mentioned that she was contemplating setting up a trust fund for them, nothing ever came of this. It has not been suggested, however, that there was anything in the nature of a promise either to the plaintiff or to her children in this regard, still less that Ms. Coleman altered her position on foot of such a representation.

5. In this respect, the present case is quite unlike *McCarron v. McCarron*, Supreme Court, 13th February, 1997. In that case a young man worked as a farm hand for his uncle for 16 years without reward. The Supreme Court found, however, that there was an oral contract between the parties that the uncle would transfer the two farms to the plaintiff on the former's death. Given that the defendant had raised no issue concerning a note or memorandum for the purposes of the Statute of Frauds, the Court held that the contract was specifically enforceable.

6. It is also important to stress, however, that the services rendered by Ms. Coleman were purely voluntary and stemmed exclusively from ties of friendship and neighbourliness. Nor was there any question of promise or expectation induced by Ms. O'Keeffe. Nor – if only to exclude extreme cases – was there any question of Ms. Coleman's will having been overborne. Nor can it be suggested that she was exploited in any way or that she was subjected to a type of quasi-servitude through some form of subtle intimidation or psychological control. Having heard the evidence of Ms. Coleman, I am perfectly satisfied that her numerous acts of kindness towards Ms. O'Keeffe were prompted exclusively by considerations of friendship and kind-heartedness. Ms. Coleman's evidence in respect of these matters was further confirmed by Ms. Sandra Hayden, a mutual friend who also knew Ms. O'Keeffe very well.

7. Ms. Coleman further stated in evidence that she would not have contemplated suing Ms. O'Keeffe during the latter's lifetime. She disclaimed the idea of any binding contract and she expressly confirmed that she would have continued as heretofore to provide such services even if Ms. O'Keeffe had made it clear that she would make no provision by will for her or for her children.

8. It is against this background that the present claim falls to be considered. At the outset, it is only fair to say that Ms. Coleman's sense of grievance is perfectly understandable. It is, I think, no different from the grievance which might be felt by a family member who had devoted a considerable time altruistically looking after an ailing and elderly parent without expectation or reward and yet who nonetheless found after the death of the parent in question that other family members had through legacy or benefaction been rewarded at his or her expense. While it is true that this type of possible injustice is capable of being remedied under s.117 of the Succession Act 1965, in the case of the parent/child relationship, no such direct remedy is available in a case of the present kind.

9. The question which actually arises is whether the plaintiff's actions can give rise to a claim in *quantum meruit*. As Brennan J. explained in a leading Australian decision on *quantum meruit*, *Pavey & Mathews Pty. Ltd. v. Paul* (1987) 162 C.L.R. 221:-

"Correspondingly, *quantum meruit* is sometimes used to describe an action to recover a reasonable sum which is due under a contract and sometimes to describe an action to recover a reasonable sum when the obligation to pay it is imposed by law independently of actual contract. As we have seen, *indebitatus assumpsit* was first expanded to embrace an action of *quantum meruit* when a contract did not stipulate a fixed sum as the remuneration of the work to be done. Later it was expanded to embrace an action of *quantum meruit* in quasi-contract when an obligation to pay was imposed

by law independently of contract. There is now, as there was in the seventeenth century, a manifest difference between implying in a contract a term to pay *quantum meruit* and imposing an obligation to pay *quantum meruit* independently of contract."

10. We are here concerned with *quantum meruit* in the second sense of that term. There was no contract and, given the modern law on *quantum meruit*, there is no necessity to resort to what Henchy J. described in *East Cork Foods v. O'Dwyer Steel* [1978] I.R. 103, 111 as a "pleader's stratagem" in order to suggest the existence of some fictitious contract, such as would have been necessary in the 17th and 18th centuries when the forms of action of *indebitatus assumpsit* held sway. We may thus rather ask whether the law would normally impose an obligation to pay in such circumstances, irrespective of whether an actual contract (or, if you prefer, a promise to pay under such a contract) is implied by law. This is clearly linked to general notions of unjust enrichment, since the obligation is imposed by law to ensure that the recipient of the services is not enriched at the expense of another: see generally *Fridman, Restitution* (2nd Ed.) at 285-287 where the Canadian law on this topic is helpfully expounded.

11. The existence of such an obligation has naturally been recognized in a series of cases dealing with the provision of professional services: see *Clark, Contract Law in Ireland* (5th Ed., 2004) at 599-600. Thus, for example, in *Henehan v. Courtney & Hanley* (1967) 101 I.L.T.R. 25 an estate agent was instructed by a purchaser to find a suitable farm. Such a farm was located by the agent and the sale subsequently closed. Teevan J. held that the estate agent was entitled to recover *quantum meruit*, since even though nothing was said about the commission or fees, the judge nonetheless quoted Bateman on *Auctions*:-

"It is the employment of a professional agent to perform duties of the kind usually undertaken by members of his profession which gives rise to an implied promise to pay him reasonable remuneration."

12. Teevan J. here proceeded on the basis that the relationship between the parties gave rise either to an implied contract or, perhaps more precisely, an implied promise to pay in such circumstances pursuant to an actual contract. But I doubt if anything greatly turns on these nuanced distinctions, since *Henehan* can just as easily be rationalised on the basis that it would have been unjust to allow the purchaser of the farm to be enriched at the expense of the agent by not paying the latter the remuneration for his services which the law required to be discharged.

13. Similar thinking is evident in the Supreme Court's judgment in *Chaieb v. Carter* [1987] IESC 5. Here the plaintiff was appointed as the defendant's agent in connection with the shipment of cattle from Ireland to Egypt. That original contract was partially frustrated when the Egyptian authorities refused to accept heifers as part of that shipment. The defendants nonetheless independently subsequently negotiated the shipment and sought to repudiate the payment of commission to the agent. The Supreme Court found that the securing of the new contract flowed from the work carried out by the plaintiff and, as Finlay C.J. observed, the plaintiff was "entitled to reasonable remuneration having regard to the work carried out by him and having regard to the expenditure which he clearly made on behalf of the defendants during this period."

14. Can it be said, therefore, that the law would have imposed an obligation on the late Ms. O'Keeffe to pay for the services which she received, irrespective of whether one looks at this through the lens of *quantum meruit* on the one hand or unjust enrichment on the other? The law here largely reflects and follows the traditional understanding of the parties. The agents in both *Henehan* and *Chaieb* were held to be entitled to payment on a *quantum meruit* basis because they were professional agents providing professional services in a commercial context. Likewise, if the plaintiff in the present had been explicitly retained qua professional housekeeper, then she would plainly be entitled to be paid on a *quantum meruit* basis, even if the question of payment had never actually been discussed.

15. But the plaintiff was not retained on that basis. As I have consistently emphasized, the plaintiff rather voluntarily acted as a good friend to an elderly neighbour. The consistency of her support and help deserves recognition and praise, but I cannot accept that there could have been any understanding that Ms. Coleman was entitled to be rewarded for her services. In this regard, it may be noted that in *McCarron* Murphy J. assumed that "humanitarian services provided on a purely neighbourly or charitable basis for some person in need" fell outside the scope of law of contract.

16. Of course, it is indisputable but that even within families binding contractual arrangements covering the provision of domestic services can be - and are - frequently made, but in such circumstances there generally would have to be a clear intention to create legal relations, even if the documentation itself governing the contract was informal. As Budd J. observed in his concurring judgment in *Rogers v. Smith*, (Supreme Court, 16th July, 1970):-

"...in social and family matters, agreements may be come to which do not give rise to legal relations, because such a consequence is not the intention of the parties. [In] family matters, an intention to remain free of legal obligation will be readily implied, whereas in business matters the opposite result would ordinarily follow."

17. There are, of course, instances of where the existence of a contract may nonetheless be found, even in family cases, as the Supreme Court's decision in *McCarron* exemplifies. Yet in this regard there would have to be clear evidence of an intention to create legal relations. I am perfectly satisfied, having heard the clear and frank evidence of Ms. Coleman that, in the present case there was no such intention. With commendable candour, she made it clear that she would have continued to befriend and assist Ms. O'Keeffe during the latter's lifetime, regardless of any expectation, promise or agreement to create legal relations or obtain monetary reward. As *Clark, Contract Law in Ireland*, has observed (at 90) "if the promise would have acted in a similar way even without the promise sought to be enforced, an absence of legal intent may be inferred."

18. If, therefore, there was no intention to create legal relations, should, then, the law impose such an obligation? I do not think that the courts can - or should - take this step. If the law is to be changed such as to enable voluntary carers of family and neighbours to make *quantum meruit* claims of this kind quite independently of any intention to create legal relationships, this would represent a potentially far-reaching legal change which could not be described as being some incremental and perfectly logical deduction from the existing corpus of case-law in this area. A change of this kind would be a matter for the Oireachtas.

19. Any such change would furthermore present considerable policy questions which the Oireachtas would have to weigh and balance. If such a claim could be made, it might lead to a situation in which, for example, an elderly couple might be dissuaded by their adult children from accepting the kindness of neighbours, simply because the children feared a subsequent claim against the parents' estates. Conversely, it might lead to or encourage a situation in which persons with less than altruistic motives officiously sought to interpose themselves into the lives of elderly neighbours and relatives in the hope - or even expectation - that they could subsequently make a *quantum meruit* claim against the estates of such persons in the wake of their deaths.

Conclusions

20. In conclusion, therefore, I must hold that in the absence of any intention to create legal relations, the plaintiff is not entitled to maintain her claim for *quantum meruit* against the estate of Ms. O'Keeffe. In these circumstances, I would therefore allow the defendant's appeal and set aside the award in the Circuit Court.