THE COURT OF APPEAL

CIVIL

Appeal No. 2014/ 1455

Finlay Geoghegan J.
Peart J.
Irvine J.

IN THE MATTER OF THE WILL OF ELIZABETH (OTHERWISE BETSY) MULLEN, DECEASED, LATE OF FAHY, CLIFDEN, CO. GALWAY

BETWEEN

JAMES MULLEN JUNIOR

RESPONDENT/PLAINTIFF

AND

JAMES MULLEN

APPELLANT/DEFENDANT

JUDGMENT of the Court delivered on the 14th day of April 2016 by

Ms. Justice Finlay Geoghegan

1. The appellant is the son and executor of the will of the late Elizabeth (otherwise Betsy) Mullen who died on the 24th May, 2012, having executed her last will and testament on the 19th July, 2004. The respondent is a grandson of the deceased and a nephew of the appellant.

2. The appeal is against the construction of a bequest in the will to the plaintiff in the judgment of the High Court (Cregan J.) of the 31st July, 2014, and declaration granted in the order of the 15th October, 2014, pursuant to the said judgment.

3. The bequest in dispute is: "I also give, devise and bequeath to James Mullen Junior, son of my son John, a small plot or piece of land of not more than half an acre to make up the site of his proposed new house should he require same".

Applicable legal principles
4. The principles applicable to the construction of the will are not in dispute. They were as set out by Laffoy J. in *Re. Rafter :Thornton v Timlin* [2012] IEHC 239 (Unreported, High Court, Laffoy J., dated 13th June, 2012), in reliance upon the guidance given by Lowry L.C.J. in *Heron v. Ulster Bank Limited* [1974] NI 44. They were set out by the trial judge at para. 12 of his judgment:-

> "12. Laffoy J. *In Re Rafter* [2012] IEHC 239 considered how the court seeks to construe a will and to give effect to the intention of the testator and referred to the principles set out by Lowry LCJ in *Heron v. Ulster Bank* Limited as follows at para. 14:-
>
> > 'The primary duty of the Court in construing a will is to ascertain and give effect to the intention of the testator. In recent years the High Court in this jurisdiction has adopted the guidance on the construction of wills generally given by Lowry LCJ in *Heron v. Ulster Bank Ltd.* [1974] N.J. 44, as appears from Howell v. Howell [1992] 1 I.R. 290 (Carroll J.), *Corrigan v. Corrigan* [2007] IEHC 367 (McGovern J.), and, most recently, *O'Donohue v. O'Donohue* [2011] IEHC 511 (Gilligan J.). Lowry LJC stated as follows:-
> >
> > > 'I consider that, having read the whole will, one may with advantage adopt the following procedure:
> > >
> > > 1. Read the immediately relevant portion of the will as a piece of English and decide, if possible, what it means.
> > >
> > > 2. Look at the other material parts of the will and see whether they tend to confirm the apparently plain meaning of the immediately relevant portion or whether they suggest the need for modification in order to make harmonious sense of the whole, or, alternatively, whether an ambiguity in the immediately relevant portion can be resolved.
> > >
> > > 3. If the ambiguity persists, have regard to the scheme of the will and consider what the testator was trying to do.
> > >
> > > 4. One may at this stage have resort to rules of construction, where applicable, and aids, such as the presumption of early vesting and the presumption against intestacy and in favour of equality.
> > >
> > > 5. Then see whether any rule of law prevents a particular interpretation from being adopted.
> > >
> > > 6. Finally, and, I suggest, not until the disputed passage has been exhaustively studied, one may get help from the opinions of other courts and judges on similar words, rarely as binding precedents, since it has been well said that 'no will has a twin brother' ...."

5. In addition ss. 89, 90 and 99 of the Succession Act 1965, are relevant and provide:-

> "89. Every will shall, with reference to all estate comprised in the will and every devise or bequest contained in it, be

construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears from the will.

90. Extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will.

99. If the purport of a devise or bequest admits of more than one interpretation, then, in case of doubt, the interpretation according to which the devise or bequest will be operative shall be preferred."

The will

6. The will provides as follows:-

"This is the last will and testament of me, Elizabeth Mullen (otherwise Betsy Mullen) of Fahy, Clifden, County Galway. I revoke all former wills and testamentary dispositions heretofore made by me

I appoint my son James Mullen to be executor of this my will subject to the payment of my lawful debts funeral and testamentary expenses.

I give devise and bequeath as follows:

My house and garden at Fahy, Clifden to my three daughters,

Lily Kane of Dawros Letterfrack

Rita McNamara of Tullyvoheen, Clifden

And Margaret Pride of Letternoosh, Clifden

In equal shares.

The field opposite my house at Fahy, Clifden as to one half thereto to my son, Marty Mullen and as to the other half thereof to my son Thomas. They are each to have the half nearest to their respective houses.

To my executor and son James Mullen the land upon which his house stands at Fahy, Clifden together with the well and water supply servicing same which comes from adjoining lands and also I give devise and bequeath to him the lands running to the sea which he presently occupies.

I also give devise and bequeath to my son, James Mullen the site of the house my late husband James Mullen senior was born in which is situated at Fahy, Clifden and is half way between the Low Road and the Sky Road.

I also give, devise and bequeath to James Mullen Junior, son of my son John, a small plot or piece of land of not more than half an acre to make up the site of his proposed new house should he require same.

All the rest, residue and remainder of my property of every nature and kind wheresoever situate I give devise and bequeath to my three sons John, Marty and Thomas in equal shares.

I direct that my executor appoint the firm of Black and Co. Solicitors of 28 South Frederick Street, Dublin 2 to act in the administration of my estate and that they be paid their proper professional fees and expenses for so doing.

In witness whereof I have herewith signed this my last will and testament this 19th day of July, 2004.

Elizabeth Mullen (Betsy)

Signed by the testatrix."

The High Court judgment

7. The trial judge applied the principles identified by Lowry L.C.J. In relation to the first principle namely, to read the relevant portion of the will as a piece of English and decide what it means, the trial judge concluded at para. 15 of his judgment:-

"In my view, the words of the testatrix are clear. The clear intention of the testatrix was that she wanted to bequeath a small piece of land to her grandson. This piece of land was not to exceed half an acre. It was to be available to him if he should require it. The purpose of the bequest was to permit him 'to make up the site'."

8. The trial judge then considered the submission made by the defendant either that the gift had lapsed or that the phrase "should he require same" must be given an objective meaning because of the use of the word "require".

9. The trial judge then continued:-

"20. But in order to take the defendant's submission, at its height, I turn to consider firstly whether on a subjective assessment, the plaintiff 'requires' the said plot and secondly, to consider whether on an objective assessment, the plaintiff requires the said plot.

21. However this in turn necessitates a consideration of the meaning of the word 'require'. There was some debate about the exact definition of the meaning of the word 'require'. The Oxford English definition of the word 'require' is:-

'1. Need something for a purpose.

2. Instruct or expect someone to do something.

3. Make compulsory: the minimum required by law.

Origin Latin requirere.'

22. Thus, the Oxford English definition of 'require' is 'to need something for a purpose'. The question then becomes does the plaintiff 'need' this half acre of land 'for a purpose' either subjectively or objectively.

23. I turn first to consider whether the plaintiff, subjectively, needs the said plot. At para. 8 of his affidavit he says as follows:

'I say that in or about March 2010 I sought the testatrix's permission to use a portion of her lands which adjoined my dwelling house as a garden. I say that my site is a particularly difficult one being very steep at the front and rear of my dwelling house and it was not possible to build up the site in order to create a garden area. Therefore I required the use of the testatrix's land in order to create a garden for my use and the use of my young family.'

24. Moreover, the plaintiff has averred on affidavit on a number of occasions that he 'required' the use of the lands in question in order to create a garden for his own use and the use of his young children; when he learned he was a beneficiary under the will, he confirmed to the executor that he did require the said lands; and he says at para. 11 that he has repeatedly asserted that he requires the said lands. It is clear therefore, on a subjective assessment, the plaintiff considers that he requires this plot."

10. Whilst the trial judge continued to make a number of further findings, it was the primary construction placed on the disputed bequest in paras. 15 to 24 inclusive of his judgment which formed the focus of the oral submissions at the hearing of the appeal. I propose therefore considering the submission on appeal against those findings prior to considering any other part of the judgment, same in relation to the facts taken into account by the trial judge.

11. The trial judge at para. 7 of his judgment set out what he termed "a summary of the relevant background to the making of the will". However the facts to which he then refers include matters which occurred after the making of the will in July 2004. Whilst on appeal there was dispute between the parties as to the admissibility of certain of the evidence relied upon by the trial judge in later parts of his judgment it was nevertheless agreed, in accordance with common sense, that independently of the admissibility of extrinsic evidence pursuant to s. 90 of the Succession Act 1965, it was permissible for the court when asked to construe a will to be given certain background facts which set the context in which the will was made and also in which the bequest would take effect as at the date of death. The facts set out by the trial judge at para. 7 with the possible exception of the averments relating to discussions with the testatrix at para. 7 thereof appear to be within the permissible background context either at the time of the making of the will or at the time the will was to take effect. The facts set out were:-

"1. The plaintiff James Mullen Jnr. had been left (sic) [given] certain lands by his father which adjoined the testatrix's lands.

2. He then set about applying for planning permission to build his own home on this site. He obtained planning permission. In or about June 2005 he commenced construction of his dwelling house on these lands and he substantially completed the construction and moved into the house with his wife on or about 30th July, 2006.

3. The plaintiff, in his affidavit, states that it was difficult to secure planning permission in the area but, as his brother had already constructed his house adjacent to the plaintiff's lands, he was able to use his brother's access road which greatly strengthened his application for planning permission.

4. It appears that the site on which the plaintiff built his house was a difficult site on a sloping road and blasting was required to clear the stone from the hillside and also to create a level space.

5. In or about March 2010 the plaintiff sought the testatrix's permission to use a portion of her lands (which adjoined his dwelling house) as a garden. The plaintiff at this stage had a number of small children and wished to obtain a garden for them to play in.

7. The plaintiff also states in his grounding affidavit that from May 2010 until the testatrix's death on 24th May, 2012 that he, the plaintiff, occupied this portion of the testatrix's land for use as a garden with her knowledge, consent and indeed encouragement. He avers that he placed swings on the land for use by his children and that the testatrix on her many visits to his house also discussed with the plaintiff the use to which he could put the lands and encouraged him to plant vegetables on the lands, to keep chickens on the lands and also to allow his children to play there."

The reason for the small change to subpara. 1 is that the court was informed that the father of the plaintiff, John Mullen, was alive at the date of death of the testatrix and therefore must have given the lands to the plaintiff as this had occurred prior to the making of the will in 2004. Nothing turns on this.

Appeal

12. The defendant agrees with the trial judge that the words used by the testatrix in the disputed bequest are clear and unambiguous. However, he contends that they have a different meaning to the construction placed on them by the trial judge. The defendant submits that the intention of the testator from the words used was to bequeath a small piece of land should the plaintiff require same for the proposed construction of a house. In doing so he relies upon the meaning of the verb "require" from the Oxford Dictionary definition to "need something for a purpose" and submits that the purpose was identified by the testator as being "to make up the site of his proposed new house" which he contends means the site required for the construction of a house.

13. The further submission is that as the house has been built the plaintiff cannot be considered as of the date of death to require the plot for this purpose.

14. The plaintiff also submits that the meaning of the words used by the testatrix are clear but to different effect. He seeks to uphold the construction of the trial judge at paras. 15 to 24 of his judgment. In particular he submits that the trial judge was correct in

construing the phrase "should he require same" as having a subjective meaning.

15. He further submits that the trial judge was correct in finding that the word "site" as used by the testatrix may include more than the foot print of a dwelling house constructed thereon and may include a garden. He refers to the background fact that the site already owned by the plaintiff was 1.2 acres and the additional plot bequeathed is to measure up to half an acre. Each of these of themselves it is submitted exceed the probable footprint of a house.

16. Attention was also drawn to the use of the word "site" in the bequest to the defendant in relation to "the site of the house my late husband James Mullen Senior was born in. . . ." It was submitted that this was intended to refer to more than the footprint of the house in question.

17. The plaintiff also sought to rely upon the initial words used in the bequest "I also give, devise and bequeath to . . . ." as evidencing a clear intention to make a bequest to the plaintiff of a small plot or piece of land which is then described as being "of not more than half an acre to make up the site of his proposed new house" subject only to the condition "should he require same". It was submitted that it was unnecessary to consider whether the condition by which the devise was to be limited was a condition precedent or subsequent as it had clearly been fulfilled by the plaintiff subsequent to the death of the testatrix.

Conclusion
18. The Court has concluded that the trial judge was correct in the conclusion he reached for the reasons stated at paras. 15 to 24 of his judgment. The words of the testatrix are clear. Her intention was to bequeath a small piece of land of not more than half an acre to her grandson, the purpose of which was to permit him to make up the site of his proposed new house. The Court agrees that the use of the term "the site" by the testatrix is not confined to the footprint of a constructed site but includes the immediately adjacent amenity land such as a garden. Further, the words "should **he** require same" clearly indicate that it is the plaintiff's subjective assessment as to whether he requires the plot for the purpose of the site of his new house in the sense already indicated that is relevant.

19. Further, the trial judge was correct on the evidence before him that the plaintiff had established that he did subjectively require the plot for the purpose of using same as a garden to make up the site of his new house.

20. There was no dispute between the parties as to the identification of the plot in question. This had been identified in correspondence by reference to a map which is appended to the High Court order.

21. The defendant independently of the submissions made against the conclusions reached by the trial judge submitted that the form of declaration set out at para. 50 of the judgment and included in the order was not consistent with the form of the bequest. This is:

> "The Court doth declare: that the Plaintiff is entitled under the terms of the Last Will and Testament of Elizabeth (otherwise Betsy) Mullen deceased late of Fahy, Clifden in the County of Galway to the right to select a plot of land up to half an acre from her lands immediately adjoining those of the Plaintiff to make up the site of his new house

22. It is not clear whether there is any practical significance to the difference in the declaration in relation to the "right to select" from the entitlement of the plaintiff to a bequest of the plot of land not exceeding half an acre identified in the map attached to the order of the High Court of the 15th October, 2014. Insofar as the Court was asked to construe the bequest in the context of the absence of any dispute in relation to the identification of the lands not exceeding half an acre on the map produced to the High Court the more appropriate form declaration appears to be:-

> "The Court doth declare: that the plaintiff is entitled under the terms of the Last Will and Testament of Elizabeth (otherwise Betsy) Mullen deceased late of Fahy, Clifden in the County of Galway to a devise of the plot of land not exceeding half an acre identified on the map annexed hereto and outlined in red in order to make up the site of his new house."

23. By reason of the conclusions reached on this issue it is unnecessary to consider the remaining findings of the trial judge in his judgment and the submissions on appeal therefrom.

Relief
24. There will be an order dismissing the appeal save in relation to a variation in the terms of the declaration in High Court Order of 15th October, 2014, to that set out at paragraph 21 of this judgment.