Neutral Citation Number [2007] IEHC 228

THE HIGH COURT

RECORD NO. 2006 197 SP

IN THE MATTER OF THE ESTATE OF PATRICK KELLY DECEASED

BETWEEN

HILDA McGOWAN

PLAINTIFF

AND

BRIAN KELLY

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 19th June, 2007.

The proceedings

1. These proceedings concern the construction of the last will dated 21st October, 2004 of Patrick Kelly (the Testator), who died on 25th October, 2004 aged 85 years. Probate of the will was granted to the plaintiff, one of the executors, reserving the right of the other executor, on 16th January, 2006.

2. The provision of the will which has given rise to difficulties of construction is in the following terms:

> "I give devise and bequeath my house and farm at Carraghs, Ballinlough, County Roscommon to my sister Hilda McGowan of Carraghs, Ballinlough, County Roscommon in trust and on condition that she (Hilda McGowan) transfers, conveys the said house and farm at Carraghs to my nephew Brian Kelly, Birmingham, England son of my late brother William Kelly provided he returns to live there but if he does not wish to take it on that condition then otherwise I give devise and bequeath my house and farm above to my sister Hilda absolutely."

3. Brian Kelly named in that provision is the defendant. The Testator devised the residue of his estate to the plaintiff in trust for his three nephews, Michael Gallagher, Robert Gallagher and Tommy Fitzgerald, to be divided equally in three shares.

4. On the special summons the plaintiff asked the court to determine the following questions arising out of the construction of the will of the Testator:

> (1) Whether or not the condition that the defendant "returns to live there" (i.e. on the farm at Carraghs) is void for uncertainty?
>
> (2) If the answer to question (1) is in the negative, whether the condition obliging the defendant to return to live on the farm is a condition precedent or a condition subsequent?
>
> (3) Whether, if the answer to question (2) is that the requirement on the defendant to return and reside on the farm is a condition precedent, the plaintiff holds the farm and dwelling in trust for the defendant, and, if so, what is the duration of the said trust?

5. Counsel for the defendant took issue with the formulation of the foregoing questions and suggested that questions which would have been posed by "an impartial personal representative" would have been the following:

> (a) Whether the condition attaching to the bequest is a condition subsequent?
>
> (b) If so, is it void for uncertainty?
>
> (c) If the answers to (a) and (b) are in the affirmative, does the defendant take the subject matter of the bequest freed and discharged from the condition?
>
> (d) Is the condition attaching to the bequest a condition precedent?
>
> (e) If so, is the same void for uncertainty?
>
> (f) If the answers to questions (d) and (e) are in the affirmative, does the subject matter of the bequest pass to the plaintiff?
>
> (g) Such further or other questions as to the court might seem proper.

The facts

6. As appears on the face of the will, the defendant is a nephew of the Testator, being the son of a brother of the Testator. The defendant was born in England in 1960. He was educated in Birmingham. Having left school at the age of sixteen, he has been working in the construction industry in Birmingham since. He is married and he has two children, a son who is sixteen years of age and a daughter who is eight years of age. The family is settled in England, from which I infer that the defendant has no wish or intention to uproot his family and settle at Carraghs.

7. The net value of the estate of the Testator as per the Inland Revenue affidavit amounted to €234,258.94, which I understand to represent the value of the dwelling and farm at Carraghs which comprises about twenty acres with a derelict house on it.

8. The foregoing facts are outlined merely for the purpose of putting the issues which arise in context. In my view, this is not a case in which it is permissible to resort to extrinsic evidence to show the intention of the Testator, having regard to the jurisprudence of the Superior Courts on s. 90 of the Succession Act, 1965. There is no ambiguity or contradiction on the face of the will and it is not necessary to resort to extrinsic evidence to ascertain the intention of the Testator.

Legitimus contradictor

9. On the hearing of the summons, the plaintiff who, as personal representative of the Testator, put the issues before the court, was

also the *legitimus contradictor*. The interest of the residuary legatees was not represented, which is somewhat unsatisfactory given that there is inherent in the issues which arise a conflict between the plaintiff and the residuary legatees. The court was informed that the residuary legatees have been kept notified of the proceedings.

10. The conflict arises because of the practical effect of the distinction between a condition precedent and a condition subsequent to which a testamentary gift is subject. The practical effect was explained in the following passage in the judgment of Gavan Duffy P. in *Burke and O'Reilly v. Burke and Quayle* [1951] I.R. 216 (at p. 223):

> "Here are two conditions and, with reference to the gift of capital, and without reference at this point to the validity of the conditions, the question is whether these conditions are conditions precedent, that is, conditions which the legatee must have fulfilled before the gift can take effect at all, or only conditions subsequent, intended to defeat a gift pre-existing (whether vested or contingent). The practical effect of the distinction is of the utmost importance: a gift made subject to a condition precedent fails altogether, as a rule, if the condition is found to be void, but, if a gift is made subject to a condition subsequent which is found to be void or inapplicable, the condition disappears and the gift takes effect independently of the condition."

11. The position adopted by the plaintiff was that the condition requiring the defendant to return to live on the farm at Carraghs was a condition precedent, and, as I understand it, that the condition was void for uncertainty, although there was equivocation on this point in the submissions, and that, consequently, the gift over in favour of the plaintiff took effect. The case made on behalf of the defendant was that the condition was a condition subsequent, that it was void for uncertainty and that, consequently, the gift to the defendant took effect independently of the condition. There was nobody before the court to make the case that, if the condition was a condition precedent and it was void for uncertainty, the gift over also failed and that the house and farm fell into the residue to be held upon trust for the residuary legatees. However, counsel for the defendant submitted that the effect of finding that the condition was a condition precedent and that it was void for uncertainty would be that the gift to the defendant and the gift over failed but that the residuary gift survived.

12. I propose considering first whether the condition is a condition precedent or a condition subsequent and thereafter whether it is void for uncertainty.

Condition precedent or condition subsequent

13. The fact that the Testator devised the house and farm to the plaintiff in trust for and to transfer it to the plaintiff is immaterial to the determination of the issue whether the condition that the defendant return to live there is a condition precedent or a condition subsequent. It is the limitation of the beneficial interest, including the gift over, not the limitation of the legal estate, which requires to be construed.

14. There is a welter of authority for the proposition that such a condition is a condition subsequent, namely:

(i) the obiter dictum of Moore L.J. in the High Court of Northern Ireland in *Moffat v. M'Cleary* [1923] 1 I.R. 16;

(ii) the decision of the Judicial Committee of the Privy Council in *Sifton v. Sifton* [1938] A.C. 656 on an appeal from a Canadian court;

(iii) the decisions of the High Court and the Supreme Court in In r*e Coghlan deceased, Motherway v. Coghlan and the Attorney General* [1963] I.R. 246, decided by the High Court in 1954 and by the Supreme Court in 1956.

(iv) the decision of the High Court (Budd J.) in In *re Hennessy* (1963) 98 I.L.T.R. 39; and

(v) the decision of the High Court (Carroll J.) in *Mackessy v. Fitzgibbon* [1993] 1 I.R. 520.

15. The provision which was at issue in *Mackessy v. Fitzgibbon* was a provision in the will of the Testator in the following terms:

> "I leave devise and bequeath my farm of land … together with dwelling house … to my grand-nephew … provided he lives and works on the land but if he does not then I leave my land together with dwelling house … to my niece … absolutely."

16. In relation to whether the condition that the grand-nephew live and work on the land was a condition precedent or a condition subsequent, Carroll J. stated (at p. 522) that there is a presumption in favour of early vesting, so that, if there is a doubt about whether a condition is precedent or subsequent, the court *prima facie* treats it as subsequent. Apropos of the condition she was considering she stated (at p. 523):

> "I am satisfied the condition is a condition subsequent. It provides for two requirements which if they are not fulfilled would lead to a forfeiture. Accordingly the condition is a condition subsequent."

17. In my view, notwithstanding that the wording is slightly different, there is no difference in substance between the condition under consideration in *Mackessy v. Fitzgibbon* and the condition imposed by the Testator in his will. The condition imposed by the Testator was a condition subsequent.

18. I have referred to the equivocation I detected in the submissions made on behalf of the plaintiff as to whether the condition was void or valid. If the plaintiff's position was that it was a valid condition precedent which has not been fulfilled by the defendant so that the plaintiff takes the gift over, in my view, that is not a tenable position. The condition requiring the defendant to return to live at Carraghs, in my view, is not one which the Testator could have intended would be fulfilled by a single act of election. Its fulfilment requires time. Therefore, adopting the reasoning of Budd J. in In *re Hennessy* at p. 45, it must be construed as a condition subsequent.

Void for uncertainty?

19. The authorities cited above in support of the finding that the condition in the will of the Testator is a condition subsequent also support the proposition that the condition is void for uncertainty. The test to be applied in determining whether a condition subsequent is void for uncertainty has been well settled for almost two centuries. In many of the authorities the following passage from the decision of Lord Cranworth in *Clavering v. Ellison* (1859) 7 H.L.C. 707 at p. 725 is quoted:

> "I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the courts can see from the beginning, precisely and distinctly, upon the happening of what event it was that the

preceding vested estate was to determine.

In my opinion, if there was no direct authority for it, I should still arrive at the same conclusion; but I have looked at the authorities, especially that of Lord Eldon in the case of *Fillingham v. Bromley* …"

20. There is no doubt but that it is possible to frame a condition subsequent with sufficient precision to satisfy that test. As was pointed out by counsel for the plaintiff, examples are given in Theobald on Wills, 16th edition, at para 45.26 in which courts in the United Kingdom have held that conditions as to residence are valid. The question in this case is whether the necessary element of precision and certainty is present in the condition imposed by the Testator. On the basis of recent Irish authority, in my view, it is not.

21. In In *re Hennessy* the Testator had devised a farm to his son or his issue "if he wishes to farm it and carry on same as he thinks best". Having quoted the passage from the judgment of Lord Cranworth which I have quoted above, Budd J. observed that he found it impossible to say with any degree of certainty what was the meaning of the words "to farm it and carry on same as he thinks best". However, that observation was *obiter*.

22. The testamentary provision under consideration in In *re Coghlan* was a devise of a farm and dwelling upon trust for the testator's nephew "provided my said nephew shall marry (if he be not married at my death) and come to reside there within one year from the date of my death, and in the event of my said nephew not marrying and coming to live there as aforesaid, in trust to sell … and apply the proceeds of such sale for the celebration of Masses …" There were two elements to the condition: the requirement to marry and the requirement to come and reside. In the High Court, Dixon J. took the view that the requirement as regards living on the farm was "too indefinite and was void for uncertainty". However, he found the requirement as to marriage to be valid and binding. The issue on the appeal to the Supreme Court was whether the condition was a composite condition and was not severable. The majority of the Supreme Court held that it was a composite condition and that, accordingly, the condition as to residence being void for uncertainty, the condition as to marriage also failed. From reading the majority judgments, it seems to have been common case that the condition as to residence was void for uncertainty. That is to be gleaned from the first sentence in the judgment of Ó Dálaigh J. In the other majority judgment Kingsmill Moore J. stated (at p. 251):

> "Certain points seem clear. The residence portion of the condition is bad for uncertainty: *Sifton v. Sifton; Moffat v. M'Cleary*. Both conditions – or the composite condition – are conditions subsequent and conditions subsequent which would operate to defeat a vested estate are to be construed strictly."

23. In *Mackessy v. Fitzgibbon*, Carroll J., having referred to In re Hennessy, *Sifton v. Sifton, Moffat v. M'Cleary* and In *re Coghlan*, stated as follows at p. 524:

> "While a will cannot be construed by looking at another will and each will must be construed as a whole in its own context, these decided cases are helpful. I find that the condition 'provided he lives and works on the land' is void for uncertainty on the same line of reasoning as in the cases cited. A beneficiary is entitled to know on what conditions his vested estate is liable to be divested. In this case the testator has been too vague and accordingly the condition is void for uncertainty both as to living and working on the lands. Since the devise and bequest is subject to a condition subsequent which is void for uncertainty it follows that the first defendant is entitled absolutely."

24. By parity of reasoning, it seems to me that the condition imposed by the Testator on the defendant is too vague, imprecise and uncertain. So the condition is void for uncertainty.

25. Counsel for the plaintiff referred to a recent decision of this Court (Keane J.) in *Fitzsimons v. Fitzsimons* [1992] 2 I.R. 295. In that case, the testator had transferred a substantial portion of a farm comprising 182 acres to his son during his lifetime. In his will, he devised a life estate in the balance of the lands to his widow with a devise in remainder to the son conditional upon "him being the beneficial owner for a like estate of the lands … transferred by me to him during my lifetime." After the testator's death the son wanted to sell a site comprising half an acre of the lands he had acquired during the testator's lifetime. Keane J. held that the condition was not void for uncertainty, stating (at p. 299):

> "It is precise and unambiguous in its scope: it requires the plaintiff to be the beneficial owner of the lands transferred to him during the testator's lifetime if he is to succeed in remainder to the balance. If one were to construe the clauses as permitting the sale of part only of the lands, the question would immediately arise as to the extent to which any sale would be permissible under the terms of the will. On any view, the sale of a substantial part of the lands would be in breach of the condition. How then is one to determine the extent of a sale necessary to bring the condition into operation? The result would be to create rather than to avoid uncertainty."

26. Keane J. considered it unnecessary to embark on a consideration of affidavit evidence as to what the testator might have said during his lifetime in order to ascertain his intention. He stated that the testator obviously did not wish a situation to arise in which the rest of the farm went to the son, although the lands transferred to him had been sold to a stranger. He also stated that it was virtually certain that he would have been perfectly happy with the proposal for the sale of half an acre. However, to ensure that sales of that type could be made by the son, it would have been necessary for the testator to create a series of elaborate and precisely defined exceptions to the straightforward condition he chose to impose. Keane J. stated that it was perfectly understandable that neither he nor his solicitor considered that necessary or even desirable. Counsel for the defendant laid particular evidence on that last point. However, I do not see how it advances the plaintiff's case. The distinction between the condition in the Testator's will and the condition in the *Fitzsimons* case is that the latter was, as was found, precise and unambiguous in its scope, whereas the condition imposed on the defendant by the Testator, as I have said, is vague, imprecise and uncertain as to fulfilment.

Decision

27. In summary, I find that the condition imposed by the Testator on the defendant is a condition subsequent and is void for uncertainty. The practical effect of that is that the defendant takes the farm at Carraghs free of the condition.

28. In view of the finding I have made that the condition is a condition subsequent, the conflict between the plaintiff and the residuary legatees, which would have arisen if I had found the condition is a condition precedent, does not arise.

29. I will hear the parties as to the form of the order.