Neutral Citation [2016] IEHC 688

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 25th November 2016

Introduction

1. This is an action to remove an administratrix and to appoint in her place a firm of professional trustees.

2. The applicants are both daughters of Michael Hoey ('the deceased'), who died intestate on the 13th October 2003, and Albina Hoey, the first respondent.

3. The first respondent is the widow of the deceased. She is the present administratrix and personal representative of his estate, having been granted letters of administration on the 22nd May 2009, some five and a half years after his death.

4. The four additional respondents are the other children of the marriage between the deceased and the first respondent. They are the siblings of the applicants.

Background

5. The evidence before the Court is quite limited. On the applicants' side, it comprises the averments contained in, and documents exhibited to, the relatively short affidavit that the first applicant swore on the 17th July 2015 to ground the special summons on foot of which the present application is brought. On the respondents' side, it amounts to the averments in, and exhibits to, a replying affidavit sworn by the first respondent on the 8th January 2016. From those affidavits, I gather that the following facts are not in dispute.

6. The first respondent swore an Inland Revenue affidavit on the 6th April 2009 in support of her application for a grant of administration intestate of the deceased's estate. It identifies the place of death of the deceased as Newry, County Down and his domicile at the time of his death as Northern Ireland. The real property of the deceased within the State was valued at €1,220,000, representing farmlands in Counties Monaghan and Louth valued at €860,000 and a commercial premises in the town of Dundalk, County Louth, valued at €360,000. Bank accounts held by the deceased with a financial institution within the State contained funds then totalling €628,891.78. The real property of the deceased in Northern Ireland was valued at €1,698,528. As disclosed in that affidavit, it comprised a house, shop and yard in or near the village of Crossmaglen in County Armagh, then valued at €551,470, and farmlands at Culloville, County Armagh then valued at €1,147,058.

7. It would appear that, at the time of his death, the deceased was entitled to a one quarter share in the estate of his late father, John Hoey, who held farmlands in County Monaghan, and to a share in the estate of a deceased sibling, Thomas Hoey, who owned a cottage and lands also in County Monaghan. At the time of John Hoey's death in 2000, the deceased had three surviving siblings: the said Thomas Hoey; Ann Ita Hoey; and Aimee Hoey. It seems that Thomas Hoey died in 2002, Aimey Hoey died in 2004, and Ita Ann Hoey died in 2013.

The deceased's estate in Northern Ireland

8. On the 13th May 2009, the High Court of Justice in Northern Ireland granted letters of administration of the deceased's estate in that jurisdiction to the first respondent.

9. On the 15th March 2011, the applicants issued proceedings in that court, seeking an Order under Article 35 of the Wills and Administration Proceedings (Northern Ireland) Order 1994, removing the first respondent as adminstratrix of that estate. In a judgment delivered on the 20th March 2014, the Northern Ireland High Court (in the person of Deeny J.) acceded to that application and appointed a firm of professional trustees, Cleaver, Fulton and Rankin Trustees Limited, as administrator of the estate in place of the first respondent. An approved copy of the text of that ex tempore decision is exhibited to the grounding affidavit of the first applicant. It is striking in its clear exposition and cogent analysis.

10. Deeny J. identified a number of points of serious concern regarding the first respondent's purported discharge of her duties as administratrix of her deceased husband's estate in Northern Ireland.

11. First, there was a considerable delay in the administration of the estate. It was then more than ten years after the death of Michael Hoey, and a draft distribution account had only recently been furnished by the first respondent in response to an express order of the court. The applicants had been prevailed upon to wait for some time after Michael Hoey's death to enable matters to be put in hand, but when they wrote to the first respondent's solicitors seeking details of the administration more than three years later, they received no reply. An inheritance tax account was not submitted to the appropriate authorities until January 2009, more than five years after Michael Hoey's death. Letters of administration were not obtained until March 2009. These delays prompted the applicants to register cautions against the lands of the deceased in Northern Ireland in September 2009.

12. Second, as the first respondent acknowledges, two sons of the family have been given a farm each, as well as the use of the yard in Crossmaglen for the purpose of continuing to conduct the business previously operated by the deceased there. That business involves the sale of coal, meal and, perhaps also, oil. Five weeks after the applicants moved to register cautions against the Northern Ireland lands, they were for the first time offered monies purportedly representing their proper share of the proceeds of the sale of those properties to their brothers by the first respondent as administratrix. They rejected the payment offered as unsatisfactory.

13. Third, the first respondent was directed to provide a full inventory of the Northern Ireland estate by the Master of the High Court there on the 7th May 2010. When she did so, eleven months later, it became apparent that there was no personal representative's bank account. It then transpired that the first respondent had not received payment as administratrix for the lands that the estate

sold to certain of the other respondents but rather had determined that the relevant respondent in each case should pay the applicants a sum equivalent to the share of each in the notional proceeds of the relevant transaction. The first respondent attempted to justify that course by reference to the existence of waivers signed by certain of the respondents but Deeny J. found that those waivers did not cover all of the properties concerned and did not explain the failure properly to account to the applicants, neither of whom had signed any of those purported waivers, for their share of the proceeds.

14. Fourth, it would appear that the first respondent's solicitors in Northern Ireland received the sum of €732,650 that had by then accumulated in the deceased's bank accounts within this jurisdiction but that, according to the relevant ledger account, instead of being placed in an administration account, €600,000 of that sum was simply paid out by those solicitors to the first respondent without any clear distribution or, indeed, evidence of any distribution at all.

15. Fifth, it emerged that it was the first respondent's contention, as administratrix, that no benefit whatsoever had accrued to the estate by way of income or profit from the agricultural and other property holdings of the deceased during the period of more than 10 years that had elapsed since his death. The first respondent gave evidence that this was so because the income generated was matched by rates and other charges on those holdings. With commendable understatement, Deeny J. described the failure of that property to yield any benefit to the estate during so long a period as 'very remarkable', before pointing out that the root problem lies in the first respondent's failure, as administratrix, to account for the relevant income and expenditure to each of the beneficiaries.

The basis for the application

16. The applicants contend that the first respondent has been guilty of excessive delay in the administration of the estate and has misunderstood her obligations as administratrix by, amongst other things:

> (a) transferring lands without the consideration for such lands being collected into the estate of the deceased;
>
> (b) sending a letter dated the 14th December 2004 to the Department of Agriculture and Food which misrepresented the interest of the deceased in his late father's estate (as being a two thirds, rather than one quarter), and
>
> (c) swearing an affidavit which omits reference to Ann Ita Hoey, and which exhibits a document authored by the first respondent which omits mention of the applicants.

17. I propose to examine each of those contentions in turn.

i. delay

18. When the present application came before this Court on the 27th April last, Michael Hoey had been deceased for over twelve years. A draft distribution account was produced for the first time as an exhibit to the affidavit sworn by the first respondent on the 8th January of this year.

19. The only explanation that the first respondent has offered for what is, by any measure, an extraordinary delay in the administration of the deceased's estate is that 'the circumstances of the deceased's death and the range and extent of his estate involved considerable input of time and effort on the part of myself and my then solicitors so as to enable an application for a grant of administration….' That explanation is too limited and too vague to be of any practical comfort or assistance.

ii. failure to collect and get in the estate

20. The applicants complain that the first respondent has transferred estate lands without gathering the consideration for those lands into the estate. The first respondent acknowledges that, in her capacity as administratrix of the deceased's estate, she transferred the greater part, if not the entire, of the deceased's farmlands in Counties Monaghan and Louth to the third respondent on the 14th September 2009 for a consideration of €400,000, and that she transferred the commercial premises in the town of Dundalk to the fourth respondent on the 12th August 2009 for an identical consideration.

21. While emphasising that those transfers were effected for consideration, the first respondent accepts, if only implicitly, that the relevant consideration was never gathered into the estate. Instead, just as Deeny J. found was done in relation to the transfer of estate property in the North, the first respondent appears to have determined that no money should be paid into the estate's account but, rather, in respect of each property, the son who acquired it should tender to her solicitors a sum equivalent to the share of each of the applicants in the notional proceeds of sale, which sum her solicitors should (however belatedly) furnish her with a receipt for, before (or after) sending each of the applicants a cheque representing the share of each in those notional proceeds as part of their share in the deceased's estate.

22. The first respondent avers that each of the respondents waived his or her claim to a share of each of those properties, although the waiver she exhibits in respect of the Monaghan and Louth lands is not signed by the second respondent and no such waiver is exhibited in relation to the Dundalk property. That is a striking omission in light of the difficulties that Deeny J. identified with the waivers that the first respondent sought to rely upon in respect of both certain estate property in the North and the monies on deposit within the State.

23. An equally fundamental concern is that, although the first respondent fails to address the issue in her replying affidavit, it is implicit in the averments that she does make that no personal representative's account has been established within the State.

24. In addition, just as Deeny J. did in relation to the distribution account belatedly produced in respect of the administration of the deceased's estate in Northern Ireland, I take the view that the long overdue draft distribution account exhibited to the first respondent's replying affidavit last January raises as many questions as it answers.

25. To address only the most obvious of those questions, it seems that I am being asked to accept by implication that neither the Dundalk commercial premises nor the Monaghan and Louth farmlands generated any profit or income for the estate during the period of almost six years between the death of Michael Hoey and the sale of those properties by the first respondent. Equally, it seems that the first respondent is inviting the Court to proceed on the basis that the funds at bank of €628,891 when the Inland Revenue affidavit was sworn on the 6th April 2009 had precisely the same value to the estate when the first respondent swore her replying affidavit on the 8th January this year, almost seven years later. Of course, the deeper problem lies in 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.

26. It is possible that the explanation for these significant shortcomings may be found in the first respondent's apparent belief that, as the widow of the deceased and the mother of the other beneficiaries, she is at large in relation to the distribution of the deceased's estate, subject only to her own conception of fairness, rather than bound, as administratrix of that estate, by the rules governing distribution on intestacy. That is certainly the impression conveyed by a significant portion of her affidavit, in which she sets out her understanding of the provision that the deceased sought to make for each of his children during his lifetime. But whatever the explanation, the duties imposed upon a personal representative by operation of law cannot be disregarded or disapplied in favour of some other conception of fairness, even one as beguiling as 'mother knows best.'

27. For these reasons, I am satisfied that the first respondent has failed in her primary duty as administratrix properly to gather in the property of the estate. I am further satisfied that, in the context of the present application, the first respondent has failed properly to account to the beneficiaries of the estate for its assets and liabilities.

iii. errors in administration

28. The applicants place significant additional reliance on certain alleged errors that the first respondent made in correspondence in relation to the deceased's estate in 2004. They point to a letter that the first respondent sent to the Department of Agriculture and Food on the 14th December 2004. In that letter, the first respondent asserted a claim to two thirds of the payment entitlement in respect of her deceased father-in-law's lands, arising under the *Single Payment Scheme* then operated by that Department. The applicants point out that the deceased was only entitled to a one quarter share in his father's estate, so that the first respondent's entitlement to a two thirds share of the deceased's estate on his intestacy would only entitle her to two thirds of one quarter (or one sixth) of that entitlement in her personal capacity or one quarter of that entitlement in her capacity as administratrix of the deceased's estate.

29. The first respondent concluded the said letter by confirming her consent to the payment to her son, the third respondent, of her asserted entitlement to two thirds of that payment. The applicants complain that this enabled the third respondent to exhibit that letter to an affidavit that he swore on the same date, the 14th December 2004, in seeking that payment in full. The applicants point out that, while the said affidavit properly acknowledges the one third share of the deceased's estate to which his six children are entitled, the said application was accompanied by a letter of waiver in that regard that was signed only by four of those children and not by the applicants.

30. In light of the conclusions I have already reached, it is not necessary to express any view on this particular complaint, beyond observing that no attempt appears to have been made by the first respondent to account for the value of the estate's share of the relevant payment entitlement in the draft distribution account upon which she now seeks to rely.

The Law

31. In Wiley, *Irish Land Law* 5th edn. (Dublin, 2013), the general position of a personal representative in relation to a deceased person's estate is neatly summarised as follows (at para. 18.27, p. 839):

> 'A personal representative is under a duty (a) to collect and get in the estate and administer it according to law; (b) when required by the court, to exhibit on oath in court a full inventory of the estate and, when so required, to render an account of administration to the court; (c) when required by the High Court, to deliver up the grant of probate or administration.'

32. S. 27, sub-s. 2 of the Succession Act 1965 provides that the High Court shall have power to revoke, cancel or recall any grant of administration.

33. S. 27, sub-s. 4 of that Act states in material part:

> 'Where by reason of any special circumstance it appears to the High Court ...to be necessary or expedient to do so, the Court may order that administration be granted to such person as it thinks fit.'

34. In *Dunne v Heffernan* [1997] 3 I.R. 431, the Supreme Court considered the test for the removal of an executrix and the appointment of an administrator in her place. In giving judgment for the Court, Lynch J. declared (at pp. 442-3):

> 'An order removing the defendant as executrix (which would be made by virtue of s. 26, sub-s. 2 and not s. 27, sub-s. 4 of the Succession Act, 1965) and appointing some other person as administrator with the will annexed by virtue of s. 27, sub-s 4, is a very serious step to take. It is not justified because one of the beneficiaries appears to have felt frustrated and excluded from what he considered his legitimate concerns. It would require serious misconduct and/or serious special circumstances on the part of the executrix to justify such a drastic step.'

35. However, later in the judgment, Lynch J. qualified that principle in the following way (at p. 444):

> 'Where the person nominated to be executor renounces, or where no executor is appointed, or on an intestacy, the right to administration is determined by the Rules of the Superior Courts in O. 79, r. 5. In such a case, the person entitled to the grant of administration may be passed over more readily and someone else appointed pursuant to s. 27, sub-s. 4 than where an executor is appointed and accepts the appointment by proving the will when weighty reasons must be established before the grant of probate would be revoked and cancelled pursuant to s. 26, sub-s. 2 and the testator's chosen representative thereby removed, and someone else not chosen by the testator appointed pursuant to s. 27, sub-s. 4 of the Act of 1965.'

36. What, then, amounts to a 'special circumstance' or 'serious special circumstance' that would render it necessary or expedient to replace an administratrix rather than, or more readily than, an executrix? Deeny J. found the answer to a closely analogous question in the judgment of Lord Blackburn in *Letterstedt v Broers* (1884) 9 App. Cas. 371 at 386, cited by Lewison J. in *The Thomas and Agnes Carvel Foundation v Carvel* [2008] Ch. 395 at para [44]. In short, while not every mistake or neglect of duty or inaccuracy of conduct will require the replacement of an administrator or administratrix, acts or omissions that endanger the estate property, or show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity, may do so. The overriding consideration is, therefore, whether the estate is being properly administered; the main guide must be the welfare of the beneficiaries.

Conclusion

37. Applying the law as I have described it to the facts presented, my conclusions are as follows:

(a) A pronounced delay on the part of a personal representative in the administration of an estate could, alone or in combination with other factors, amount to a special circumstance warranting the removal and replacement of that person.

(b) A failure by a personal representative to discharge the fundamental duty to collect and get in the estate and administer it according to law can, depending on the gravity or extent of that failure, whether alone or in combination with other factors, amount to a special circumstance warranting the removal and replacement of that person.

(c) An administrator (or administratrix) may be replaced more readily in such circumstances than an executor.

(d) The factors identified at (a) and (b) above are both applicable in the circumstances of the present case and each demonstrates a want of proper capacity on the part of the first respondent to execute the duties of administratrix, amounting to a special circumstance.

(e) Considering those factors individually in this case, I am satisfied that it is appropriate, indeed necessary, by reference to each to replace the first respondent as administrator of the deceased's estate. It is certainly necessary to do so on considering them in combination.

38. In exercise of the power conferred on the Court by s. 27, sub-s. 2 of the Succession Act 1965, I will therefore revoke the grant of administration to the first respondent and, in the special circumstances arising, I will order, pursuant to s. 27, sub-s. 4 of that Act, that administration of the deceased's estate be granted to Cleaver, Fulton and Rankin Trustees Limited.