

THE HIGH COURT**2004 1066 P****BETWEEN****SINEAD DEVANE HICKEY****PLAINTIFF****AND****MICHAEL GEARY AND PAUL MCCARTHY****(Practising under the style and title of Breen, Geary, McCarthy and Shee)****DEFENDANTS****AND****NICOLE HICKEY****THIRD PARTY****JUDGMENT of Ms. Justice Dunne delivered on the 12th day of March, 2009**

This is an application to set aside the service of a Third Party notice herein. The Third Party notice was served pursuant to an order of the High Court (Quirke J.) made herein on 18th February, 2008. Originally, four third parties were joined to the proceedings. A notice of discontinuance has been served against the second-named Third Party Brian O'Dwyer, the third named Third Party Grainne O'Dwyer and the fourth named Third Party Breda Ryan.

The background to this matter relates to the last will and testament of John Hickey, who took out a policy of assurance on his life in 1993, then aged 28. At that time he executed a declaration of trust in a standard form. He reserved to himself a power of appointment over the proceeds of the policy. It was provided that in default of appointment the fund provided for under the policy of assurance should be held to the absolute benefit of his only daughter, Nicole Hickey, who was born on 5th December, 1990. She is the third party named in these proceedings. Subsequent to taking out the policy of assurance, the said John Hickey married the plaintiff in these proceedings on 5th October 1997. Some time later he executed his last will and testament and the defendant firm of solicitors advised him in that regard.

Unfortunately, the said John Hickey died on the 30 January, 1999. He failed to execute any appointment under his last will and testament or during the course of his life in respect of the policy of assurance. Indeed, no reference of any kind was made in his will to the life assurance policy. The third party herein became absolutely beneficially entitled to the proceeds of the life policy with effect from 30th January, 1999, the date of death of the said John Hickey, some ten years ago.

In the course of the administration of his estate, an issue arose as to whether the third party was beneficially entitled to a specific pecuniary bequest of £100,000 under the terms of her father's will in addition to the proceeds of the policy of assurance or whether the doctrine of election and the doctrine of satisfaction were engaged requiring her to elect between the legacy under the terms of her late father's will or the proceeds of the policy. Proceedings were instituted by the widow of the late John Hickey, the plaintiff in the present proceedings. In those proceedings, the High Court ruled, *inter alia*, that the doctrine of satisfaction required that an election had to be made on behalf of the third party in these proceedings between the provision under the trust, that is to say the proceeds of the policy of assurance and the provision under the will. As the amount available under the policy of assurance was greater than the amount available under the provisions of the will, an election was made on behalf of the third party in respect of the provision available under the policy of assurance. It was noted in the course of the judgment in that case (*Hickey v. O'Dwyer* [2006] 2 I.L.R.M. 81 at p. 89) that:

"On the assumption that she will elect to take the proceeds of the policy and, indeed, the proceeds have already been paid to trustees on her behalf, the plaintiff has no interest in the proceeds."

Following the ruling in that case, the plaintiff herein, the widow of the late John Hickey, brought proceedings against the solicitors who had advised the late John Hickey in and about the preparation of the said will claiming that as a result of the negligence of the defendants, the plaintiff herein has suffered loss and damage. The loss and damage claimed is particularised in the particulars of special damage as follows:-

€150,528.37 being the legal fees incurred by the estate of the deceased in respect of the previous High Court proceedings and the sum of €156,622.19 being the difference between the amount paid to the Third Party pursuant to her election and the bequest to her under the terms of the said John Hickey's will.

The defendants have denied liability in their defence and have also alleged that the third party herein is, to the extent of the shortfall to the plaintiff, a constructive trustee for the plaintiff in respect of the funds received on foot of the policy to the extent that the same exceed £100,000. In those circumstances the defendants claim an indemnity or alternatively a contribution from the third party.

An affidavit of Eugene Sullivan was sworn herein to ground the application for a leave to join Nicole Hickey as a third party in these proceedings. In the course of that affidavit it is stated as follows:

"Notwithstanding the latter finding, it is the plaintiff's contention that John Hickey deceased only intended that Nicole Hickey would receive £100,000 being €123,350 and that the plaintiff would receive the balance of the estate and more particularly the balance of the life assurance policy.

I say and believe that if the plaintiff's contention is true, that accordingly, Nicole Hickey in electing to take the total sum of the life policy obtained an unjust enrichment in that she received more than the deceased intended and that the monies received by her and/or the trustees on her behalf were intended for the plaintiff herein.

I say and believe and am advised by counsel that Nicole Hickey and the trustees hold the sum of £156,622.19 as trustees under a modern Constructive trust to and for the benefit of the plaintiff and that such sums should be paid to the plaintiff by them."

The third party notice recites the following matters which are of relevance to this application:

"It is the defendant's case that Nicole Hickey and/or the trustees who hold the proceeds of the said policy on her behalf, to the extent of the said shortfall to the plaintiff, hold all monies in excess of £100,000 on Constructive trust for the plaintiff, since John Hickey deceased intended that Nicole Hickey receive only the sum of £100,000 and that the plaintiff receive the balance of the insurance policy.

The defendant claims against you to be indemnified against the plaintiffs claim and the costs of the action on the grounds that you hold all monies in excess of £100,000 (the sum of £156,622.19 as claimed by the plaintiff) together with interest thereon on constructive trust for the plaintiff."

The application to set aside the service of the third party notice herein is brought on a number of grounds. The first matter relied on by the third party is that the third party notice herein was not served as soon as is reasonably possible. The statement of claim herein was served on the defendants on 3rd August, 2007, and a defence was delivered on 24th January, 2008. The motion seeking to join the third party was dated 24th January, 2008, and the order giving leave to join the third party was made on 18th February, 2008. Given that timeframe, Counsel on behalf of the third party did not press the application on that ground.

The second matter relied on by the third party in seeking to set aside the third party notice is an argument based on *locus standi*. In the light of the pleas contained in the third party notice and set out above, it is argued that the claim made therein is, in effect, a vicarious claim by the defendant for and on behalf of the plaintiff. Thus it is argued, the defendant does not have *locus standi* to pursue such a claim. It is submitted that the defendant is not now entitled to seek an appropriation or a declaration of trust in respect of the proceeds of the life assurance policy and above and beyond the sum of £100,000.

It is also argued that having regard to the way in which the third party notice is framed that the defendant is seeking to have an issue determined in these proceedings that has already been dealt with in the previous proceedings between the plaintiff and the third party. Accordingly it is contended that there is an issue estoppel as between the plaintiff and the third party.

The argument is also made on behalf of the third party that the proceeds of the policy never formed any part of the estate of the deceased and that the only party beneficially entitled to the proceeds of the policy deceased was his daughter, the third party herein. Her right to those proceeds upon her election dated back to the date of death of the deceased. Given that the third party notice is dated 28th February, 2008, it is contended that any claim made by the defendants herein against the third party is statute barred.

Counsel for the third party then considered the procedures by which a defendant can claim an indemnity or contribution from a third party. It was submitted that the Defendant could not rely on the provisions of s. 27 of the Civil Liability Act 1961, which deals with the position of a concurrent wrongdoer who wishes to make a claim for contribution. It was pointed out that the third party herein could not under any circumstances be described as a concurrent wrongdoer. Counsel for the defendants readily accepted that this was so.

In those circumstances, the only basis that can be relied on by the defendants for the purpose of applying to have someone joined to these proceedings as a third party is the procedure contained in O. 16, r. 1 of the Rules of the Superior Courts.

Order 16, r. 1 provides:

"(1) Where in any action a defendant claims as against any person not already a party to the action (in this order called "the third party") -

(a) that he is entitled to contribution or indemnity, or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any or either of them, the court may give leave to the defendant to issue and serve a third party notice and may, at the same time, if it shall appear desirable to do so, give the third party liberty to appear at the trial and take such part therein as may be just, and generally give such directions as to the court shall appear proper for having any question or the rights or liabilities of the parties most conveniently determined and enforced and as to the mode and extent in order to which the third party shall be bound or made liable by the decision or judgement in the action."

In the course of the arguments before me counsel on behalf of the defendants indicated that he relied on the provisions of Order 16, r. 1(c) in joining the third party. Accordingly it is necessary for the defendants to show that substantially the same question or issue arises between the plaintiff and the defendant and between the plaintiff and the defendant and the third party or between any or either of them.

Counsel on behalf of the third party reiterated that any issue between the plaintiff and the third party was already determined in the proceedings that have already taken place. It was also submitted that the issues between the plaintiff and the defendants and the defendant and the third party are different. The claim against the defendants by the plaintiff is a claim in negligence, breach of duty, (including breach of contract and breach of fiduciary duty). It is difficult to see how it could be argued that the matters in question and the issues sought to be resolved between the plaintiff and the defendants are the same as the issues sought to be resolved between the defendants and the third party herein.

What the defendants have in fact alleged against the third party in the third party notice is that she holds the sum in excess of £100,000 on constructive trust for the plaintiff. Even though counsel for the defendant conceded in the course of argument that he was not seeking an indemnity or contribution from the third party on the basis that she was a concurrent wrongdoer, nonetheless, the third party notice does in fact claim an indemnity from the third party. It is difficult to see any legal basis for seeking such an indemnity. It is relevant to note that in the affidavit grounding the application to have the third party joined to the proceedings, it was stated that "Nicole Hickey in electing to take the total sum of the life policy obtained an unjust enrichment in that she received more than the deceased intended and that the monies received by her . . . were intended for the plaintiff herein".

The concept of unjust enrichment and the remedial constructive trust is one which has given rise to much debate in recent years. (See *Delany, Equity and the Law of Trusts in Ireland*, 2nd ed., p. 254 et seq.) It is not a matter that was canvassed in front of me but it is a concept at the heart of the defendant's application in this case. Without entering into any debate on the merits of this concept, I think it is important to bear in mind that there is no suggestion that the third party acted improperly or wrongly in electing to take the proceeds of the life assurance policy. In the course of her decision in the earlier proceedings in the case of *Hickey v. O'Dwyer*, Laffoy J. at p. 89 of her judgment ruled as follows:-

"The fourth defendant [the third party herein] is entitled to elect to take the proceeds of the policy or the bequest contained in the will.

The interest of the plaintiff [the plaintiff in these proceedings] in the proceeds of the policy depends on the election made by the fourth defendant. On the assumption that she will elect to take the proceeds of the policy and, indeed, the proceeds have already been paid to trustees on her behalf, the plaintiff has no interest in the proceeds.

The provision in the Testator's will in favour of the fourth defendant was intended to be in part satisfaction of the proceeds of the policy the subject of the 1993 trust.

The distribution of the proceeds of the policy depends on the election to be made on behalf of the fourth defendant. On the assumption that the election is to take the proceeds of the policy, the distribution of the proceeds to trustees on behalf of the fourth defendant will stand."

It is clear from the passages quoted above that the third party herein was entitled to elect to take the proceeds available under the life assurance policy. At the time, she was a minor and the election was exercised on her behalf. One could not see how those responsible for the third party's interest and welfare could have taken any other course. The plaintiff in these proceedings could not maintain any entitlement to the proceeds of the life assurance policy in the light of the decision in the earlier proceedings which make it clear that the third party was entitled to elect to take the proceeds of the life assurance policy. That being so, it is difficult to see how the defendants could make what has been described by counsel for the third party as "a vicarious claim" by the defendants for and on behalf of the plaintiff. The issues between the plaintiff and the third party were determined in the previous proceedings before Laffoy J. To that extent, I am satisfied that the submissions made by counsel on behalf of the third party, relying on the Supreme Court decision in the case of *McCauley v. McDermott* [1997] 2 I.L.R.M. 486, are correct. Reliance was also placed on the decision in the case of *Henderson v. Henderson* [1843] 3 Hare 100, where it was stated by Wigram V.C. at p. 114 as follows:-

"In trying this question I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even an accident, omitted part of their case. The plea of *res judicata* applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

Paragraph 17, of the defence find herein states as follows:-

"There was further contributory negligence on the part of the plaintiff in that in the prior claim of the plaintiff referred to in para. 15 of the statement of claim, the plaintiff failed to claim that the fourth defendant there even was, to the extent that the fourth defendant was entitled to the proceeds of the said policy in excess of £100,000, a Constructive trust of the said excess in favour of the plaintiff."

It seems to me that the defendants are by the joinder of the third party seeking to litigate in these proceedings an issue that could or should have been dealt with in the earlier proceedings contrary to the principle set out in *Henderson v. Henderson* and referred to above.

Bearing in mind that the defendants contend that the application to join the third party is based on O. 16, r. 1(c), namely that the same question or issue arises not only as between the plaintiff and the defendants but as between the plaintiff and the defendants and the third party or between any or either of them, it seems to me that the issue or question

arising in these proceedings is an issue or question that arises as between the plaintiff and the third party and as such is *res judicata*.

In the circumstances of this case and having regard to the matters set out above, I am satisfied that the third party notice herein should be set aside.