Neutral Citation Number: [2007] IEHC 367

THE HIGH COURT

[2006 No. 64 S.P.]

IN THE MATTER OF THE SUCCESSION ACT, 1965

BETWEEN

EAMON CORRIGAN

PLAINTIFF

AND

SEAN CORRIGAN AND EOIN (OTHERWISE OWEN) CORRIGAN

DEFENDANTS

Judgment of Mr. Justice Brian McGovern delivered on 2nd day of November, 2007

1. Christopher Corrigan ("the deceased") died on the 5th day of March 2000. He was a widower and left surviving him five children. He made his last will and testament on the 23rd September, 1997. The will was drawn up by a solicitor who is now deceased. In his will he appointed the plaintiff and the first and second named defendants as executors.

2. These proceedings were brought by the plaintiff as executor seeking a construction of a clause in the will. A grant of probate issued to the plaintiff and the second named defendant from the District Probate Registry of Mullingar on 10th January, 2002. By order of the High Court dated 23rd January, 2006 the second named defendant was given liberty to renounce his rights to act as an executor and he did so on the 30th January, 2006. The first named defendant renounced his position as executor on the 2nd November, 2001 prior to the grant of probate.

3. The first named defendant is joined in these proceedings as a person who is named as a beneficiary in the will on foot of a clause that requires construction by the court. The second named defendant is joined in the proceedings as the person entitled to the entirety of the residuary estate.

4. Difficulties have arisen in construing clause 1 of the will which states as follows:

> "1. I have 21 acres of land in Folio 13658 Co. Westmeath and I have been advised that said land or part thereof is zoned for residential and/or industrial development. I direct my executors to hold the said lands upon the following trusts:
>
> (a) To allow my son Sean to hold and enjoy the profits of the land for his own benefit until there is acquisitions of my lands for the purposes mentioned above. In such event the net proceeds of the sale of my land shall be divided equally amongst all my children and any section of the farm not so acquired shall become the absolute property of my son Sean."

5. At the time of the execution of the will the lands referred to in the bequest were zoned for agricultural use. In April 2005 some of these lands were rezoned for use as a special district for business and enterprise development by Westmeath County Council.

6. The plaintiff as personal representative seeks the assistance of the court in administering the Estate..

7. These proceedings have been commenced by special summons in which the plaintiff seeks the answers to a number of questions which I will answer later in this judgment.

8. The bequest which I am to construe ("the bequest") is in clause 1 in that part of the will in which the testator disposes of his property. Clause 1 is divided into two parts. The first part is a preamble in which the testator states that he has 21 statute acres of land in Folio 13658 Co. Westmeath and that he has been advised "…that the said land of part thereof is zoned for residential and/or industrial development". The second part of the clause comprises the bequest to Sean in the following terms:

> "to allow my son Sean to hold and enjoy the profits of the land for his own benefit until there is acquisition of my lands for the purposes mentioned above. In such event, the net proceeds of the sale of my land shall be divided equally amongst all my children and any section of the farm not so acquired shall become the absolute property of my son Sean."

9. The bequest only makes sense in the light of the first part of the clause and seems to be predicated on it. This can clearly be seen from the words "… until there is acquisition of my lands for the **purposes mentioned above**" (my highlights). On the face of it, it appears that the intention of the testator was that first named defendant should hold and enjoy the profits of the lands until they were acquired for the development purposes which are stated to be residential and/or industrial. This would appear from the use of the words "to **allow** my son Sean to hold and enjoy the profits of the lands for his own benefit **until**…" (my highlights). In other words the testator expected the lands or part of them to be acquired for a value that would reflect the fact that they were zoned for residential and/or industrial development in that event the proceeds of sale would be divided equally among his children and first named defendant would hold any part of the lands not so acquired.

10. Interpretation of the will

It is clear from the evidence that the testator acted under a mistake of fact when he declared that "… the said land or parts thereof is zoned for residential and/or industrial development". He may well have been advised that that was case but the advice was wrong and he was therefore acting under a mistake of fact. Even now, after the rezoning of the land they have not been zoned for residential or industrial development but rather for use as a special district for business and enterprise development.

11. In interpreting the will the court must have regard to the relevant provisions of the Succession Act, 1965.

12. Section 90 provides that "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". In *Rowe v. Law* [1978] I.R. 55 and *O'Connell v. Bank of Ireland* [1998] 2 I.R. the Supreme Court held that s. 90 must be strictly interpreted. In *Rowe v. Law*, Henchy J. stated on p. 72:

> "I read s. 90 as allowing extrinsic evidence to be received if it meets the double requirement of
>
> (a) showing the intention of the testator, and
>
> (b) assisting in the construction of , or explaining any contradiction in, a will."

At p. 73 he states:

"…s. 90 allows extrinsic evidence of the testator's intention to be used by a court of construction only where there is a legitimate dispute as to the meaning or effect of the language used in the will. In such a case… it allows the extrinsic evidence to be drawn on so as to give the unclear or contradictory words in the will a meaning which accords with the testator's intention as thus ascertained. The section does not empower the Court to rewrite the will in whole or in part."

13. I am satisfied that the clause 1 of the bequest contains a lack of clarity and that there is ambiguity contained therein. I am also satisfied that the admission of extrinsic evidence is permissible in this case. There is extrinsic evidence to be found in notes taken by the testator's solicitor upon taking instructions for the drafting of the will. I will look at these notes in some detail later in this judgment.

14. Section 91 of the Succession Act provides:

"Unless a contrary intention appears from the will, any estate to comprise or intended to be comprised in any devise or bequest contained in the will which fails or is void by reason of the fact that the devisee or legatee did not survive the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, shall be included in any residuary devise or bequest as the case may be, contained in the will."

15. Section 94 provides:

"Where real estate is devised to a person (including a trustee or executor) without any words of limitation, the devise shall be construed to pass the whole estate or interest which the testator had power to dispose of by will in the real estate, unless a contrary intention appears from a will."

16. Section 99 provides:

"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."

General principles of construction

17. In considering the authorities on this subject it seems that the following principles apply:-

(i) The court will strive as far as it can to give effect to the intention of the testator insofar as this can ascertained from the will. In limited circumstances the court is permitted to rectify a will to safe it from bad drafting. See *Curtin v. O'Mahony* [1991] 2 I.R. 566.

(ii) The court considers the will by placing itself in the position of the testator sitting in his armchair shortly before his death to see what he was setting out to achieve.

(iii) As a general rule the court will give legal or technical words used in a will their legal or technical meaning.

(iv) The guidelines suggested by Lowry L.C.J. in *Heron v. Ulster Bank Limited* [1974] N.I. 44 at 52 were approved and adopted by Carroll J. in *Howell v. Howell* [1992] 1 I.R. 290. These are as follows:-

1. Read the immediate 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 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 exhaustibly studied, one may get help from the opinions of other courts and judges on similar words, rarely as binding precedents, since it has be well said that "no will has a twin brother" (per Werner J. in *Matter of King* [1910] 200 N.Y. 189, 192), but more often as examples, sometimes of the highest authority) of how judicial minds nurtured in the same discipline have interpreted words in similar context."

Construing the 'conditions'

18. The court has to decide whether the statement in clause 1 of the bequest is a declaration of the testator's belief (which was erroneous) or whether it constitutes a condition attaching to the bequest. If it is a condition then the court has to decide if it is a condition precedent or a condition subsequent. Counsel for the plaintiff adopts a neutral position. Counsel for the first named defendant argues that it is clearly a condition subsequent and counsel for the second named defendant argues that it is a condition precedent.

19. I take the view that if it is a condition it must be a condition subsequent. There is a presumption of early vesting and it is clear that, if the words at the beginning of the bequest are a condition, that the first named defendant is to hold and enjoy the profits of the lands until such time as the condition is fulfilled, namely, the lands are acquired for the purposes of residential and/or industrial development. There are a number of cases which are authorities for the proposition that where a condition attaches to a bequest the court should approach the condition prima facie as a condition subsequent unless its construction as a condition precedent is unavoidable. (See *McGowan v. Kelly* [2007] IEHC 228 *Mackessey v. Fitzgibbon* [1993] I.R. 520 and *Re Porter* [1995] N.I. 157). If a condition subsequent is found to be void the beneficiary takes the bequest freed from the condition. So in this case if clause one of the bequest is a condition subsequent and is found to be void for uncertainty or incapable of taking effect, the first named defendant would take the bequest free from the condition. (See judgment of Laffoy J. in *McGowan v. Kelly* [2007] IEHC 228 and judgment of Gavan Duffy P. in *Bourke and O'Reilly v. Bourke and Quale* [1951] I.R. 216 at 223).

What is the effect of the factual error in the belief of the testator?
20 A gift made upon a mistake of fact cannot be cut down or altered to suit the supposed facts. See Theobald on *Wills*, 16th Ed., para. 53.36. Correction of mistakes by the court can only arise where the words used do not accurately reflect what the testator intended. A court can only supply or omit words in exceptional circumstances and with the greatest caution. If the gift to the first named defendant is made upon a mistake of fact then the entire bequest would fail and the bequest would fall into the residuary estate by virtue of s. 91 of the Succession Act

Extrinsic evidence
21 In clause 1 of the bequest there are a number of words which give rise to difficulty. In the first place there is the factual inaccuracy concerning the zoning of the lands. Then there is the use of the words "…until there is acquisition of my lands for the purposes mentioned of above" and a further reference to "…any section of the farm not so acquired…." Counsel for the plaintiff argues that the use of these words tends to suggest that the testator had in mind the compulsory acquisition of land rather than a sale in the ordinary course of events. Looking at the extrinsic evidence one gets some general idea of the testator wishes. The hand written notes of the testator's solicitor ("now deceased") show that he received instructions at 11.00 am on the 26th August, 1997. In the course of those instructions he sets out the name and status of the testator, namely, that he is a widower, and then he sets out names and status of the children. He goes on to set out the assets and the executors. When it comes to the heading "**dispositions**" his notes read as follows: "farm to Sean, but if any is sold for residential or commercial purposes then it's to be divided between all children equally. Sean can keep what is not required for residential purposes, all five to share in such sale money". Two things are interesting about the notes. In the first place they make reference to what will happen if the property is "sold". The words "acquired" or "acquisition" are not used. Secondly, the notes refer to what will happen if any of the property is sold "for residential or commercial purposes". In the bequest in the actual or final will the words "… zoned for residential and/or industrial development" are used.

22. In the draft will the following words appear:

> "I make dispositions of my property -
>
> > 1. I have about 21 acres in Folio 13658 Co. Westmeath and am aware that it is or will be zoned for residential and/or industrial development…"
>
> In the instructions, the solicitor records the deceased assets and when referring to the farm says "farm; zoned for residential".

23. When the will was drawn up the word 'is' appears in connection with the zoning although it is coupled with the words "… I have been advised that …". So the position has moved from a situation where the assets were stated to include a farm which is "zoned for residential" to a draft will which says that the land "is or will be zoned for residential and/or industrial development…" to a final position where the testator says in his well that he has been advised that the land or part thereof is zoned for residential and/or industrial development. All in all the position concerning the land is anything but clear. What does seem to emerge from the instructions and the bequest in the will is that it was the intention of the testator to let his son Sean hold the land if it remained in agricultural use but that if the land or part thereof was rezoned and sold or acquired at a significantly greater value than agricultural land then all his children should share in that windfall and Sean would retain such part of the land (if any) as was not rezoned. That is as much as can be said from looking at the will and the extrinsic evidence to be found in the solicitor's notes.

24. But it seems to me that a great deal of uncertainty remains. In the first place it is not clear what was the zoning of the land as understood by the testator. The notes suggest that he instructed his solicitor that the farm was zoned for residential use whereas in the will he says that he has been "advised" that the lands are zoned for residential and/or industrial development. But it is now clear that the lands were not zoned as understood by the testator or as "advised" to the testator and although part of the land has been rezoned since his death it has not been zoned for residential or industrial development. In April 2005 part of the deceased land was rezoned as a special district for business and enterprise development and part was zoned for open space. The larger portion of the land which is zoned as a special district is intended to be a business and enterprises district. Evidence to this effect was given by Ms. Geraldine Fahy, a planning consultant in an affidavit of the 30th April, 2007. She says that the aim of the special district zoning is to attract economic and commercial investment and substantial employment but that residential development is not permitted in a special district zoning. It may well be that the zoning of part of the land as a special district constitutes "commercial purposes" as referred to in the draft instructions of the testator's solicitor and indeed it might amount to "industrial development" as stated in the bequest. But there remains the problem of the use of the word "acquisition" of the testator's land for residential and/or industrial development. It is unclear whether this means that in the event of the lands being compulsorily acquired for those purposes then the children of the deceased will share equally the proceeds of such acquisition. Or did the testator intend that if the land (as he believed) was zoned for residential and/or industrial development that the lands should be sold and the proceeds divided among his children. The problem is that the will does not say that and appears to "allow" Sean to remain on the land and enjoy the profits of same until they are acquired. When would they be acquired? Could the other children of the deceased compel the executors to sell the land? I take the view that if clause 1 of the bequest contains a condition, that the condition is vague and uncertain. I have already indicated that, in my view, if it is a condition it is a condition subsequent. If the condition subsequent is void for uncertainty then it follows that the first named defendant would be entitled to the land without the condition.

25. The plaintiff and the first named defendant both raised the possibility that the estate intended to be created by the bequest to the first named defendant could be regarded as a conditional or determinable freehold. It is argued that where the word "until" is used in the grant of a fee simple the general rule of constructions is that it may be construed as giving rise to a determinable fee simple. (See Lyall: *Land Law in Ireland*, 2nd edition, p. 179.) If it is a determinable fee simple then it gives rise to a "possibility of a reverter" in the grantor or settlor, in this case, the estate of the deceased. The court has been referred to *Attorney General v. Cummins* [1906] I.R. 406 where it was held that the rule against perpetuity does not apply to the possibility of reverter in such a situation. If the bequest to the first named defendant is a determinable fee simple, then it follows that if the determining events are void for uncertainty or otherwise the entire limitation fails. See Lyall: *Land Law in Ireland* at p. 180 where the following statement appears:

> "At common law, if the determining event occurs, the land reverts automatically to the grantor. The grantor has the possibility of a reverter. Indeed, this is the only interest that can exist after the determinable fee simple at common law. At common law the grantor cannot, in the same deed create a determinable fee and then provide that if the event occurs, the land is to pass to someone else. The grantor cannot create a gift over to a third party after a determinable fee."

This seems to me to be a correct statement of the law.

26. I have been urged to look at the will as a whole and that is what the authorities suggest I must do. However, in this particular case the will as a whole does not offer much assistance in construing clause 1 of the bequest.

Findings
27. I have already stated in this judgment that if clause 1 of the bequest contains a condition then it is a condition subsequent.

28. I am satisfied, however, that the bequest to the first named defendant in clause 1 does not contain a condition. The use of the words "allow" and "until" cause me to take the view that the bequest to the first named defendant is in the nature of a determinable fee simple. I am satisfied that at common law the Testator cannot, in his will, create a determinable fee simple to the first named defendant and then provide that, in the event that a determining event occurs, the land is to pass to someone else. A testator cannot create a gift over to third parties after a determinable fee. On that ground, the entire limitation and the entire bequest fails.

29. I am satisfied that the determining event specified in clause 1 of the bequest is void for uncertainty and it follows therefore, that on this basis, the entire limitation and bequest fails.

30. I am also satisfied that the bequest to the first named defendant was made upon a mistake of fact and that, in the circumstances of this case, it is not possible for the court to rectify or correct the mistake of fact.

31. It follows in my view that the subject matter of clause 1 of the bequest falls into the residuary estate of the Testator.

I answer the questions posed in the Special Summons as follows:

1. The bequest of lands comprised in Folio 13658 in the County of Westmeath is not subject to a condition.

2. Not applicable.

3. Not applicable.

4. No. The statement or declaration is incorrect.

5. The statement is of no dispositive effect.

6. No.

7. Not applicable.

8. Not applicable.

9. Not applicable.

10. The bequest is a determinable fee simple.

11. Yes.

12. Yes.

13. Not applicable.

14. No.

15. Yes.