THE HIGH COURT

[2013 No. 7394 P.]

IN THE MATTER OF THE ESTATE OF K, DECEASED,

AND IN THE MATTER OF SECTION 117 OF THE SUCESSION ACT 1965

BETWEEN

K

PLAINTIFF

AND

K

DEFENDANT

JUDGMENT of Mr. Justice Denis McDonald delivered on the 23nd day of November, 2018 by way of addendum to the judgment previously given on 7th November 2018

1. This is an addendum to the judgment given by me on 7th November 2018 ("my first judgment"). This judgment deals solely with an issue which is mentioned briefly in para. 50 of my first judgment. In that paragraph I dealt with certain material which was put to the plaintiff on cross-examination in relation to occasions when (so it was alleged) he sought to intimidate the deceased.

2. In para. 50, I mentioned that certain evidence had been heard by me on a de bene esse basis from P (a sister of the deceased) in relation to an incident which she recounted between her mother and herself relating to the conduct of the plaintiff. P gave evidence as to what the deceased had said to her about a particular incident involving the plaintiff and the deceased. In para. 50 of my judgment I noted that this was heard by me on a *de bene esse* basis in circumstances where counsel for the defendant (at the time the evidence was given) said that submissions would subsequently be made to me as to the admissibility of this evidence. I did not, however, recount that evidence in my judgment. I said that I could not have any regard to it in circumstances where I said that, when it came to the closing submissions, I was informed that I would not be addressed on the issue.

3. However, following the delivery of my first judgment on 7 November 2018, it was brought to my attention by counsel for the defendant on 9 November that I was mistaken in what I had said in para. 50 of the judgment. Counsel explained that the defendant had in fact prepared submissions that the evidence should be admitted under the *res gestae* exception to the hearsay rule but that it was ultimately not necessary to make those submissions in circumstances where counsel for the plaintiff had accepted that the evidence could be admitted, for what it was worth.

4. Counsel for the plaintiff also attended before me on 9 November 2018 and confirmed that he agreed with counsel for the defendant that I had been informed of the matter set out in para. 3 above in the course of the closing submissions made by the defendant. I regret to say that I have no recollection of that having occurred and I have no note to that effect in my court book but I entirely accept what has been said to me by counsel and I am sorry that I did not make a note to that effect during the course of the submissions.

5. In the circumstances, it is clear that I ought to have considered the evidence given by P in relation to what was said to her by her mother. In my view, it is appropriate in these circumstances to revisit my first judgment. As *Delany & McGrath On Civil Procedure* (4th Ed., 2018 at para 25 – 53 makes clear, it has long been accepted that a judge has jurisdiction to revise or alter a decision at any time after judgment has been given up to the moment the order giving effect to the decision is perfected. The order in the present case has not yet been perfected. The matter has been adjourned to enable the parties to consider the judgment.

6. While it was indicated by Clarke J. (as he then was) in *Re: McInerney Homes Ltd* [2011] IEHC 25 that it is necessary that there be "*strong reasons*" before a court should exercise its jurisdiction to revisit a question after the delivery of a written judgment. I am in no doubt that there are strong reasons for doing so in the present case. It would be wholly unjust to the parties in this case (and in particular to the defendant) if I were to leave untouched para. 50 of my first judgment. It is quite clear, based on what I have been told by counsel, that I was incorrect in what I said in para. 50 in suggesting that the evidence could not be admitted in circumstances where I had heard no submissions in relation to it. The true position is that it was not necessary for those submissions to be made in light of the very helpful attitude adopted by counsel for the plaintiff. In my view, the circumstances of this case clearly demonstrate that there are strong reasons for me to revisit my first judgment to the extent that I excluded this element of P's evidence from my consideration of the issue as to whether the plaintiff, on occasion, had sought to intimidate the deceased.

The evidence in question

7. On Day 4 of the hearing, P gave evidence as follows: -

> *"It was around 2006 and I came back from the town, I had been doing some errands and Mam was sitting in the office and the office at that time was a Portakabin. It was a warm day, the door was open, she was sitting in the middle at the desk and she had slid back her chair. I noticed she wasn't herself, there was something not right and I asked her was she okay and she said yeah. I asked her what had happened, I knew there was something. I spent a lot of time with my mother, I was very close to her, I knew by her. She told me that [the plaintiff] had been in and I asked, well, what happened, and she told me he had thrown a piece of timber at her. Whatever the discussion was about he had left, there was a couple of steps to the office, he had walked down, there was a piece of timber on the ground and he had thrown it. The door of the office was one side and thank God it clipped the side of the frame of the door and went out the back of the Portakabin. Thank God it didn't hit her because she was sitting right, she would have got hit with it."*

8. She was then asked had she seen the piece of timber and she answered: -

> *"Yes, it was the only piece because I asked her what did he throw and she says it is out the back and when I looked it was only the one piece of timber at the back of the office on the ground."*

9. P then explained that she examined the piece of timber which she believed had broken off from a pallet. P also explained that it had only happened about 45 minutes before she came back to the office and saw her mother.

10. P was cross-examined in relation to this evidence. She said that her mother never told lies and that she believed her mother. She also acknowledged very readily that she had not been physically present at the time this incident is alleged to have occurred.

11. I should explain that the plaintiff, in his evidence, had strenuously denied that he had thrown anything at his mother. I am therefore left with what is acknowledged to be hearsay evidence on the one hand, and a total denial of that evidence by the plaintiff who, as set out in my first judgment, I have found to be a credible witness.

12. On the other hand, I found P to be an entirely credible witness also. I was impressed by her evidence generally.

Analysis

13. In light of the fact that the evidence of P in relation to this incident is essentially hearsay, I do not believe that I can make a finding that the incident as described by P actually occurred. However, in fairness to the defendant, I believe I should, nonetheless, consider whether if this incident occurred, it would make any difference to the decision which I reached in my first judgment.

14. Having reflected on the matter, I have come to the conclusion that even if it could be said that this incident occurred, I do not believe that it would alter the decision set out in my first judgment. I have come to that conclusion for the following reasons: -

(a) In the first place, if this incident did in fact occur, it was, on the evidence heard by me, an isolated event. While I have accepted in my first judgment that there may have been occasions when the plaintiff shouted at his mother, the evidence given by the defendant and the witnesses called by him did not establish any pattern of offensive behaviour on the part of the plaintiff.

(b) Secondly, I must bear in mind that in a family situation, there may sometimes (one would hope very rarely) be occasions when tempers flare and events happen or words are spoken which are intemperate or entirely unjustified. However, unless there is a pattern of such behaviour, these events usually blow over and normal familial relations resume.

(c) Thirdly, and most importantly, when the deceased came to the family home of the plaintiff and his wife with her daughter M on the August Bank Holiday weekend in 2007, she made no complaint of aggressive behaviour on the part of the plaintiff. Nor indeed did she complain that the plaintiff had ever shouted at her or that the plaintiff had thrown anything at her. If the event described by P occurred, it does not seem to have had any lasting impact on the deceased. It is quite clear from the evidence of everyone who was present at that meeting that what the deceased was concerned about was the breakdown in relations between the plaintiff and the defendant. In this context, I should note that there is an error on para. 59 of my judgment where I quote what was said by the plaintiff's wife. There, I quote from the evidence of the plaintiff's wife on Day 3 and I say that: -

"The first sentence [the deceased] said was P. and yourself are not getting on . . .."

I should make clear that the reference to P in that extract was intended to refer to the defendant and not to P, his sister..

(d) If it had been a matter of huge concern to the deceased that the plaintiff was acting aggressively towards her, it is extraordinary that she said nothing about this in the course of the meeting on that Bank Holiday Monday when she communicated her decision that the plaintiff should be expelled from the family farm and family business.

(e) Moreover, I do not believe that this incident (if it occurred) could be said, of itself, to be sufficient to justify the deceased in expelling the plaintiff from the family farm and effectively disinheriting him. In my view, a just and prudent parent would forgive an incident of this nature, however justifiably upset the parent might have been at the time. I bear in mind in this context that if this incident occurred, it happened in 2007 several years before the last Will and testament of the deceased was written in 2011. I also bear in mind that she did not die until 2013. I do not believe that a just and prudent parent in 2011 or in 2013 would take the view that an incident of this kind would be sufficient to justify punishing a child to the extent of confining the provision to be made for that child to the very limited gift made to the plaintiff under the terms of the 2011 Will notwithstanding the obvious needs of that child and the long years of service he had provided on the family farm.

(f) Equally, I do not consider that the incident (if it occurred) would be sufficient to justify refusing any of the equitable relief claimed by the plaintiff in these proceedings. There is no evidence of any pattern of abusive behaviour sufficient to persuade a court that the plaintiff has come to equity with unclean hands.

Conclusion

15. For all of the reasons outlined in para. 14 above, I have come to the conclusion that, even if I were to accept that the incident described by P occurred, it would not affect the decision arrived at by me in my first judgment. Thus, I would not interfere with any of the orders proposed to be made by me in that judgment.