THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 269

Appeal No. 2015/403

Peart J.
Birmingham J.
Moriarty J..

IN THE MATTER OF THE ESTATE OF CECIL DUNNE DECEASED, LATE OF MILLICENT CROSS, CLANE IN THE COUNTY OF KILDARE, FARMER, DECEASED

BETWEEN:

ARTHUR DUNNE, DYMPNA DORMON (NEE DUNNE), JAMES DUNNE, GERRY DUNNE, CECIL DUNNE JUNIOR, DOMINIC DUNNE, ANN RYAN (NEE DUNNE), PATRICK DUNNE AND MARTIN DUNNE

PLAINTIFFS/RESPONDENTS

- AND -

WILLIAM DUNNE

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 11TH DAY OF OCTOBER, 2016:

1. Arising from the contents of a defence delivered by William Dunne on the 10th November 2014 to the plaintiffs' claim for an order for the administration of their late father's estate, and other reliefs, they issued motion on the 19th March 2015 seeking:-

> *(a) a declaration that their brother, William, is conflicted in his role as legal personal representative of their late father's estate,*
>
> *(b) an order revoking the grant of administration de bonis non by which he became the legal personal representative of the unadministered estate of their late father, and*
>
> *(c) an order pursuant to s. 27(4) of the Succession Act, 1965 ("the Act of 1965") allowing an independent person to extract new letters of administration de bonis non so that the administration of the estate may be fully and properly completed.*

2. Briefly stated, the reason why the plaintiffs contend that their brother William is conflicted now in his role as legal personal representative of their late father's estate is that within his defence he pleaded that the plaintiffs' are no longer entitled to their 1/42nd share in their father's estate because their claims in that regard are statute-barred under s.45 of the Statute of Limitations,1957 (as substituted by s. 126 of the Succession Act, 1965) and/or that since both he, and his mother Eileen Dunne until her death in 2010, farmed the lands in question without interruption since the death of their father, they acquired a possessory title as against the plaintiffs under s. 125 of the Succession Act, 1965, and accordingly that any claim that they would have to a share in the lands arising from the intestacy of their father had has been lost.

3. That motion was heard by Mr Justice Cregan, and on the 15th July 2015 he delivered a written judgment setting out his reasons for granting:-

> *(a) the declaration sought,*
>
> *(b) an order revoking, cancelling and recalling the grant of administration de bonis non dated 31st August 2011 which issued to the defendant, and*
>
> *(c) an order, pursuant to s. 27(4) of the Act of 1965, giving liberty to David Osborne solicitor to extract a new grant of administration de bonis non of that estate.*

An order for costs of the motion was made also against William Dunne. The order appealed against was made on the 28th July 2015 and was perfected on the 30th July 2015.

4. For reasons which I hope will become clear, I consider that the trial judge was wrong to conclude that such conflict of interest as does arise by virtue of the pleaded defence on the statute was such as to require that William Dunne be removed as legal personal representative, and replaced by an independent person as ordered. In my view, this appeal should be allowed, so that the action can proceed as presently constituted.

Background

5. The nine plaintiffs and the defendant are siblings, and together comprise ten of the fourteen children of the late Cecil Dunne (the deceased) who died intestate on the 29th March 1994 and the late Eileen Dunne who survived him and died testate on 20th October 2010.

6. Following the death of Cecil Dunne, letters of administration (intestate) issued to his widow Eileen Dunne. Upon the death intestate of her husband, she was entitled to two thirds of the estate of her late husband, and the remaining one third was divisible equally between each of fourteen children of the marriage, being a 1/42nd share.

7. The litigation which has arisen has done so largely because prior to her death Eileen Dunne had not completed the administration of her late husband's estate, and in particular had not vested in each child the share to which each was entitled in c. 62 acres of farm lands known as Moatfield.

8. In her Will she named her son, William, as her sole executor, as well as her sole residuary devisee and legatee.

9. On the 31st August 2011, William took out a grant of administration intestate *de bonis non* to the estate of his late father which would enable him to complete the administration of that estate. On the 12th October 2011 he extracted a grant of probate in the estate of the late Eileen Dunne.

10. The plaintiffs have pleaded that despite being called upon to do so, and despite his acknowledgement of their entitlement to their share in their late father's estate, failed and neglected to distribute their share to them. They complain also that in his capacity as legal personal representative of their late mother's estate he has failed to properly account for her administration of their late father's estate prior to her death.

11. The defendant's opening salvo in his defence was to plead the statute as already indicated, and without prejudice to that plea, to plead that the plaintiffs were guilty of inordinate and inexcusable delay in the commencement of these proceedings, and further in the alternative that they have been guilty of *laches* to the extent that it would be now unfair and unreasonable that their claims should be allowed to proceed and should be dismissed. He went on to plead that his mother had not in fact intermeddled in the estate of her late husband at all as alleged, and pleads certain facts to substantiate his claim that the plaintiffs' claims have been lost by virtue of s. 125 of the Succession Act, 1965, and he further denies that he ever acknowledged the entitlement of the plaintiffs to a share in their father's estate as alleged by them. The defence contains other pleas such as that the plaintiffs have suffered no losses as alleged, but that if they have it is on account of their own inordinate and inexcusable delay.

12. In the normal course of events, one could expect this case to have simply gone to trial once the pleadings were closed. On the pleadings and the evidence adduced by the parties the Court could be expected to have reached a conclusion as to whether the defendant's issue of the statute or on adverse possession should succeed, or whether instead the plaintiffs are entitled to be registered as owners of a 1/42nd share each in these lands. I should add that the defendant has stated that he will abide by whatever order the Court might make in that regard once the issues are determined. However, as I have stated, the plaintiffs instead brought a motion to have their brother, William, removed as legal personal representative on the basis that he was so conflicted between his role as legal personal representative and as beneficiary and the person who stands to gain if the plaintiffs' claims are found to be statute barred, that he should no longer be entitled to remain in that role and as defendant in that capacity. They contend that it is necessary that an independent person become legal personal representative and that he/she should have control of the administration of the estate of their late father, and therefore of these proceedings. One of the points made by the defendant is that in reality what the plaintiffs are seeking is to have a new personal representative appointed in the hope that such an independent person, having reviewed the file and considered what the plaintiffs say against the case being made by the defendant as to adverse possession and the statute, might decide not to plead the statute at all, and simply have the plaintiffs registered as to their 1/42nd share each in the lands. I will return to that matter later in this judgment.

13. One of the plaintiffs, Cecil Dunne junior, swore a grounding affidavit for the motion, both on his own behalf and on behalf of the other plaintiffs. Having explained in some detail the general background which gave rise to the proceedings being brought for an order that the defendant administer the estate of their late father, the nature of the assets comprising his estate, he goes on to describe how the Moatfield lands were occupied and managed by their late mother following their father's death, she did so *"at all times in her capacity as legal personal representative of the deceased only",* and further that they

> *"deny … that Eileen Dunne and/or William Dunne were ever in fact in (sufficient) possession of the land such as to allow time to run against the estate of Cecil Dunne, regardless of the capacity in which Eileen Dunne used, or was in possession of the land".*

14. This affidavit addresses the merits of the case which the defendant makes on the statute issue and on the issue raised under s. 125 of the Succession Act, 1965, and he sets out the responses of the plaintiffs to the case raised against them by the defendant. Given the limited nature of the reliefs sought in the motion before the court, it is not necessary to dwell upon the merits of the substantive issues in the case. Those will be matters to be determined at the full trial of the action in due course.

15. The basis for the plaintiffs' belief that the defendant is now conflicted to the extent that he should be replaced as legal personal representative and, therefore, as defendant in these proceedings, is stated in paras. 18 – 21 of this grounding affidavit as follows:-

> *"18. We are advised and believe that the assertion by the defendant in his capacity as legal personal representative of Cecil Dunne deceased, that the title of the estate of Cecil Dunne deceased was acquired by the defendant and his mother, and of necessity therefore extinguished by them is, in itself, an extraordinary assertion for him to make, because his role is to maximise to the best of his ability the estate of Cecil Dunne. Instead, he has positively adopted a position calculated to diminish it (to and for his ultimate benefit*
>
> *19. Furthermore, he has done so in circumstances where a cogent and compelling case can be advanced by Cecil Dunne's estate that Eileen Dunne was at all times in possession of the lands as trustee for the estate of the deceased so that time never ran against the estate either in her favour or in favour of any other person in possession with her.*
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> *20. Were the defendant, who is the only person in a position to advance that argument on behalf of the estate of Cecil Dunne deceased, to do so, he would come into conflict with himself as personal representative of Eileen Dunne and/or personally. So long as he relies upon section 125 of the Succession Act in answer to the plaintiffs' claims, therefore, he is inescapably conflicted.*
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> *21. The defendant, in addition (as noted above) relies on section 45 of the Statute of Limitations, q957. This is a plea to the effect that the plaintiffs' claim is barred simpliciter, and it does not necessarily rely on the assertion that the title of the estate of the deceased has been extinguished (as does the section 125 plea). However, it is clear from the defence (and is acknowledged by the defendant) that if the section 45 plea succeeds, the defendant himself will benefit from the outcome, whether in his personal capacity as alleged surviving joint possessory owner or as executor or residuary legatee of Eileen Dunne. Therefore, in so far as section 45 is raised by the defendant, he seeks to benefit from his office as trustee, and would, we are advised and believe, be conflicted and/or would be an inappropriate person to act as administrator for that reason even if he were placing no reliance on section 125 of the Succession Act."*

16. In brief therefore the plaintiffs assert that in adopting the stance which he has in his defence the defendant has in a sense set himself up against the estate of which he is the legal personal representative by virtue of the grant of administration *de bonis non* which he extracted to his father's estate, and that he has raised an issue which has to be resolved as between himself personally and the legal personal representative, and accordingly, he is in a position of hopeless conflict such that he must be replaced in that role. In addition, the plaintiffs assert that if the defendant continues to hold the assets of that estate as legal personal representative, he is obliged to administer them for the benefit of those entitled to them, and that by relying upon s. 45 of the Statute of Limitations, 1957 as a reason not to do so, he is in breach of his obligations and should be removed. They maintain that the issue which arises now in view of the defence delivered is one that should be resolved by a legal personal representative who does not stand to gain in the event that the plaintiffs' claims are statute barred or that their rights are otherwise extinguished.

17. William Dunne filed a replying affidavit. After dealing with some preliminary matters which are not really relevant on this appeal, he refers to the fact that in the plaintiffs' reply to defence delivered on the 10th November 2014 they did not raise any issue as to a conflict of interest arising from the defence, and that it was only at a much later stage, in February 2015 that this issue surfaced. He refers to the fact that these proceedings relate to essentially a family dispute, and goes on to state that he believes that the raising of the conflict of interest issue *"is nothing about a genuine belief that I am conflicted but in fact all to do with (in the face of the plea that their claim is statute barred) my removal as administrator of the estate of the deceased by whatever means and in the most unfair fashion possible."*

18. He refers also to the fact that when this issue first arose in February 2015 his solicitors were furnished with a draft plenary summons which the plaintiffs' were intent on issuing at that time in which the plaintiffs were seeking, inter alia, an order giving liberty to one of the plaintiffs to be substituted as legal personal representative in his place, and not some independent person as is now the case. He believes that the plaintiffs' true position is that they simply want to have him removed so that they can gain control of the conduct of these proceedings. He states also that he believes in such circumstances "the estate of the deceased would concede the 'statute point' on the instructions of whatever plaintiff then stood in place of your deponent". However, as has been made clear, the plaintiffs altered their position and later sought and were granted an order for the appointment of an independent person, David Osborne solicitor, to become legal personal representative in place of the defendant.

19. The defendant goes on to point to the fact that the period under the statute expired during the lifetime of their mother, Eileen Dunne. It will be recalled that she obtained a grant of probate to her late husband's estate in 1996 and she later died in 2010. He notes in that regard that the present proceedings were only commenced by the plaintiffs in June 2012. He considers that it is his duty as legal personal representative to plead the statute where there is a factual basis for doing so, and states also that his actions as administrator are and always have been taken in the best interests of the estate and with a view to preserving the estate of the deceased. He makes the point that the plaintiffs have not made any argument that he has in any way acted improperly as administrator, and the only basis for their contention that he should be removed is that he has pleaded the statute against them. He does not consider that this is a sufficient basis upon which to take the very serious step of having him removed and replaced.

20. The defendant believes that the issue on the statute can be readily determined in these proceedings as they are presently constituted and that there is no proper basis on which he should be removed. He believes that the plaintiffs want him "removed from the pitch", as he puts it, so that in effect he is prevented from advancing his claim that the plaintiffs' claims are statute barred.

21. His affidavit also responds to the much of what the plaintiffs asserted in their grounding affidavit as to the merits of the statute issue itself. However, those averments are not relevant to the issue to be determined on this appeal.

22. Cecil Dunne junior swore a second affidavit in order to respond to the defendant's replying affidavit. He takes issue with the defendant's statement that as legal personal representative he is obliged to raise the statute issue. He also states that the defendant's position that he was at all times acting in the best interests of the estate is irreconcilable with the case which he makes, namely that he and his mother have extinguished the title of the deceased's estate to the lands and that he himself has now acquired that title. He makes the point that if the statute issue which the defendant has raised is to succeed it will denude the estate of all its assets, and it will be the defendant alone who will benefit.

23. Having heard this motion, Cregan J. gave judgment on the 15th July 2015. He outlined a chronology of relevant events, and the pleadings, and in particular the pleadings on the statute issue. He then stated at para. 10:-

> *"10. The defendant may be right or wrong in that claim; that is not a matter for me to decide, that is a matter for the trial judge to decide at the full hearing of the action. The only issue I have to decide in this application is whether the defendant has a conflict of interest." [emphasis added]*

24. The trial judge went on to set forth certain relevant provisions of the Succession Act, 1965 and the Statute of Limitations Act, 1957 to which he had been referred.

25. Since the question of whether or not there was a conflict of interest on the part of the defendant is largely a legal issue, albeit subtended by the particular facts of the case, the trial judge addressed in some detail the authorities to which he had been referred by counsel, and then reached his conclusion that the defendant should be removed as administrator because he was, on the facts of this case, seriously conflicted by reason of his having raised the statute issue against the plaintiffs, and where he alone stood to gain if that issue succeeds.

26. Having noted at para. 33 of his judgment that the conflict of interest in the case arose because the defendant is the legal personal representative, and was at the same time claiming in his personal capacity the bulk of the assets of the estate by reason of adverse possession, thereby defeating the interests of the plaintiffs, he went on to express his conclusions in paras. 34 - 37 as follows:-

> *"34. The matter only has to be stated in these stark terms to reveal the clear conflict of interest. Thus, if the personal representative in this case took the view that the claim for adverse possession was not well-founded, he would issue proceedings against the person making that claim. In such a case, William Dunne, acting as personal representative, would be the plaintiff, and William Dunne, as the person making the claim for adverse possession would be the defendant. This shows in clear and unequivocal terms that Mr Dunne has a conflict of interest in his role as personal representative.*
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> *35. Mr Dunne's claim for adverse possession may be a good, or a bad claim, that is not the point in this application. Again, as I have stated, that is a matter for the trial judge. The issue here is whether he is in a conflict of interest situation and in my view, he is. The fact that this is so is also confirmed by the fact that both counsel confirmed, that in*

the event that Mr Dunne was replaced as personal representative, what would happen is that a new personal representative would be appointed, that he or she would review the file and that he or she may decide not to plead the statute. However, it would then fall on William Dunne to hand back land to which he has claimed possessory title and if he did not do so, then it would result either in a new personal representative issuing proceedings against Mr Dunne, or, Mr Dunne issuing proceedings against the personal representative, seeking declaratory orders in relation to his alleged possessory title.

36. Again however, that would show clearly what an indefensible conflict of interest Mr Dunne has placed himself in, not, I emphasise, by claiming adverse possession but rather by seeking also to be the personal representative. Counsel for the defendant sought to argue that Mr Dunne had merely pleaded the statute in his defence and therefore there was no conflict of interest or misconduct; however, in my view that is to ignore the substance of these pleas in the defence.

37. The pleas, when taken in conjunction with para. 8 of the defence, raise a substantive plea: firstly, that the defendant has been in adverse possession of the land for over twelve years; secondly, that the defendant has thereby acquired possessory title to the these lands; thirdly, that this title defeats the claims of the plaintiff; and fourthly, that the [plaintiffs'] claims are statute barred. It is the substance of these pleas and the substance of his defence as a beneficiary that puts him in a conflict of interest in his role as a personal representative. As personal representative, he must contest the claims of a beneficiary to a large portion of the estate if he is of the view that there are valid grounds for such a challenge. In this case, the beneficiary and the personal representative are the same person, so he would in effect be suing himself. This of course would never happen, and he is therefore not in a position to properly discharge his duties as a personal representative."

27. The trial judge concluded that these circumstances amounted to *"a serious, obvious and indefensible conflict of interest situation in his role as personal representative … and is a serious special circumstance to justify his removal within the terms of the Supreme Court decision in Dunne v. Heffernan"*.

28. On this appeal the defendant submits that the trial judge erred in concluding that the situation which has arisen causes such a conflict of interest that he must be removed, and in addition, has referred to a long line of authority for the proposition that it is perfectly legitimate for one sibling to assert adverse possession of assets forming part of the deceased's estate over other siblings, even where that sibling is also the personal representative, including a judgment of the Supreme Court in *Vaughan v. Cottingham* [1961] 1 IR 183. Indeed, the plaintiffs do not dispute this. I will return to that decision in due course.

29. He submits that there is nothing in the situation that has arisen which prevents the parties from giving their evidence and making their respective cases to the Court in the within proceedings, both as regards the statute and the adverse possession argument, and that nothing of any utility would be gained by simply replacing the defendant as personal representative with some other person, whose role would in all probability be to indicate to the Court that he/she would abide by whatever order the court might make. In that situation, he submits, the case as pleaded would proceed with the former personal representative having to be joined back as a defendant so that he could make his case on the statute or by way of adverse possession, he being the person making that case. It is submitted therefore that replacing him as personal representative would simply add another party's costs to the litigation with no other purpose being achieved, and a potential diminution of the assets of the estate.

30. The defendant submits also that the trial judge erred by confining himself to considering whether or not a conflict of interest arose simpliciter, without going on to consider whether, though there be a conflict, it necessitated his removal as personal representative, or whether instead the issues between the parties could still be fairly and properly determined at trial within the proceedings as constituted. It is submitted that the leading cases on this question (*e.g. Dunne v. Heffernan* [1997], *Flood v. Flood* [1999] IR 234) recognise that the removal of a personal representative/executor is a serious step not to be lightly taken, and only where such removal is necessary for the fair and proper determination of the issues arising in any particular case.

31. To summarise therefore – it is submitted:-

☐ firstly that the trial judge erred in characterising the circumstances of the present case as being a serious, obvious and indefensible conflict of interest requiring his removal;

☐ secondly, that he erred by not applying the restrictive test – in other words in concluding that once a serious conflict of interest exists, removal had to follow regardless of whether it was actually necessary or achieved anything of use;

☐ thirdly, failing to take into account the additional and needless expense of having the defendant replaced by an independent administrator;

☐ fourthly, in failing to follow a line of authority which establishes that there is nothing untoward about a beneficiary pleading the statute even where he is also a personal representative, and stands to gain from doing so;

☐ fifthly, the trial judge erred in making a personal costs order against the defendant in respect of the motion.

32. The plaintiffs on the other hand submit that the trial judge was correct to identify the clear conflict of interest in which the defendant placed himself when he decided to plead the statute, and also claim that by virtue of the adverse possession of the lands by his mother and himself the plaintiffs' entitlement to their share in the lands was extinguished, and to conclude that he could not therefore remain as legal personal representative.

33. They have submitted that the defendant sets the bar too high when they submit that the circumstances must be "extraordinary or unusual" or that there must be an "extraordinary conflict of interest" before the Court should consider it necessary to replace the legal personal representative. They accept, as stated in *Dunne v. Heffernan* that such a step is a drastic step and one that should not be taken absent some serious misconduct and/or some special circumstances, but they contend that while no misconduct as such by the defendant is asserted, nevertheless there is sufficient for "special circumstances" to exist.

34. They submit also that since the legal personal representative holds the estate as trustee for the beneficiaries, as provided in s. 10(3) of the Succession Act, 1965, he must have their best interests in mind at all times, and must act impartially. They say that in the present case the defendant cannot comply with those obligations given the defences he has pleaded against their claims to be entitled to be registered to a 1/42nd share each in the lands, and therefore has a conflict of interest based on his trusteeship.

35. The plaintiffs liken the present case to the facts in *Flood v. Flood*. It is a case where the plaintiffs as beneficiaries of the estate

sought by special summons to have the defendant executor removed because he was refusing to pay back to the estate money which the plaintiffs believed he had borrowed from the deceased, claiming that the money was a gift to him by the deceased and not a loan. He also claimed that even if the money was owed to the estate the plaintiffs' claim was statute barred and that no prudent executor would endanger the assets of the estate by commencing proceedings which had only a remote prospect of success. Macken J. in the High Court considered that this conflict was such that it was necessary to replace him as executor given his refusal to return the money, and his potential to be a debtor of the estate. Clearly there was the prospect of proceedings having to be taken by the estate against him in order to determine whether it was a gift or a loan. Clearly also, the executor could not bring those proceedings against himself, so one can readily see why the learned judge determined that he should be replaced notwithstanding that this could potentially involve additional cost to the estate.

36. In relation to the defendant's submission that there is no legal impediment to an administrator pleading the statute or making the adverse possession case for his own personal benefit, and the authorities upon which the defendant has relied, the plaintiffs seek to distinguish those cases on their facts, and suggest that they do not provide all of the support which the defendant seeks to derive from them. The plaintiffs accept, rightly in my view, that there is ample authority in favour of the proposition that the administrator may plead the statute against other beneficiaries for his own personal benefit. That much is clear from a number of cases, but I will refer to just one, namely *Vaughan v. Cottingham* [supra at para. 28]. It is a judgment of Lavery J. in the Supreme Court (with whom O'Dálaigh J. (as he then was) and Maguire J. agreed) on a Case Stated from Kingsmill Moore J. (sitting as a judge of the High Court on Circuit). However, the plaintiffs do not accept that it is authority for the proposition that the issues in the present proceedings may be determined in an action between the next of kin as plaintiffs and the legal personal representative as defendant. That is correct of course. There is nothing within the judgment that so states explicitly. Nevertheless, it can be noticed that Ms. Cottingham, as the administrator under a grant of administration *de bonis non*, was attempting to have Daniel Vaughan ejected from certain lands which had been devised to him under the Will of Margaret Vaughan on the basis that the latter had not acquired title to the lands and therefore could not devise them to Daniel Vaughan. If she succeeded in her argument, the lands would devolve to her and her siblings. There is no suggestion within the judgment of Lavery J. that she was in any sort of conflict situation necessitating that she step aside, and the plaintiff does not appear to have made any argument to that effect.

37. I should remark that the trial judge makes no reference to Vaughan v. Cottingham in his judgment, though the defendant's written submissions at para. 55 states that it was opened to him. The defendant has submitted that the trial judge erred in not having regard to this judgment.

Conclusions

38. The plaintiffs are of course correct to say that the defendant a legal personal representative under a *de bonis non grant* is legally obliged to gather in the assets that remain unadministered, and to distribute them, as indeed he has sworn to do when completing his oath of administrator for the purpose of obtaining the grant of administration *de bonis non*.

39. However, it must be added that this obligation is to administer the estate *"in accordance with law"*. In the present case, there is a legal issue to be determined as to how to do just that. For example, it may not be in accordance with law for the legal personal representative to vest the lands in the 14 siblings where the title of 13 of those siblings has been extinguished by operation of law, thereby entitling just one of the 14 siblings (*i.e.* the defendant) to be registered as full owner because of either his adverse possession of the lands, or indeed by the operation of the statute of limitations. These situations arise from time to time in the administration of any estate, and naturally where the issue involves rights and claims as between family members, relations can become strained, especially where the legal personal representative is a member of the family.

40. But whether he/she is a family member or not, the laws as to devolution of property and distribution is the same. Where a dispute arises during the course of the administration, a prudent legal personal representative would wish to have it determined by a court. How that is to be achieved can vary depending on the circumstances of the case. In *Vaughan v. Cottingham*, as we have seen, the issue arose out of ejectment proceedings brought against the person in possession by the legal personal representative, and came before the Supreme Court by way of Case Stated.

41. In another case, whether the legal personal representative stands to gain or not, he/she might simply apply to the court for directions as to the proper administration of the estate, and raise the issue for the court's determination. One can usefully note that Ord. 3 of the Rules of the Superior Courts makes provision in Rule 2 thereof that procedure by special summons can be adopted for *"the determination of any question affecting the rights or interests of any person claiming to be the creditor, devisee, legatee, next of kin, or heir at law of a deceased person …"*. Order 3, Rule (6) RSC also permits procedure by way of special summons for *"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"*.

42. In any such proceedings the court can give appropriate directions as to the parties to be notified, so as to ensure that any party likely to be affected by the court's decision is provided with an opportunity to be heard and make submissions, and to give any other directions as to pleadings, or the filing of affidavits.

43. In another case, and perhaps the present case is a good example, a next of kin may consider that the legal personal representative is failing to administer the estate properly or within a reasonable time, and may issue proceedings against him/her for the administration of the estate by the court or for some other order which will ensure that the administration of the estate will be properly completed. The defendant may, as in this case, respond to the proceedings by explaining what difficulty has arisen in order to explain his/her delay or inaction. In the present case, as it happens, the defendant's answer is that the plaintiffs have no entitlement to be registered as owners of a 1/42nd share each that they claim. It is unfortunate, I would say, that he did not raise this matter himself at an earlier stage and sought to have it resolved by the court as an issue arising during the course of the administration.

44. There are many and various ways in which a legal issue may arise for determination during the course of an administration, as indeed the various cases to which the court has been referred during submissions demonstrate. There is no hard and fast rule as to how each must be dealt with. But even where the legal personal representative stands to gain depending on how the issue is determined, and this will occur quite frequently where the administrator will often be a family member, it is not in every case where such an issue arises that it will be necessary that he/she be replaced, even though it is easy to characterise that situation as one giving rise to a conflict of interest or even a potential conflict of interest. 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.

45. This in my view is what is meant by Macken J. in *Flood v. Flood* [supra] when she stated:-

> *"A court should not remove an executor from his role, unless it is satisfied that it is necessary to do so. 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."*

46. I see no reason not to apply these remarks to the present case even though in *Flood* the target of the application was an executor and not an administrator.

47. One reason why a legal personal representative should not be replaced unless it is necessary in the sense described is that to do so imposes an extra level of expense upon the estate. Inevitably perhaps, the new independent replacement will be a professional person, or at least somebody who is not a volunteer and who will be entitled to be paid for his services. Where litigation is involved, in particular, this will lead to a considerable drain on the resources of the estate, and to the detriment of the beneficiaries. This must be avoided in all but those cases where it is necessary.

48. Let us suppose for a moment what would happen in all likelihood if the defendant is replaced by some independent person such as David Osborne, solicitor. The plaintiffs say for example that if he was in situ he would have to take a view on the issue that has been raised, and that view may be that on the facts as known the defendant was unlikely to succeed in his claim to adverse possession or on the statute, and therefore he might withdraw those issues from the defence delivered in the case, and he could then just register the plaintiffs (and presumably the defendant too) as owners of the land in the shares to which they claim entitlement. I have to say that I find that to be fanciful given what we know already as to the nature of the issue. I ask rhetorically how could a prudent legal personal representative proceed in that fashion and ignore the claim that he knows is being made by the defendant to full ownership.

49. The reality, I think, is that if replaced by Mr Osborne, the defendant's issue cannot simply without his agreement be wiped away or otherwise ignored. Inevitably, the defendant would be entitled to apply to be joined as a defendant and to be heard as the person whose asserted interest is directly affected. He would be entitled to be legally represented, and if successful, would in all likelihood be awarded his costs out of the estate, as would Mr Osborne. Thus, the same issue would be before the court. The same evidence would be heard. The same parties (plus an additional one) would be before the court. It is unlikely that Mr Osborne would have any evidence to give. In reality nothing will have been gained by the replacement of the defendant as far as the determination of these issues is concerned. It would, of course, be a matter for the court to ensure that a fair hearing takes place for all concerned.

50. The plaintiffs have submitted that it is necessary to replace the defendant since they would be at a litigious disadvantage or prejudice should the defendant remain *in situ*. For example, they have stated that if the defendant does not cooperate in relation to the handing over of any relevant documents that he may possess which speak to the issue of adverse possession, including acknowledgement of their entitlements by Eileen Dunne during her lifetime, either to her solicitor, her accountant, her auctioneer or other third parties, they will be disadvantaged, whereas if an independent person is appointed to replace him, that difficulty is overcome since that person will be entitled to all documents and other material belonging to the estate, and their fears of non-cooperation would be dissipated. Insofar as the defendant might offer to make discovery, the plaintiffs submit that they should not have to be put to that task and that this itself constitutes a disadvantage in the litigation.

51. In my view this particular fear is speculative only, and given the fact that it has been made clear to this Court that the defendant wishes to have the issue determined by the High Court and that he will simply abide by whatever order the court may make and administer the estate accordingly, I would not accept that this could be a basis for his removal at this stage. Of course, it goes almost without saying that if he is not true to his word, and fails to co-operate appropriately in relation to the proper determination of the issues that he has raised in his defence, by way of failing to make proper discovery or whatever, the question of whether he ought to be replaced as legal personal representative could arise again, but on those or other new facts.

52. Other reasons of a more technical or legal nature have been posited by the plaintiffs as to why they believe that the issues that have arisen cannot be properly determined in the existing proceedings as presently constituted are set forth in the plaintiffs' very helpful and comprehensive written submissions (see para. 40 thereof at (i) to (v). It is no disrespect to those submissions to say that I do not believe that the issues identified are insuperable, and that the trial judge at the conclusion of the case will be able to make whatever order is required to be made in order to give effect to the conclusions of the court on the issues that have been raised.

53. In my view the trial judge took too narrow a view of the question of conflict of interest, and failed to give sufficient weight to the question of necessity. In my view, the replacement of the defendant as legal personal representative is not necessitated in the circumstances of this case, and I would allow the appeal, including the appeal against the order for costs of the motion made against the defendant personally. Such an order for costs would in my view require a finding of some misconduct or other culpable behaviour on the part of the defendant, and there was none. The parties can make submissions as to what costs order might be appropriate in all the circumstances.