THE HIGH COURT

[RECORD NO 2017 212 SP]

BETWEEN

PHILIP DAVIES AND JOAN DAVIES

PLAINTIFFS

AND

MARIAN HUTCHINSON

DEFENDANT

JUDGMENT of Ms. Justice O'Regan delivered on the 20th day of November, 2017

Issues

1. The plaintiffs herein are seeking four substantial reliefs against the defendant in respect of the administration of the estate of Daphne Conlon, deceased who died on 4th December 2004 (herein after referred to as the deceased). The reliefs include an order under s. 26 (2) of the Succession Act of 1965 revoking or cancelling the grant of probate which issued to the defendant on 13th December 2005, thereby removing her as executrix in the estate of the deceased, together with an ancillary order under s. 27 (1) of the 1965 Act granting administration to a third party.

2. In addition, the plaintiff seeks the relief of a direction to the defendant to render within a specified time, a true and perfect inventory and account of the estate and in the alternative an order compelling the defendant within a specified time to complete the administration and distribution of the estate.

3. The contention between the parties in the matter that came before the Court on 6th November 2017 was relative to the removal of the defendant under s. 26 (2) of the 1965 Act, aforesaid.

4. Written submissions were not tendered to the Court by either party.

The proceedings

5. To ground the special summons of the 12th May 2017 seeking the aforesaid relief, Philip Davies swore an affidavit bearing the date 3rd of May 2017 which included various exhibits. The defendant swore an affidavit of 1st November 2017, in resisting the application of the plaintiffs wherein she also referred to various exhibits.

The arguments

6. It is common case that following the extraction of the grant of probate a claim was made pursuant to s. 117 of the Succession Act 1965 by the estranged son of the deceased and proceedings in this regard commenced in January 2006. These proceedings were ultimately settled in June 2010 for the total sum including costs of €92,500. The plaintiffs first consulted Messrs Ronan Daly Jermyn Solicitors in August 2009 (which solicitors have continued to advise the plaintiffs in respect of the distribution of the deceased's estate to the date of the within hearing) as they were concerned as to the delay in the dealing with the s. 117 proceedings. On the 18th March 2010 the plaintiffs through their solicitors authorised the settlement thereof for the inclusive figure of €100,000, however the plaintiffs complained, and the defendant does not address this complaint in the replying affidavit, that the defendant did not react constructively to the plaintiffs' suggestion.

7. Following the settlement of the s. 117 proceedings, in January 2011, the defendant raised a bill of costs in excess of the sum of €306,000 and as a consequence, the plaintiffs made a complaint to the Law Society. However, the Law Society did not intervene as the defendant had submitted her fees for taxation.

8. The taxation process dragged on and according to the plaintiffs this was effectively because of various obstacles presented by the defendant. In any event an agreement in principle was reached between the parties on 29th May 2015 which was subsequently recorded in a written agreement on 3rd February 2016 (although the written agreement records a date of 3rd February 2015 the parties accept that this agreement was signed on 3rd February 2016).

9. At para. 18 of the grounding affidavit of Mr. Davies, the plaintiffs complained that the defendant failed to comply with the agreement and the plaintiffs reserve their position. During submissions the plaintiffs suggested that the defendant had resiled from the agreement and subsequently Counsel for the plaintiffs suggested that as a result of the failure on behalf of the defendant in complying with the agreement, the plaintiffs were resiling from same. When asked how the plaintiffs communicated this intimation of termination by the plaintiffs, the plaintiffs suggested same was by virtue of the grounding affidavit of Mr. Davies, however, notwithstanding that the grounding affidavit of Mr. Davies ran to eight pages, nowhere therein is it suggested that the plaintiffs were thereby claiming that the plaintiffs were thereby resiling from the agreement of the 3rd February 2016 because same was abandoned or frustrated by the defendant.

10. At para. 12 of the replying affidavit of the defendant of the 1st November 2017 the defendant complained that she heard nothing in respect of the cash account furnished to the plaintiffs. In this regard the terms of settlement of 3rd February 2016 records that there was an agreement that the beneficiaries would authorise payment of the total sum of €135,000 to the executrix by way of all costs. But insofar as their agreement contemplated a possible termination thereof, same is contained in the condition no. 2 thereof and not in any other condition.

Condition no. 2 reads:

"The executrix has furnished to the beneficiaries full cash account and distribution account. The beneficiaries have one month from the date of this agreement to approve the cash account and if they do not, then this agreement is at an end in its entirety."

11. In inter-party correspondence exhibited in the affidavits, the defendant under cover letter of 4th July 2017 furnished completed CAT returns "in accordance with the agreement signed and dated the 3rd February 2016".

12. In a response letter on behalf of the plaintiffs of the 12th July 2017 it was indicated that the foregoing letter of 4th July 2017 was being reviewed and the plaintiffs reserved their position in relation to the proceedings. In a follow up letter from the plaintiff's

solicitors of 13th July 2017 the plaintiffs called for a distribution of monies held by the defendant in the sum of approximately €400,000, immediately without prejudice to any claim right and remedies against the defendant. Thereafter and as and from the 18th July 2017 until ultimate payment in late October 2017 the defendant attempted to link the distribution of the €400,000 to agreement that seemingly would resolve all outstanding issues between the parties. The plaintiffs rejected this condition of payment or distribution and continued to rely on the contents of the aforesaid letters of the 12th and 13th of July 2017.

13. In a letter of the 5th October 2017 the defendant's solicitors sought confirmation from the plaintiffs that the relevant distribution would be in full compliance with the terms of the agreement entered into between the two parties and the payment would be a full and final settlement of all or any claims.

14. Notwithstanding reference to the agreement of *inter alia*, the 3rd of February 2016 in the letter of the 4th of July 2017 and reference to an agreement entered into between the parties in the letter of the 5th October 2017 the plaintiff's solicitors did not raise any point on the continued subsistence or otherwise of the agreement of 3rd February 2016.

The law

15. The parties agreed that the most recent up to date Supreme Court judgment on the issue of a removal of an executor under s. 26 (2) of the Succession Act 1965 is the Supreme Court judgment in *Dunne v. Heffernan* [1997] 3 IR 431. The unanimous judgment of the five member Supreme Court was delivered by Lynch J. where it was stated (442-444):

> *"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… [W]hen an executor is appointed and proves the will and thus accepts the duty of administering the testator's estate he or she can be removed, not pursuant to s. 27, sub-s. 4, but pursuant to s. 26, sub-s. 2 of the Act of 1965, but there must be serious grounds for overruling the wishes of the testator.… [W]here 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 rule 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."*

16. During the course of his judgment Lynch J. referred to *Chaine-Nickson v. Bank of Ireland* [1976] IR 393 where the trustees of a discretionary trust refused to render accounts of the trust property to the plaintiff who was a potential beneficiary. In that case the trustees were ordered by the High Court to render such accounts but no question was ever raised that they might be removed as such trustees by reason of their unwarranted refusal to render accounts.

17. Lynch J. also referred to In *re Martin Glynn (deceased)* [1992] 1 IR 361 where the person nominated as executor under the Will of the deceased was in fact the convicted murderer of the deceased's sister. Lynch J. was of the view that In *re Martin Glynn (deceased)* had no relevance to the case at hand.

18. In *Flood v. Flood* [1999] 2 IR 234 a petition to remove an executor came before Macken J. in the High Court. The reason being that the executor was a potential debtor of the estate and was refusing to make the relevant payment to the estate. Macken J. stated (243-244):

> *"A court should not remove an executor from his role, unless it is satisfied that it is necessary so to do. It is clear from the decision in Dunne v. Heffernan [1997] 3 I.R. 431, that the Supreme Court considers this should only occur where the court is satisfied it must be done and that Court made it clear that it is a very serious step to take. It is not justified because one of the beneficiaries appears to have felt frustrated and excluded, but requires serious misconduct and/or serious special circumstances on the part of the executor to justify such a drastic step."*

19. The plaintiffs rely on two additional cases, which I consider of limited value namely:

> a) *Spencer v. Kinsella* [1996] 2 ILRM 401 being a judgment delivered by Barron J. on 12th March 1996 involving the removal of trustees. It was acknowledged that the threshold for such removal would be the welfare of the beneficiaries - was the continued status of the trustee as such detrimental to the welfare of the beneficiaries? At para. 13 of the judgment of Laffoy J. in *Scally v. Rhatigan* [2012] 2 IR 286 the Court following reference to the judgment in *Spencer v. Kinsella* aforesaid, notes that Delany in "*Equity and the Law of Trusts in Ireland*" (5th Ed. 2011) comments on the judgment of Barron J. and expresses that judgment as being useful in that it confirms that the overriding principle that the court must have regard in exercising its power to remove trustees is the welfare of the beneficiaries however the authors of the textbook acknowledge that the removal of an executor involves a stricter approach as per the Supreme Court decision in *Dunne v. Heffernan*.
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> b) *Scally v. Rhatigan* [2012] 2 IR 286. This case did not in fact involve a removal of an executrix under s. 26 (2) of the 1965 Act but rather involved proceedings seeking a declaration that the plaintiff was not an appropriate person to act as executor and therefore that case in my view comes within the ambit of the situations where the grant may be passed over more readily than someone appointed where that party has accepted the appointment by proving the Will. Furthermore, in *Scally* there was professional conflict as opposed to personal conflict. In that regard, at para. 50, Laffoy J. states:
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> > *"Having regard to her past professional involvement, it is possible to conclude on the basis of a probative standard that goes way beyond the standard which the defendant has to meet, that the plaintiff could not make full disclosure without breaching her duty of confidentiality to clients for whom she has acted in the past. The Court cannot allow that situation to arise."*
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> Laffoy J. went on to find that such a conflicted position amounted to "serious special circumstances" in the sense intended by Lynch J. in *Dunne v. Heffernan* and therefore Laffoy J. considered it inappropriate to grant probate of the Will to the plaintiff.

20. The final case referred to is Dunne v. Dunne [2016] IECA 269 being a judgment of Peart J. in the Court of Appeal. In his judgment, at para. 44, Peart J. stated:

> *"In my view, absent some serious misconduct (not alleged in the present case) the conflict must be one which has the capacity to hinder or prevent the proper and fair determination of the issue that has arisen. One could describe this as an operative conflict – in other words it is a conflict which operates unfairly against the interests of another party who is therefore at a meaningful or significant disadvantage or prejudice in the resolution of the issue, and where the appointment of another representative would remove that disadvantage or prejudice."*

Peart J. concluded with the view that the trial judge took a too narrow view of the question of conflict of interest and failed to give sufficient weight to the question of necessity.

Decision

21. The particulars of the complaint made by the plaintiffs as against the defendant are set out in para. 19 of the special summons. These particulars are reproduced in the grounding affidavit of Mr. Davies. No particulars are included as to the compliance or otherwise with the agreement of 3rd February 2016. Having regard to the totality of the particulars mentioned it does appear that the bulk of those are effectively subsumed by the agreement of 3rd February 2016. and in my view there is currently insufficient evidence before the court to consider that this agreement can no longer be considered of relevance between the parties given that the evidence before the court is to the effect that if termination occurred under condition 2 it was because the Plaintiffs didn't consent or reject the relevant accounts within the anticipated one month period.

22. The plaintiffs consulted their own solicitors in August 2009 but did not in fact take any steps to challenge the administration to the estate prior to the institution of the within special summons although I do note that a plenary summons issued as against the defendant by the plaintiffs in February 2017 which was served in September 2017. There is no statement of claim to date in respect of such a plenary claim.

23. Although the plaintiffs in the affidavit of Mr. Davies suggest that the agreement of 3rd February 2016 was far from ideal from the plaintiffs' point of view, nevertheless this in my view is a comment which might be made about any compromise – a compromise is always less than ideal however it may be something manageable.

24. The plaintiffs have not sought to dispute the assertion in the affidavit of the defendant at para. 12 that she has not heard anything in respect of the cash account furnished prior to or at the time of execution of the agreement of 3rd February 2016.

25. The failure to conduct the s. 117 proceedings in a cost effective and timely manner together with the failure to provide charging as required by s. 68 of the Solicitors (Amendment) Act 1994 and the raising of manifestly disproportionate and excessive fees were resolved by the entry into the agreement of 3rd February 2016.

26. It is clear from correspondence that there has been significant engagement between the parties following the institution of the within proceedings.

27. I have great difficulty in accepting that the administration of the estate is now completed as asserted by the defendant not least because of the failure on the part of the defendant to address the interest which might have accrued in respect of monies held on behalf of the estate from 2008 to in or about July 2017. When asked as to the status of this interest the defendant's Counsel confined himself to answering the question as though an interest query were raised as between July 2017 and October 2017 when the defendant furnished a bank draft to the behalf of the plaintiffs.

The plaintiffs asserted that the defendants' misconduct arose because of gross delay, the failure to render accounts, excessive fee, non-accounting for interest since 2008 and the withholding of monies contingent on a waiver of all claims. The plaintiffs suggest that the conflict of interest arises as between the defendant and the plaintiffs arise because of the dispute between them on the foregoing issues and as between the defendant and the estate should the estate be administered by a third party and inaction or a cause of action against the defendant uncovered.

The Plaintiffs argument under section 26 (2) of the 1965 Act is premises on looking behind the Agreement of the 03/02/2016 without reference to condition 2 thereof and on the basis that the Plaintiffs were merely reserving their position with regard to the Defendant's asserted breach which has been denied and the Defendant asserts that by their silence she assumed that the accounts had been agreed (condition 2 does not specify how agreement on the accounts was to be communicated). I do not accept that it is appropriate to look behind the agreement in the current application by reason of the foregoing and:-

a. there is no evidence before this court that either party attempted to revert to the taxation process being the issue resolved by the agreement;

b. there is no evidence as to when the agreement terminated;

c. the evidence by affidavit does not specifically claim a termination;

d. the jurisprudence relied on was limited to s.26 (2) of the 1965 act only;

e. oral submissions did not develop the claim of termination other than the Plaintiffs saying same was terminated by virtue of their grounding Affidavit which I do not accept.

28. The asserted conflicts appear to me to be speculative in assuming the 2016 agreement terminated prior to these proceedings (or since then by some unilateral action of the plaintiffs which is far from clear) and are relative to proceedings which have only recently been served with no statement of claim to date. Therefore I am satisfied that the asserted conflicts do not amount to special circumstances or serious grounds for a removal of the testator at this time.

29. In conclusion therefore I am not satisfied that the plaintiffs have achieved the high threshold required to remove an executrix at this time, however the delays in completing the administration of the estate are most unsatisfactory and at a minimum there remains outstanding a query in respect of accumulated interest from 2008 to July 2017.

30. In these circumstances therefore the reliefs sought at paras. 2 and 3 of the special summons are refused as I am not satisfied that it is necessary to do so or that the asserted conflicts are sufficient to grant the relevant orders.

31. Nevertheless, certain orders and directions would in my view be required to resolve any outstanding issues vis-à-vis completion of the administration of the estate and I will hear Counsel further as to the appropriate orders to be made in this regard under the relief sought at paras. 4 and 5 of the special summons.