Neutral Citation [2012] IEHC 559

THE HIGH COURT

[2011 No. 715 SP]

IN THE MATTER OF PART VI OF THE SUCCESSION ACT 1965, AS AMENDED AND IN THE MATTER OF THE ESTATE OF THOMAS REBURN, DECEASED, LATE OF DERNASCROBE, CARRICKMACROSS IN THE COUNTY OF MONAGHAN

BETWEEN

MICHAEL RENNICK AND MARIE BARRETT

APPLICANTS

AND

ERIC RENNICK AND MARY RENNICK

RESPONDENTS

Judgment of Ms. Justice Laffoy delivered on 21st day of December, 2012.

The issue

1. The issue which the Court has to address in this judgment is who shall bear the cost of these proceedings in which the Court made an order on 30th April, 2012 by consent of the parties.

The background to the proceedings

2. The proceedings relate to the administration of the estate of Thomas Henry Reburn (the Deceased) who died on 11th March, 2005 intestate. Letters of administration intestate to the estate of the Deceased issued from the Principal Probate Registry to the plaintiffs on 20th November, 2009. The plaintiffs were lawful first cousins of the Deceased, as was the first named defendant (Mr. Rennick). The second defendant (Mrs. Rennick) is the wife of Mr. Rennick, and she was not related to the Deceased.

3. Prior to the plaintiffs extracting the grant of letters of administration there had been correspondence passing between the solicitors acting for Mr. Rennick and solicitors acting for Mrs. Rennick, on the one hand, and solicitors acting for the plaintiffs on the other hand for approximately two and a half years. Initially, Mr. Rennick, for whom G. Jones & Co., Solicitors, acted at the time, intended extracting a grant of letters of administration to the estate of the Deceased and the first named plaintiff was informed of this by letter dated 17th May, 2007 from G. Jones & Co. Mackey & Sullivan, Solicitors, who act for the plaintiffs in the proceedings, who originally acted for the first named plaintiff, commenced correspondence with G. Jones & Co. in May 2007. Ten months later, in response to a request for information as to the then current position in relation to the application for the grant of letters of administration from Mackey & O'Sullivan, G. Jones & Co. informed Mackey & O'Sullivan that the matter was complicated, in that they were in receipt of a claim from Mrs. Rennick, who alleged that she was owed money for work done and services rendered to the Deceased. Immediately, Mackey & O'Sullivan raised the issue that Mr. Rennick would be compromised if he extracted a grant, given that Mrs. Rennick was his wife.

4. The plot thickened a month later when, by letter dated 2nd April, 2008, Pierce O'Sullivan & Associates, on behalf of Mrs. Rennick, submitted a claim for €67,560 against the estate of the Deceased to G. Jones & Co. In fact, a caveat was entered in the Probate Office on behalf of Mrs. Rennick, in her capacity as creditor, in September 2008. At that stage, G. Jones & Co. prudently decided that they should not continue to act for Mr. Rennick in extracting a grant of administration and so informed Mackey O'Sullivan. That led to the decision by the plaintiffs to apply to be appointed administrators of the estate of the Deceased. Mackey O'Sullivan who were acting for them sought the file in relation to the estate of the Deceased from G. Jones & Co., whose response was that they did not have the authority of Mr. Rennick to release the file. G. Jones & Co. then fell out of the picture and Pierce O'Sullivan & Associates informed Mackey O'Sullivan that they were acting for both Mrs. Rennick and Mr. Rennick by letter of 30th April, 2009. Thereafter the correspondence passed between Mackey O'Sullivan, on behalf of the plaintiffs, and Pierce O'Sullivan & Associates, on behalf of the defendants. By June 2009 Mrs. Rennick had dropped her claim against the estate of the Deceased, save in respect of outlays which she alleged she had incurred on his behalf.

5. By late August 2009 a new issue had arisen in relation to a joint account with Irish Nationwide Building Society in the joint names of Mrs. Rennick, Mr. Rennick and the Deceased at the date of the death of the Deceased. The position of Mrs. Rennick was that the balance in the account passed to the surviving joint tenants on the death of the Deceased. One of the issues raised in the proceedings was the ownership of the monies in that account. The monies in question (€43,130.73) were returned as assets of the Deceased on the Inland Revenue Affidavit filed with the Revenue Commissioners by Mackey O'Sullivan. The only other asset of substance which the Deceased owned at the date of his death was a residence and farmland comprising approximately twenty four acres, which were valued at €230,000. Accordingly, the net value of the estate as shown on the Inland Revenue affidavit was only €270,733.24.

6. As I have already outlined, the grant of the letters of administration intestate issued to the plaintiffs on 20th November, 2009.

The proceedings

7. The proceedings were initiated by special summons which issued on 25th October, 2011. The proceedings were entitled "The High Court - Probate". The word Probate should not have appeared in the title. In the special summons the plaintiffs sought the determination of two questions arising on the administration of the estate of the Deceased, namely:

> (a) whether all reasonable steps had been taken to identify the next of kin of the Deceased and, if not, what steps should be taken to identify the next of kin; and
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> (b) whether the defendants held the funds in the Irish Nationwide Building Society account in trust for the estate of the Deceased, or, alternatively, whether they were beneficially entitled to the funds by right of survivorship.

Further, the plaintiffs sought an order directing the defendants to provide an account of their dealings with, including rents, profits and income derived from, the property comprised in the estate of the Deceased.

8. The proceedings were grounded on the affidavit of the first named plaintiff, which was sworn on 25th October, 2011. As regards the question as to the identity of the next of kin of the Deceased, there was exhibited in that affidavit a genealogical report furnished by Massey & King Ltd. with their letter of 23rd February, 2010 and a revised report furnished with their letter of 26th May, 2010. It was also disclosed in the affidavit that the plaintiffs had caused notices for the purposes of tracing the next of kin of the Deceased to be published in the Belfast Telegraph, the Irish Independent and the Northern Standard in July 2011. The result of the steps taken by the plaintiffs to ascertain the next of kin was their conclusion that the Deceased was survived by four first cousins on the maternal side, namely, the plaintiffs and Mr. Rennick and Gordon Rennick, who resides in the USA, and one first cousin on the paternal side, William Reburn, who resides in County Dublin.

9. The first named plaintiff also dealt with the status of the joint account in Irish Nationwide Building Society in the grounding affidavit, noting that the information furnished by G. Jones & Co. in their letter of 31st July, 2007 was that the account had existed for the previous eight years and that "the origin of the funds belonged to . . . [the] Deceased" and the instructions they had received from Mr. Rennick and Mrs. Rennick were that it was at all times the intention of the Deceased that the funds should go to the surviving account holders, namely, Mrs. Rennick and Mr. Rennick. The thrust of the plaintiffs' position was that the monies in the account belonged to the estate of the Deceased and not to Mrs. Rennick and Mr. Rennick and correspondence was exhibited in which, in effect, Mrs. Rennick and Mr. Rennick were asked to confirm that they had dropped their claim to those monies, but there had been no response.

10. There was also implicit in the plaintiffs' claim for an account from the defendants of their dealings with the property of the Deceased the contention of the plaintiffs that the defendants had taken the rents and profits of the agricultural land from 2005 to 2008. There was also a complaint about the failure of the defendants' then solicitors to hand over the file in March 2009, which, it was contended, made the plaintiffs' solicitors' task of identifying the assets of the Deceased significantly more difficult than it might otherwise have been.

11. In response to the grounding affidavit, Mrs. Rennick swore an affidavit on 6th December, 2011, which was expressed to be sworn on her own behalf and on behalf of Mr. Rennick. The most significant averment in that affidavit is to be found in the last paragraph, in which Mrs. Rennick made it clear that at no time had she waived her entitlement to the monies in the joint account in Irish Nationwide Building Society by right of survivorship.

12. The following further affidavits were filed in the proceedings:

> (a) an affidavit sworn by the first plaintiff on 13th January, 2012, which addressed both the plaintiffs' claim for an account and the question in relation to the joint deposit;
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> (b) an affidavit sworn by Mrs. Rennick on 21st March, 2012, which set out the dealings of Mr. Rennick and Mrs. Rennick with the Deceased's property; and
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> (c) an affidavit sworn by the first plaintiff on 27th April, 2012, which disputed that Mrs. Rennick and Mr. Rennick did not have to account to the estate of the Deceased in respect of the assets of the Deceased, by, for instance, raising an issue in relation to a lease of the Deceased's land coupled with the milk quota attached to the lands.

13. The proceedings were transferred from the Master's Court and first appeared in the Chancery List on 26th March, 2012, on which date, by consent of the parties, the proceedings were adjourned to 30th April, 2012. On 30th April, 2012, by consent of the parties, the Court made an order in which the two questions raised on the special summons were answered as follows:

> (a) as to whether all reasonable steps had been taken to identify the next of kin of the Deceased, the answer was yes; and
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> (b) as to whether the defendants held the funds the subject of the Irish Nationwide Building Society account in trust for the estate of the Deceased, the answer was yes also.

In addition, it was ordered that the defendants do provide an account of their dealings with, including the rents, profits and income derived from, the property comprising the estate of the Deceased. The proceedings were then adjourned so that the Court could hear arguments in relation to costs.

14. By the time the Court heard the arguments in relation to liability for costs, Mrs. Rennick had filed two further affidavits, one sworn on 26th June, 2012, in which she set out to demonstrate that the defendants do not have to account for any sum to the estate of the Deceased and a further affidavit sworn on 12th July, 2012. Nonetheless, the Court was told by counsel for the plaintiffs that the plaintiffs do not accept that the defendants have not yet provided an adequate account. The issue whether they have or have not is not before the Court. In relation to affidavits which Mrs. Rennick swore after the order of 30th April, 2012, the only comment I have to make is that I do not consider that the question of the state of Mr. Rennick's health goes to the issue of costs.

The law

15. It was submitted on behalf of the defendants that, in determining where liability for costs should lie, the Court should have regard to the decision of the Supreme Court in *Elliott v. Stamp* [2008] 3 I.R. 387. In that case, the Supreme Court applied the principle which had been reiterated forty years earlier by the Supreme Court in *In bonis Morelli*: Vella v. Morelli [1968] I.R. 11. In my view, neither decision is relevant to the circumstances of this case. The underlying rationale of an unsuccessful party in a probate action having his or her costs paid out of the estate of the testator where two questions (was there reasonable ground for litigation?; was it conducted *bona fide?)* are answered in the affirmative was explained by Budd J. in *In Bonis Morelli* as follows (at p. 34):

> "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 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."

These proceedings did not concern the testamentary disposition of property nor did they concern execution of testamentary documents. The Deceased died intestate. Therefore, neither the decision in In bonis Morelli nor the decision in Elliott v Stamp has any relevance to these proceedings.

16. Counsel for the plaintiffs, on the other hand, submitted that two decisions of the High Court are relevant: the decision of this Court in *Young v. Cadell* [2006] IEHC 49 and the decision of Herbert J. in *O'Connor v. Markey* [2007] 2 I.R. 194. In my view, the latter decision is of particular relevance. In that case, a dispute arose in the course of the administration of the estate of a testator between the first and second defendants, both beneficiaries under the will. The first defendant, the principal beneficiary under the will, claimed that the payment of several outstanding debts was solely the liability of the testamentary estate and that he was not obliged personally to discharge the debts. The claim was adverse to the second defendant, whose residuary request would be substantially or entirely consumed by the payment of those debts. The outcome of the substantive action was that the first defendant was obliged personally to indemnify the estate in respect of the whole amount of those debts. In other words, the first defendant lost. Having rejected a submission that *In bonis Morelli* was of relevance, Herbert J. went on to make the following observations (at para. 7), which I think are of particular relevance to this case:

> "By contrast, the instant application bore all the hallmarks of contentious litigation between beneficiaries which did not in any way touch upon the capacity of the testator or the state in which he had left his testamentary papers. The present application arose in the course of the administration of the estate, was not a probate action, but neither was it an ordinary administration suit. To all intents and purposes it was a hostile *lis inter partes* between two beneficiaries under the will. It related to the conduct of the testator's business by the first defendant while the testator was still alive and to the issue of whether the first defendant was or was not obliged to pay the particular debts as they arose, so that they would not become a burden upon and payable out of the estate on the death of the testator. The special administrator was in reality only a nominal plaintiff to enable the opinion of the court to be obtained by way of a special summons for directions in the course of the administration. The many issues of fact and of law were litigated as a proceeding *inter partes* between the first defendant and the second defendant on their own evidence, and the evidence of witnesses called by each of them."

While I have stated that the forgoing passage is relevant to these proceedings, it would be more accurate to state that it is relevant to two aspects of the proceedings.

17. Order 3 of the Rules of the Superior Courts lists the circumstances in which proceedings may be initiated by special summons, one being the determination of any question arising in the administration of any estate or trust or the ascertainment of any class of creditors, legatees, devisees, next of kin or others. The question in relation to the identity of the next of kin was undoubtedly properly brought by way of special summons and, in my view, it was prudent of the plaintiffs, as personal representatives of the Deceased, to bring it before the Court.

18. However, the question in relation to the joint deposit account, if Mrs. Rennick had not made the concession she had made, would, in reality, have been a *lis inter partes* between the plaintiffs, as personal representatives of the Deceased, on the one hand, and Mrs. Rennick, on the other hand, and would have had to go to plenary hearing. That did not happen because Mrs. Rennick conceded that the estate of the Deceased should get the monies on joint deposit. It was emphasised by counsel for the defendants that Mrs. Rennick still feels that the monies on joint deposit were hers and Mr. Rennick's but, despite her strong views, she accepted that on balance she should make the concession. In this context, counsel for the defendants relied on observations made by Kearns J. in the Supreme Court in *Elliott v. Stamp*, which were *obiter dictum.* Kearns J. stated that it was preferable, where possible, for a defendant to an action challenging the validity of a will to disclose all relevant documentation in advance upon which he intends to rely at the trial of the matter, so that claims which might no longer be made in the light of such disclosure might be reconsidered and withdrawn, if necessary. In addressing the costs implications of that approach, having stated that it would represent a valuable protection for estates of deceased persons, without in any way diluting the principles enunciated in *In bonus Morelli,* Kearns J. stated (at p. 396):

> "Thus, while it may be reasonable to commence and bring proceedings, and to bring them *bona fide*, a point may arrive where, as a result of disclosure made by the defence, the further maintenance of the claim can no longer be seen as reasonable. In such circumstances, it seems to me a trial judge should not be fettered in the exercise of his discretion as to costs and should be free both to decline costs from the estate to an unsuccessful litigant or even to award costs against such a litigant from the time of disclosure."

While I respectfully agree with those observations, I really do not see the relevance of them to what I have said would, in reality, have been a *lis inter partes* as regards the joint deposit, if the concession had not been made by the defendants. The concession was made and, when it was made, the proceedings were finalised. In effect, the concession is the "event" for the purposes of the application of Order 99 of the Rules, which, subject to the overriding discretion of the Court, mandates that costs should follow the event.

19. As regards the order directing that the defendants account to the estate, the defendants also made a concession on that issue to the extent that they agreed to account. However, I do not see that as being an event for the purposes of determining where costs should lie; the event must be the outcome of the proper assessment of the account, which is not before the Court and on which the Court cannot adjudicate.

Conclusion

20. Having regard to all of the foregoing factors I consider that the fair and equitable way of dealing with the costs of the proceedings to date is as follows:

> (a) the costs of ascertaining the next of kin must be borne by the estate and that includes the outlay, for instance, the cost of the genealogical reports and also the costs of advertising for the next of kin;
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> (b) as regards the remainder of the costs of the proceedings until the order of 30th April, 2012 was made, I consider that –
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> > (i) 25% of their taxed costs should be paid to the plaintiffs out of the estate of the Deceased; and

(ii) the remaining 75% of their taxed costs should be paid to the plaintiffs by the defendants, to reflect the event represented by the concession made by the defendants in relation to the joint deposit in Irish Nationwide Building Society; and

(iii) there should be no order for costs in favour of the defendants;

(c) as regards the costs of the application for costs, the plaintiffs should be paid 75% of their taxed costs out of the estate and, subject to that, the plaintiffs and the defendants should each bear their own costs, because the plaintiffs were not wholly successful in their pursuit of all of the costs against the defendants.