THE HIGH COURT

[2014 No. 417 SP]

IN THE MATTER OF THE ESTATE OF THOMAS HEUSTON STANLEY DECEASED

IN THE MATTER OF THE TRUSTEE ACT 1893

ON THE APPLICATION OF KAREN STANLEY AND FRANCIS STANLEY

Ruling of Mr Justice David Keane delivered on the 15th January 2016

Introduction

1. This is an application for orders setting aside a trust ("the trust") on the basis that it is void for uncertainty. The trust came into being on the death of Mr. Thomas Heuston Stanley ("the settlor"), on the 30th of November 2012, in accordance with the terms of a will executed by him on the 18th of July 2002 ("the will").

2. The application is made on behalf of Karen Stanley and Frances Stanley ("the applicants"), who are, respectively, the daughter and widow of the settlor.

Background

3. The will appoints the applicants, together with Mr. Donal Branigan, a solicitor, and Mr Vincent Murray, an auditor, as both executors under it and trustees of the trust that it creates.

4. The relevant portion of the will, which creates the trust at issue, is the following:

> *"2. I GIVE DEVISE AND BEQUEATH all of the property of whatsoever nature or wheresoever situate of which I stand possessed to my Trustees to hold upon the following Trusts:*
>
> (a) To pay all my debts, funeral and testamentary expenses.
>
> (b) To hold as to income for my daughter KAREN, such income of the Trust to be paid within 28 days of it being received by the Trust.
>
> (c) To hold as to Capital (subject to any appointments made by them) upon Trust for:
>
> (i) My wife FRANCES STANLEY, my daughter KAREN and any spouses or issue of KAREN. Such of my, or those of FRANCES STANLEY, NEPHEWS AND NIECES as I or FRANCES STANLEY may from time to time add. All of whom are hereafter referred to as "My Beneficiaries" in such shares and at such times as my said Trustees may in their absolute discretion think fit and generally in such manner in all respects as my Trustees may in their absolute and uncontrolled discretion at any time or times or from time to time by deed or deeds revocable or irrevocable executed before the Vesting Day but without transgressing the rule against perpetuities appoint
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> (d) In default of an (sic) subject to such appointments as aforesaid my Trustees shall hold my Estate upon Trust to pay, apply or accumulate such part or parts of the income therefrom as they shall in their absolute and unfettered discretion see fit to or for the benefit of any one or more of my Beneficiaries to the exclusion of the other or others in such proportions and in such manner as my Trustees in their absolute discretion shall think fit PROVIDED that my Trustees may accumulate all or such parts of the income as an accretion to the Trust Fund by investing the same and resulting income therefrom in the manner hereinafter providing and my Trustees may apply the accumulation of any preceding year or years to or for any of the Beneficiaries in the same manner as such accumulation might have been applied had it been income arising from my Estate in the then current year and subject thereto my Trustees shall hold such accumulations and investments representing the same for such of my Beneficiaries as shall eventually become entitled to my Estate.
>
> (e) Subject to the Trust's powers and provisions herein declared and contained and to any and every exercise of such powers and Trustees shall hold the Trust Fund upon Trust for such of the Beneficiaries as shall be living on the Vesting Day and the issue then living of any such child or children who may have died before Vesting Day and if more than one in equal shares but so that such issue of a deceased child shall take equally between then as tenants in commonly only the share which their parent would have taken had he or she been living on the Vesting Day so that any part of the Capital of the Trust Fund appointed or advanced to any Beneficiary under the powers of aforesaid shall be brought to hotchpot or account in assessing such equal shares.
>
> (f) The Vesting Day shall be the day on which will have expired one hundred years from my death."

The present application

5. The applicants submit that clause 2 of the will establishes two separate trusts: a fixed trust under clause 2(b) and a discretionary trust under clause 2(c). They then argue that each of those trusts is void for uncertainty on various grounds. For reasons I will come to shortly, I do not propose to address those arguments in the present ruling, nor do I propose to address whatever argument there may be concerning whether the will creates two separate trusts (one fixed and one discretionary) or a single trust with both fixed and discretionary elements, and whether anything turns on that distinction.

6. The application is brought on very limited evidence. At several points in the analysis that follows, it will be evident that relevant information has not made available to the Court.

The capacity in which the present application is brought

7. As is evident from the foregoing, the first named applicant is the daughter of the settlor; an executor of his will; a trustee of the trust thereby created; and a beneficiary of the trust. The second named applicant is the widow of the settlor; an executor of his will;

a trustee of the trust thereby created; a beneficiary under the trust; and the holder of a power conferred on her by the trust to appoint additional beneficiaries from the class of persons comprising her nieces and nephews and those of the settlor.

8. Moreover, although the applicants have not addressed the point, it seems tolerably clear that, should the trust fail (or be declared void, as the applicants argue it should be), the settlor's estate would then fall to be distributed in accordance with the rules on intestacy, since the will contains no residuary clause. S. 67 (2) of the Succession Act 1965 provides:

> "If an intestate dies leaving a spouse and issue-
>
> (a) the spouse shall take two-thirds of the estate, and
>
> (b) the remainder shall be distributed among the issue…."

Accordingly, it would seem that the applicants have an obvious personal interest in the question of the validity of the trust as the persons entitled to share directly (and, in all probability, exclusively) in the property the subject of the settlor's estate, should the trust of which they are trustees fail. The applicants have not disclosed whether the first named applicant is the sole (or sole surviving) issue of the settlor. It may or may not be appropriate to draw an inference to that effect from the terms of the settlor's will, whereby the first named applicant is the only child of the settlor identified and provided for.

9. In relation to the status of the applicants as beneficiaries of the trust, the first named applicant has averred that she is not now, nor has she ever been, married or in a civil partnership with any person, and that she has not now, nor has she ever had, any children. However, other than averring that she has reached her majority, the first named applicant provides no further information concerning her age or her personal circumstances. No evidence whatsoever has been laid before the Court concerning whether or not the settlor or the second named applicant exercised the power of appointment vested in each to add any nephew or niece as an additional beneficiary under the trust. Counsel, for the applicants informed the Court that, according to his instructions, no such appointment has been made to date but, as Counsel well knows, his instructions are not evidence.

10. In relation to the status of the applicants as executors of the settlor's will, the first named applicant has sworn an affidavit exhibiting the grant of probate made on the 26th August 2013, whereby the will was admitted to proof and the administration of the settlor's estate was granted by the Court to each of the applicants as two of the executors named in the will. In the same affidavit, the first named applicant has averred to the truth of the matters pleaded in the special summons. The special summons pleads that no income or capital has yet been put on trust but no explanation is forthcoming as to why that has not been done, nor is any other information provided concerning the present status of the administration of the estate.

The relevant duties of trustees

11. As the very learned author of Keane, Equity and the Law of Trusts in the Republic of Ireland, 2nd ed., Dublin, 2011, states (at para. 10.01 of that work):

> "The first duty of a trustee who has accepted office is to acquaint himself with the nature of his trust. He must, accordingly, without delay, familiarise himself with the terms of the instrument creating the trusts and find out what property is subject to the trust. He is, thereafter, under a paramount duty to carry out the directions of the settlor in administering the trust."

12. Earlier in the same work, addressing the topic of those who can be appointed trustees, the author states as follows (at para 9.02):

> "A beneficiary may be appointed a trustee, but it is undesirable that he should be in any case where a conflict of interest is likely to arise. In practice, beneficiaries are frequently appointed, if for no other reason than that it is hard to find persons who are willing to act who are not going to benefit. This is perfectly lawful, but the possibility of a conflict of interest arising should always be borne in mind."

13. It seems to me that the duty upon a trustee to avoid a conflict of interest is not in any sense narrowly confined to those cases where the conflict at issue is that between a person's duties as trustee and his or her interests as a beneficiary. In Snell's Equity, 32nd ed., London, 2010 (at para. 7-018), the authors cite, as the general principle governing conflicts between the duty and interest of a trustee, the following dictum from *Bray v. Ford* [1896] A.C. 44 (at 51):

> "It is an inflexible rule of a Court of Equity that a person in a fiduciary position…is not allowed to put himself in a position where his interest and his duty conflict."

The position of the trustees on the present application

14. It is a remarkable feature of the present application for orders declaring the trust void that the applicants are themselves trustees under the will, subject as such to a paramount duty to carry out the directions of the settlor (which directions the present application would, if successful, negate) and subject also to an obligation not to permit any conflict to arise between the personal interest of each (whether as a beneficiary under the trust or as a person entitled to the trust property should the trust fail) and the duties of each as a trustee (including the paramount duty just described).

15. The position of the other trustees is scarcely less troubling. The applicants' solicitor has sworn an affidavit in which he avers that he served a copy of the proceedings on each of the other two trustees, Mr Branigan and Mr Murray, and to which he exhibits the letter that he received from each in reply. Both of those letters comprise a single sentence, amounting to the laconic recital in each instance that the trustee concerned has "no objection" to the applicants' claim. In neither of those letters, nor anywhere else in the evidence before the Court, does either of those trustees explain why he has adopted a position of disengagement or how he can reconcile having doing so with the proper discharge of his responsibilities as trustee.

The position of Mr Branigan

16. This application turns on the proper construction of the settlor's will. Indeed, the applicants contend, by reference to the arguments they make, that they can surmount the high hurdle of persuading the Court that it is entirely impossible to place a meaning on the will that would prevent the trust that it creates from being void for uncertainty.

17. That test of impossibility derives from the following statement of Budd J. in *Kilroy v. Parker* [1966] IR 309 (at 320):

> "The difficulties in interpreting a disposition which is ambiguously expressed are not enough to render the disposition void for uncertainty. To be void for this reason it must be utterly impossible to put a meaning on it."

18. In the subsequent case of *O'Byrne v. Davoren* [1994] 3 IR 373 (at 382) Murphy J. commented on that test as follows:

> "the significance of the judgment of Budd J.…is the determination with which he sought to salvage the validity of the particular testamentary trust notwithstanding the difficulties created by the manner in which the testatrix had expressed her intentions. Again I could respectfully agree that the learned judge was entirely correct in that course and as far as possible I believe that a similar approach should be taken in the present matter."

19. S. 90 of the Succession Act 1965 states:

> "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."

20. The decision of the Supreme Court in Rowe v. Law [1978] IR 55 makes clear that, under s. 90, extrinsic evidence will be admissible where: (a) there is ambiguity on the face of a will; and (b) it is necessary to ascertain the intention of the testator.

21. Accordingly, if the applicants can make any headway with their argument that there is some ambiguity in the terms of the will creating the trust, then that will in turn, at least arguably, open the door to the admission of extrinsic evidence of the settlor's intentions to the extent that it is appropriate or necessary to consider them in order to resolve that ambiguity.

22. In circumstances where Mr Branigan is named as an executor and trustee under the will; where the copy of the will admitted to probate has been certified by his firm; where the grant of probate was extracted by his firm; and where the will appears to have been witnessed by two persons who describe themselves as legal secretaries and who each give as their address that of Mr Branigan's firm, it seems to me very possible, if not probable, that Mr Branigan may be in a position to provide some relevant extrinsic evidence in that event.

23. In view of the duties and obligations of Mr Murray and Mr Branigan as trustees; the potential conflict of interest on the part of the applicants who are the only other trustees; and the possibility that Mr Branigan, in particular, may be in a position to provide evidence relevant to the present application, it seems to me entirely inappropriate that the involvement of Mr Murray and Mr Branigan in these proceedings should be limited to the provision by each of a bare statement that he does not object to the grant of an Order setting aside the trust.

24. On the contrary, in order to properly exercise the supervisory jurisdiction vested in this Court, I require each of the trustees to apprise the Court of the steps that he or she has taken to date both to become acquainted with the nature of the trust and to carry out the settlor's directions. On the limited evidence so far presented, a disturbing (though, perhaps, misleading) impression has been created that the instant application arises, not in the context of an attempt by the trustees to obtain some necessary clarification of the meaning of the trust instrument in order to enable the proper discharge of their duties, if that is possible, but rather in the context of an attempt by some or all of the trustees to repudiate those duties by impugning the validity of the trust that imposed them. It is probably superfluous to observe in that context that, while the role of a trustee can be an onerous one (especially in a case like this where, atypically, the trust instrument contains no remuneration clause), there are mechanisms available whereby a trustee who is unwilling to act may disclaim his or her appointment or, if he or she has accepted it, may seek to be discharged from that position.

Procedural issues

25. I have already referred to the failure of the applicants to state whether they have brought these proceedings in their capacity as trustees or in some other capacity, such as that of the persons directly entitled to the trust property in the event that the trust is found to be invalid.

26. Order 4, rule 9 of the Rules of the Superior Courts ("RSC"). provides as follows:

> "If the plaintiff sues or the defendant is sued in a representative capacity, the indorsement shall show in manner appearing in such of the forms in Appendix B, Part I, as shall be applicable to the case, or by any other statement to the like effect, in what capacity the plaintiff or defendant sues or is sued."

27. Turning to Appendix B, Part I of the RSC, it contains the following precedent:

> "Trustee
>
> The plaintiff's claim is as [or the plaintiff's claim is against the defendant as] trustee under the will of AB…."

28. Were the Court to infer from the trustees failure to plead that they sue in their capacity as trustees that they do not sue in that capacity, then a number of questions follow.

29. The first question is who is to represent the trust? The applicants have brought the present proceedings *ex parte.* Order 54, rule 1 of the RSC provides in material part that:

> "…[T]he trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as…cestui qui trust under the trust of any deed or instrument…may take out a special summons for relief of the nature or kind specified in Order 3 (1) to (7) inclusive."

30. Order 54, rule 2 provides in relevant part that, where the summons has been taken out by the executors or trustees, the persons to be named as defendants in proceedings covered by the foregoing rule shall be, at least in the first instance, one or more of those persons claiming an interest in the trust as beneficiary (or, in the words of the rule, as *'cestui que trust'*). Since, in the unusual circumstances of the present case, that rule would give rise to the unhelpful, if not absurd, result that the applicants would be suing themselves, it is obviously necessary to move beyond 'the first instance' in seeking to ensure the effective and efficient administration of justice in this case.

31. Order 54, rule 2 (2) of the RSC provides that where a summons of the kind at issue is taken out by a person other than an executor or trustee, the appropriate defendants at first instance are the executors or trustees. This rule, while not of immediate

application in the circumstances of the present case, demonstrates what many would argue is the self evident proposition that the interests of the trust should be represented in the face of any challenge to the validity or operation of that trust.

32. In advancing the quest for an appropriate legitimus contradictor in the unusual circumstances of this case, some assistance can be gleaned from the case law. *Kilroy v. Parker* [1966] IR 309 was a will construction suit brought by the executors of that will in that capacity. Very properly it seems to me, the defendants in that case included the sole surviving brother of the deceased (presumably, as the person entitled to benefit on an intestacy, should the trust completely fail) and two separate classes of potential beneficiary under the trust. It seems to me that the pertinent principle demonstrated by the approach adopted in that case is that different classes of beneficiary (or, in my view, different beneficiaries within the same class) may have different interests necessitating separate representation on an issue of construction.

33. In the subsequent case of *O'Byrne v Davoren* [1994] 3 I.R. 373, again the plaintiff brought a will construction suit in his capacity as executor. The first defendant was joined in the proceedings as representative of the potential beneficiaries under a residuary bequest and the second defendant was joined as representative as those who would benefit in the event of an intestacy.

34. The obvious difficulty in this case is that the persons purporting to prosecute the present will construction suit ex parte are persons among the trustees and executors; among the potential beneficiaries (indeed, it would seem, the only extant potential beneficiaries); and comprise the persons who, it appears, would be entitled to the trust property should the trust fail.

35. Order 15, rule 8 of the RSC provides as follows:

> "Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court may, at any stage of the proceedings, order any of such persons to be made parties either in addition to or in lieu of the previously existing parties…."

36. It seems to me that, as the foregoing rule suggests, it would be quite improper to issue proceedings impugning the validity of a trust in a non-trustee capacity without joining the other trustees of the relevant property or estate. While the applicants in this case have put the other trustees informally on notice of the present ex parte application, that cannot be sufficient since it leaves the applicants' claim without a legitimus contradictor and deprives the wider class of potential beneficiaries (comprising any person who may yet come within that class other than the applicants and, thus, will come within a separate class of beneficiaries without any evident residual or other claim to the trust property) of any representation of its interests in the face of the applicants' claim to orders that would, if granted, extinguish those interests.

37. On the other hand, if the applicants are purporting to prosecute these proceedings in their capacity as trustees, then that would give rise to a number of problems, quite apart from their obvious breach of the rule requiring them to include an express plea to that effect. First, a question would then arise concerning whether or not it is permissible for the applicants as trustees to bring proceedings challenging the validity of the trust in respect of which they are more aptly the appropriate defendants.

38. Second, even if it were accepted that some circumstance might be imagined in which it may be appropriate to allow a trustee to bring such proceedings, it is difficult to see how the present action could fall properly within that category.

39. Third, the present proceedings have not been brought in the form appropriate where a trustee or trustees require the resolution of a question or questions arising upon the construction of a trust instrument.

40. Order 4, rule 4 of the RSC, provides (in relevant part):

> "The indorsement of claim … on a special summons shall be entitled "SPECIAL INDORSEMENT OF CLAIM", and shall state specifically and with all necessary particulars the relief claimed and the grounds thereof. The indorsement of claim on … a special summons shall be in such one of the forms in Appendix B, Part III, as shall be applicable to the case, or, if none be found applicable, then such other similarly concise form as the nature of the case may require."

41. Precedent No. 2 in Appendix B, Part III, section 2 of the RSC, recites as follows:

> "Construction
>
> The plaintiff's claim is as the executor and trustee of the said will mentioned in the title hereof of XY,deceased, for the determination of the following questions arising (in the administration of the estate, and) upon the construction of the said will of the said testator, and in the events that have happened, viz (Set out questions in form which will enable them as far as possible to be answered "yes" or "no") and that the cost of the proceedings may be provided for."

42. There is a stark contrast between proceedings constituted in the manner just described and the present proceedings. Here, the applicants do not present disinterestedly particular questions for the consideration of the Court to enable them to carry out their duties as trustees, in so far as may be possible in accordance with the terms of the trust instrument. Instead, they seek a very particular construction of the trust instrument rendering it void for uncertainty, in support of an application for specific terminal reliefs, namely, Orders declaring the trust void, and they purport to do so, against the background of an apparent conflict of interest (whereby they would directly benefit in their personal capacity from such Orders), in the absence of any *legitimus contradictor*. It is difficult to see how, in the exercise of its supervisory jurisdiction, the Court could permit the proceedings as presently constituted to proceed in that way.

Conclusion

43. For the reasons set out above, I have come to the conclusion that the presence before the Court of Mr Murray and of Mr Branigan in the capacity of each as trustee of the trust at issue is necessary to enable the Court effectually or completely to adjudicate upon and settle the questions involved in the present proceedings. Accordingly, both in the exercise of this Court's supervisory jurisdiction and pursuant to the terms of Order 15, rule 13 of the RSC, I hereby Order that Mr Vincent Murray and Mr Donal Branigan be joined or added as defendants to these proceedings in the capacity of each as trustee of the trust at issue and I will adjourn the present application to afford the applicants (or plaintiffs, as it seems to me those parties should more properly be described), a reasonable opportunity to take the appropriate consequential steps in accordance with the RSC, if the present proceedings are to be maintained. It is for that reason that I do not propose to adjudicate at this stage on the application as it was presented to the Court.