Neutral Citation Number: [2006] IEHC 49

THE HIGH COURT

2004 No. 277 SP

IN THE ESTATE OF WILLIAM YOUNG
IN THE ESTATE OF SAMUEL YOUNG
IN THE ESTATE OF JOSEPHINE YOUNG

BETWEEN

SAMUEL YOUNG

PLAINTIFF

AND
PADDY CADELL. TERESA DOYLE, MARY COURTNEY, DONAL YOUNG, PATRICK YOUNG, MARY YOUNG, MICHAEL YOUNG, PAUL YOUNG AND CATHERINA MOCKLER

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 13th February, 2006.

1. The special summons in this matter was issued on 7th July, 2004.

2. Samuel Young and Josephine Young mentioned in the title were the parents of the plaintiff and of William Young, first mentioned in the title, whom I will call "the Testator", and also of the second, third, fourth and fifth defendants. They both died in 1970.

3. The Testator, who was the son of Samuel and Josephine Young, and the brother of the plaintiff and the second, third, fourth and fifth defendants, died on 28th October, 2000, having made his last will and testament on 8th August, 2000. Probate of his will was granted to the first defendant, who is a solicitor and one of the executors named in the will, on 8th November, 2001.

4. Apparently, the plaintiff's parents, Samuel Young and Josephine Young, died intestate. Representation has not been raised to the estate of either of them.

5. The only provisions of the will of the Testator which are relevant to the issues raised in the special summons are the provisions contained in clauses 4 and 5 in the following terms:

> "4. I leave my dwelling house together with a garden field (which are currently used by my brother Donal) to my brother Sam for his own absolute use and benefit.
>
> 5. I leave all the out-offices, yard, hayshed etc. and the remainder of my land situate at Barnane, formerly owned by my parents, to my brother Pat Young, his wife Mary Young and to each of their four children in equal shares."

6. The lands referred to in clauses 4 and 5 were the lands registered on Folio 25344, County Tipperary. Clause 5 is relevant only insofar as the lands to which it relates were registered in Folio 25344.

7. The allegations made by the plaintiff in the special endorsement of claim in the special summons were:

> · that the defendants had failed, refused or neglected to communicate with the plaintiff and attempted to deny him his share under the will of the testator.
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> · that the first defendant had failed, refused or neglected to execute a deed of assent transferring to the plaintiff the dwelling house together with a garden field comprising an area of 0.5 hectares at Barnane as contained in Folio 25344 to and for his own absolute use and benefit, and
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> · that the first defendant had failed to distribute the assets of the estate of Samuel Young and the estate of Josephine Young pursuant to the rules of intestacy.

8. When the matter came into the Chancery List on 17th October, 2005, counsel for all of the defendants other than the fourth defendant, applied that the proceedings against his clients should be struck out. The basis of the application was that in his replying affidavit sworn on 8th November, 2004, with regard to the dwelling house and the garden field comprising approximately 0.5 hectares, the first defendant averred as follows:

> "Neither I nor the second named defendant have any difficulty with regard to executing an Assent in favour of the Plaintiff with regard to the said property. However, in doing so, I say that I have been advised that I cannot vest in the Plaintiff any better title to the dwelling house and garden than the Estate of William Young deceased has in the said property. If Donal Young is entitled to the entirety of that property by virtue of survivorship upon the death of William Young, the execution of the Assent is a meaningless exercise. Clearly, this is an issue which will have to be determined as between the Plaintiff and Donal Young the fourth named defendant who is separately represented in these proceedings by Messrs. Nash, McDermott & Company, Solicitors. I say that there is no basis for continuing or maintaining these proceedings against any of the defendants other than the fourth defendant and it would be the intention of the remaining defendants to seek their costs from the Plaintiff if he persists with this action against them."

9. There was no appearance on behalf of the fourth defendant, Donal Young, on 17th October, 2005.

10. The implicit offer of the first defendant to execute an assent in favour of the plaintiff of the interest of the Testator in the dwelling house and land specifically devised to the plaintiff should have been taken up in November, 2004 and that should have been the end of the matter. The offer was not pursued by the plaintiff. On the other hand, an assent was not executed by the first defendant. On 17th October, 2005 I adjourned the proceedings, indicating that I intended to strike out the proceedings against all of the defendants except the fourth defendant, if an assent was executed by the first defendant. I also indicated that I would deal with the question of costs on the adjournment but that the plaintiff and the defendants, other than the fourth defendant, should put their respective cases in relation to costs on affidavit. On 17th October, 2005 I explained the basis on which I was adopting that course, stating:

> · That as the personal representative of the Testator was prepared to assent to the specific devise to the plaintiff of the dwelling house together with 0.5 hectares, the plaintiff had no other standing in relation to the estate of the testator and

no basis for maintaining the action further.

· That the estates of Samuel Young and Josephine Young were not before the court and no order could be made in relation thereto.

· That the plaintiff was not entitled to any relief except the assent proffered.

11. I went through each item of relief claimed on the special summons and explained why it was not appropriate to grant it.

12. The matter came back into the list on 12th December, 2005.

13. I will deal first with the issues which arose between the plaintiff and all of the defendants other than the fourth defendant on that occasion first. The first defendant had filed an affidavit sworn on 2nd November, 2005 in which he exhibited an assent sworn by him on 2nd November, 2005 in which he assented to the registration of the plaintiff as full owner of the lands specifically devised to him for all the right, title, estate and interest held by the Testator therein. The execution of that assent, in my view, renders these proceedings redundant, the only issue remaining being the issue of costs. On the issue of costs, counsel for the first defendant, who also appeared for the other defendants except the fourth defendant, submitted that, as between the plaintiff and the defendants other than the fourth defendant, there should be no order for costs up to November, 2004 when the first defendant proffered the assent and that thereafter there should be an order for costs against the plaintiff. Counsel for the plaintiff submitted that the plaintiff had made a bona fide request for information and the first defendant had refused to furnish the information and, accordingly, that there should be an award for costs in favour of the plaintiff against the defendants other than the fourth defendant. Counsel for the plaintiff referred to the decision of the Supreme Court in In *Bonis Morelli; Vella v. Morelli* [1968] I.R. 11.

14. I will deal first with the relevance of the decision of the Supreme Court in *Vella v. Morel*li to the costs issues in these proceedings. That was a probate suit, in which the plaintiff sought an order recalling the grant of letters of administration with the will of the deceased annexed, which had been granted in common form, and condemning the will, ultimately, on the ground that it was not duly executed in accordance with law. Budd J., delivering the judgment of the Supreme Court referred to the "well-established Irish practice formulated in the last century" and he quoted the statement of the practice set out in Miller's *Probate Practice* (Maxwell: 1900 Ed.) at p. 438, which was in the following terms:

> "Two questions are to be considered with reference to an application for costs of the unsuccessful party:- (1) Was there reasonable ground for litigation? (2) Was it conducted *bona fide*? Where both these questions can be answered in the affirmative it is the usual practice of the court, without having regard to the amount or the ownership of the property, to order the general costs to be paid out of the personal estate."

15. Later, Budd J. stated that he did not think that any good reason had been shown for departing from the old practice and he then set out the rationale of the practice as follows:

> "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."

16. As Budd J. made clear at the end of his judgment, when answering the two questions posed on the facts of the case before him, the principle applies when the court is "considering whether an unsuccessful party in a probate suit should be allowed costs out of the estate".

17. The factors which arise in a probate suit which justify the special rule in relation to costs which was reiterated in *Vella v. Morelli*, the importance of ensuring that what are presented as testamentary documents are above suspicion and that legal costs are not a deterrent to pursuing bona fide beliefs or suspicions as to the validity of such documents, do not arise in administration suits, which, in the case of a death testate, proceed on the assumption that the testamentary document is valid, as was the case here. Therefore, in my view, the rule in *Vella v. Morelli* has no application to the resolution of the costs issues in these proceedings.

18. It seems to me that the only possible basis which the plaintiff has for complaint against the first defendant arises from a letter of 11th April, 2001 from the first defendant's solicitors to the plaintiff which, in reality, was the opening sally in these proceedings. The solicitors for the first defendant told the plaintiff in that letter that the Testator had made an application to the Land Registry to be registered as sole owner of, *inter alia*, the land specifically devised to the plaintiff prior to his death. Difficulties were being encountered with that application. It was proposed to extract letters of administration intestate to the estate of the parents of the plaintiff and the testator, Samuel Young and Josephine Young. The solicitors for the first defendant requested that the plaintiff execute renunciations so that his sister, the third defendant, who had no conflict of interest with her siblings, could extract letters of administration to the estate of Samuel Young and Josephine Young. In that letter, the solicitors for the first defendant stated as follows:

> "The other beneficiaries are your brothers, Patrick (lands) and Donal (1 hectare site and right to reside in dwelling house). Therefore Donal will have a right to reside in the dwelling house you are inheriting. This was an arrangement which your late brother reached with Donal before he died. Because Donal had been living in the house in excess of twelve years he has certain entitlements. However, he is willing to forego these entitlements provided that the arrangement he worked out with William (1 hectare site and right to reside in dwelling house are fulfilled)."

19. As it transpired, the plaintiff never executed the renunciation forms and, as I have stated, representation has not been raised on the estates of Samuel Young and Josephine Young. Further, as I have already stated, neither estate was before the court and the plaintiff should not have sought any relief in these proceedings in respect of either estate.

20. However, the paragraph which I have quoted did put the plaintiff on notice that his brother, Donal, the fourth defendant, had some claim in respect of the dwelling house specifically devised to the plaintiff. In fact, in a letter of 28th June, 2000 from the fourth defendant's solicitors to the solicitors for the first defendant, a settlement between the fourth defendant and the Testator was recorded as follows:

> "Therefore, the settlement agreed between the parties is as follows:-
>
> (A) My client is getting the plot of ground referred to in paragraph 4 hereof outright.
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> (B) He will have a right of residence in the residence on Folio 25344 together with the right to use and cultivate the plot at the rear right of the house, beside the river.
>
> (C) My client will be paid £5,000. If this payment is not made within two months from the date hereof it will carry interest hereon at the rate calculated under the Courts Act."

21. The reality of this case is that the plaintiff could not get any better title to the dwelling house and garden specifically devised to him than the Testator had. However, I do think the personal representative of the Testator, the first defendant, should have told him what title the Testator had and, in particular, should have furnished him with a copy of the letter of 28th June, 2000. As against that, it seems to me that the plaintiff's solicitors never asked the right question. The plaintiff's complaint is that he did not get a copy of the letter of 28th June, 2000 until he eventually got discovery in these proceedings.

22. The conclusion I have come to in relation to the issue of costs between the plaintiff and the defendants, other than the fourth defendant, is that to a very large extent the plaintiff's claim was misconceived. I am certainly of the view that it was unnecessary for the plaintiff to join the second, third, fifth, sixth, seventh, eighth and ninth defendants in these proceedings. On the other hand, the first defendant should have told the plaintiff or the plaintiff's solicitors in plain and simple terms what the perceived problems with the Testator's title were and he should have simply assented to the vesting of the property specifically devised in the plaintiff for all the estate, right, title and interest of the Testator therein, as has eventually been done.

23. As between the plaintiff and the defendants other than the fourth defendant, I propose to make no order as to costs.

24. There is a genuine dispute between the plaintiff and the fourth defendant, but it is a dispute the genesis of which is anterior to the death of the Testator. Therefore, it is not a dispute which can be resolved by proceedings brought by way of special summons for the administration of the estate of the Testator.

25. On 12th December, 2005 counsel for the fourth defendant sought either –

> · an order that the issue as between the plaintiff and the fourth defendant should be remitted for plenary hearing, or, alternatively,
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> · an order dismissing the plaintiff's claim against the fourth defendant with costs.

26. The dispute between the plaintiff and the first defendant is a title dispute. In my view, procedurally, it is not a matter which can be resolved by proceedings initiated by special summons in the High Court. Therefore, I dismiss the plaintiff's claim against the fourth defendant. As between the plaintiff and the fourth defendant, there will be no order as to costs.