**THE HIGH COURT**

**[2010 No. 410 SP]**

**IN THE MATTER OF THE ESTATE OF CELINE CAWLEY LATE OF ROWAN HILL, WINDGATE ROAD, HOWTH IN THE COUNTY OF DUBLIN DECEASED**

**AND**

**IN THE MATTER OF QUESTIONS ARISING IN THE COURSE OF THE ADMINISTRATION OF THE SAID ESTATE**

**BETWEEN**

**CHRISTOPHER CAWLEY AND SUSANNA CAWLEY**

**AND**

**BY ORDER GEORGIA LILLIS**

PLAINTIFFS

**AND**

**EAMON LILLIS**

**DEFENDANT**

**Judgment of Miss Justice Laffoy delivered on 21st day of February, 2012.**

1. This judgment concerns the costs of these proceedings in which I gave judgment on 6th December, 2011 ([2011] IEHC 515) on the questions raised in the special summons. When the matter was back before the Court on 24th January, 2012 the Court was told that the matter had been settled save in relation to costs. The terms of settlement were handed into Court and orders were made in the terms of the terms of settlement. For present purposes, it is only necessary to record that the implementation of the terms of settlement will create a fund arising from the realisation of the assets which were jointly held by the defendant and the late Celine Cawley (the Deceased) at the date of the death of the Deceased. I will refer to that fund as the "joint fund" in this judgment. Submissions on where liability for the costs of the proceedings should lie were made by counsel for both sides on 14th February, 2012.

2. While the proceedings are entitled "In the matter of the Estate of the Deceased" and the original plaintiffs brought the proceedings as personal representatives of the Deceased, the reality of the situation is that the proceedings relate to the resolution of questions concerning the ownership of, and title to, assets which did not form part of the estate of the Deceased. Having said that, the proceedings were properly brought by way of special summons, involving as they did questions affecting the rights and interests of the estate of the Deceased on the one hand, and the defendant, on the other hand, in relation to those assets.

3. While I propose to analyse the nature of these proceedings in greater depth later, I think it is important to record first that I consider that the special jurisprudence in relation to payment of costs out of the estate in probate actions, which had developed in this jurisdiction for the reasons set out by Budd J. in *In bonis Morelli; Vella v. Morelli* [1968] 1 I.R. 11, and was applied by him in that case and was more recently considered by the Supreme Court in *Elliott v. Stamp* [2008] 3 I.R. 387, has no application to the circumstances of these proceedings. The rationale of the special jurisprudence was explained as follows by Budd J. (at pp. 34 to 35):

> "In our country the results arising from the testamentary disposition of property are of fundamental importance to most members of the community and it is vital that the circumstances surrounding the execution of testamentary documents should be open to scrutiny and be above suspicion. Accordingly, it would seem right and proper to me that persons, having real and genuine grounds for believing, or even having genuine suspicions, that a purported will is not valid, should be able to have the circumstances surrounding the execution of that will investigated by the court without being completely deterred from taking that course by reason of a fear that, however genuine their case may be, they will have to bear the burden of what may be heavy costs. It would seem to me that the old Irish practice was a very fair and reasonable one and was such that, if adhered to, would allay the reasonable fears of persons faced with making a decision upon whether a will should be litigated or not. If there be any doubt about its application in modern times, these doubts should be dispelled and the practice should now be reiterated and laid down as a general guiding principle bearing in mind that, as a general rule, before the practice can be operated in any particular case the two questions posed must be answered in the affirmative."

The two questions referred to in that passage are whether:

> (a) there was reasonable ground for litigation, and
>
> (b) whether it was conducted *bona fide*.

The guiding principle laid down by the Supreme Court in that case does not apply to these proceedings which are not concerned with execution of a testamentary document. That is not to say, however, that the Court, in the exercise of its discretion in relation to costs should not, where appropriate have regard to issues of the type involved in the questions posed by the Supreme Court.

4. While these proceedings raised a novel and a difficult point of law, in essence, they involved a contest between the estate of the Deceased, on the one hand, and the defendant, on the other hand, as to the beneficial ownership of the assets which had been jointly held by the Deceased and the defendant (the joint assets). As I stated in the judgment, the resolution of the issues which were raised in the proceedings turned on the application of established principles of law and equity, primarily, in the area of real property law.

5. The proceedings were properly brought by the original plaintiffs in their capacity as personal representatives of the Deceased, because in that capacity the plaintiffs had to protect the interests of the estate and, in particular, the interests of Georgia Lillis (the Beneficiary), who was joined as a plaintiff by order of the Court made on 27th June, 2011, but who had not attained her majority when the proceedings were initiated. The proceedings were unquestionably necessary. They were not initiated prematurely. On the contrary, prior to their initiation on 15th June, 2010, the personal representatives' solicitors had sought to elicit information as to what claim, if any, the defendant was making to the joint assets in no less than five letters to the defendant's solicitor between 23rd March, 2010 and 30th April, 2010, none of which was responded to. The defendant was a necessary party to the proceedings, being the only *legitimus contradictor*. Therefore, the personal representatives could not have attained a resolution of the issues concerning the joint assets without the defendant being a party to the proceedings.

6. Broadly speaking, the proceedings became a contest between the plaintiffs, who contended that the estate of the Deceased became solely beneficially entitled to the joint assets on her death caused by the criminal act of the defendant, and the defendant, who contended that he became solely beneficially entitled to the joint assets by right of survivorship. The Court resolved that contest by finding that the legal estate in the joint assets accrued to the defendant, who holds the same on a constructive trust for the estate of the Deceased and himself in equal shares. Against that background, in my view, on the issue of costs, the Court is bound by the relevant provisions of Order 99, rule 1 of the Rules of the Superior Courts 1986, as amended (the Rules).

7. The relevant portions of Order 99, embodying the changes introduced by S.I. 12 of 2008 with effect from 21st February, 2008, that is to say, the introduction of rule 1 A, now provide as follows:

"1. Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:

> (1) The costs of and incidental to every proceeding in the superior courts shall be in the discretion of those courts respectively.
>
> (2) …
>
> (3) …
>
> (4) Subject to sub-rule (4A), the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event.

1A. (1) Notwithstanding sub-rules (3) and (4) of rule 1-

> (a) …
>
> (b) The High Court, in considering the awarding of the costs of any action (other than an action in respect of a claim or counterclaim concerning which a lodgment or tender offer in lieu of lodgment may be made in accordance with Order 22) or any application in such an action, may, where it considers it just, have regard to the terms of any offer in writing sent by any party to any other party or parties offering to satisfy the whole or part of that other party's (or those other parties') claim, counterclaim or application.
>
> (c) …
>
> (2) In this rule, an 'offer in writing' includes any offer in writing made without prejudice save as to the issue of costs."

Apropos of the application of rule 1A, which reflects the jurisprudence which developed in relation to a so-called Calderbank letter, the Court's attention has been drawn to two items of correspondence.

8. The earlier is a letter of 17th May, 2011 from the plaintiffs' solicitors to the defendant's solicitors, which is referred to in the judgment at para. 3.3. As I stated, there was a proposal made on behalf of the plaintiffs in that letter to the effect that, notwithstanding the personal representatives' belief that there was a legal argument to the effect that in all of the circumstances the estate of the Deceased should be entitled to one hundred per cent of the joint assets, in an effort to resolve the matter, the plaintiffs would agree to the question raised on the special summons being answered on the basis that there was a severance of the joint tenancy. Because the Court was not concerned with the distribution of assets at that stage, it was not necessary to mention in the judgment the basis on which it was proposed that the joint assets would be distributed between the estate of the Deceased and the defendant. The proposal in relation to distribution did not entail an equal division of the joint assets according to their value. The defendant was invited to agree to the entire proposal, the terms of which were stated not to be severable. There was no response from the defendant's solicitors to that letter.

9. The later letter from the defendant's solicitor to the plaintiffs' solicitors, which was dated 10th November, 2011, was brought to the attention of the Court in the context of the issue of costs. This letter was headed "without prejudice save as to costs". In it the defendant's solicitor stated:

> "Without prejudice, save as to costs, we confirm that our client is willing in order to settle all matters present or future howsoever described between the above parties (with the exception of on-going legal proceedings in France) to agree to an equal division of the joint assets ... between the plaintiffs taking one half and our client taking the remaining half. Each side to bear their own costs."

The offer remained open until close of business on Tuesday, 15th November, 2011, but was not taken up by the plaintiffs. As counsel for the plaintiffs pointed out, subject to one exception, the proposal related to settling "all matters present or future", not just the

proceedings.

10. The position of counsel for the plaintiffs on the issue of costs was that there should be an order that the plaintiffs' costs be paid out of the joint fund, but that there should be no order for costs made in favour of the defendant, so that the defendant would be liable for his own costs. In other words, as I understand the plaintiffs' position, it is that the plaintiffs' costs should "come off the top" of the joint fund and that the joint fund should then be distributed in accordance with the terms of the settlement. The position adopted by counsel for the defendant was that the defendant should be awarded his costs against the plaintiffs because the offer in the letter of 10th November, 2011, which was "an offer of a 50/50 split down the middle" was not responded to, as a result of which the hearing had to proceed, and, while at the hearing the defendant made a concession in the terms of his offer, the plaintiffs pursued their claim for one hundred per cent of the joint assets.

11. In their written submissions, counsel for the plaintiffs submitted that the proceedings were necessitated at their root by the criminal act of the defendant and that to award the defendant his costs from the joint assets would allow him to benefit from his criminal conduct. It was also submitted that it would allow the defendant to benefit from his lack of *bona fides* in conducting the proceedings. I have come to the conclusion that it would not be a proper exercise of the Court's discretion, in determining where liability for costs lies, to penalise the defendant on account of the fact that the issue as to the ownership of the joint assets arose out of the tragic death of the Deceased at the hands of the defendant.

12. As regards the authorities from other jurisdictions considered in the judgment, which counsel for the defendant suggested the Court should have regard to, they provide little guidance on the issue of liability for costs. There was a range of issues in *Re Pechar, decd*. (referred to at para. 8.1 in the judgment). Apart from that distinguishing factor, the issue of costs was not dealt with in the judgment, although at the end of the judgment Hardie Boys J. did state that there was "ground for contending that Ante Grbic's estate should bear the greater burden although not necessarily the whole burden of the court's order for costs". In *Schobelt v. Barber* (referred to at para. 7.1 in the judgment), Moorhouse J. stated, at the end of his judgment, that the defendant had resisted a claim which had been founded against him and costs should follow the event and be against the defendant in his personal capacity. Earlier in the judgment, Moorhouse J. recorded that the plaintiff's claim was for an undivided one half interest in the parcel of real estate in issue.

13. Returning to the offers made in the correspondence outlined at paras. 8 and 9 above, traditiomilly the test applied in determining whether a Calderbank offer has been effective in relation to the costs of litigation is the test adumbrated by Sir Thomas Bingham M.R. in *Roache v. News Group Newspapers Ltd*. (1992) CA 2 1120-on the facts, who, as a matter of substance and reality has won. I have come to the conclusion that, if one were to apply that test strictly to the application of rule 1 A(1)(b) of Order 99 to the facts of this case the answer would be that it does not benefit either side in determining where liability for costs should lie. As regards the plaintiffs, the offer in the letter of 17th May, 2011 was stated not to be severable and, had it been accepted in its totality by the defendant, he would be in a much less advantageous position than he is as a result of the decision of the Court and the settlement as to the distribution of the joint funds which ensued. As regards the offer of the defendant in his letter of 10th November, 2011, I agree with the submission made by counsel for the plaintiffs that, given that the proceedings were listed for hearing on 16th November, 2011, that proposal came far too late to carry weight on the issue of where liability for costs should lie. Given that the matter was at hearing for one day only, the reality of the situation is that the vast bulk of the costs had already accrued before 10th November, 2010.

14. However, that is not the end of the matter. While, as a matter of substance and reality, in this case neither side achieved the optimum outcome aimed for, taking an overview of the matter, it is probable that, if the defendant had adopted a different and more reasonable approach from the outset, the proceedings would have been unnecessary or, at any rate, truncated and less expensive. His failure to engage at all with the plaintiffs' solicitors before the proceedings were initiated, necessitated the initiation of the proceedings. More importantly, he persisted in his contention that, on the death of the Deceased, he became solely beneficially entitled to the joint assets until less than one week before the hearing, when it was too late to avoid the costs of the hearing. The defendant's conduct of his defence of these proceedings also necessitated the joinder of the Beneficiary as a plaintiff in the proceedings. In the circumstances, I think the proper course is to accede to the plaintiffs' application. Accordingly, there will be an order that the plaintiffs be paid their costs (including the reserved costs of the application to join the Beneficiary as a plaintiff) out of the joint funds before distribution. There will be no order in relation to the defendant's costs. That I believe is a fair and just approach. It is also a practical approach having regard to the circumstances.

Approved: Laffoy, J