[2018] IEHC 47

THE HIGH COURT

[2014 166 SP]

BETWEEN

TRENTDALE LIMITED

PLAINTIFFS

AND

MARY O' SHEA

DEFENDANTS

JUDGMENT of Ms. Justice Creedon delivered on the 25th day of January, 2018

BACKGROUND

1. The plaintiff seeks a declaration that a judgment mortgage registered over lands comprised and described in Folio 762 of the Register of Freehold ownership for the County of Kerry stands well-charged over the interest of the defendant.

2. In addition, the plaintiff seeks auxiliary reliefs, including a declaration that the sum due and owing to the plaintiff, is the sum of €92,903.35 with the continuing interest on the principal sum of 8% per annum; and an order for partition of the lands and sale of the defendant's interest in the lands or an order for sale of the lands and distribution of the proceeds of sale.

3. This case arises as a result of unsuccessful judicial review proceedings (Record No. 2003 129 JR), which were brought by Margaret O'Shea the defendant's late mother, against Kerry County Council, as respondent, and Elmpath Limited and Elmpath Holdings Limited as notice parties.

4. A costs order was made against Margaret O'Shea on the 10th of November, 2003.

5. On the 23rd of August, 2004, costs were taxed and ascertained in the sum of €92,903.35. After taxation, Elmpath Holdings Limited applied to the Land Registry to convert the order for taxed costs to a judgment mortgage against the interest that Margaret O'Shea retained in the lands described above.

6. Elmpath Holdings Limited was registered as the owner of the said judgment mortgage on the 14th of December 2004.

THE LANDS

7. The defendant's father (hereinafter called 'Daniel P. O'Shea, Sr.') transferred the lands as described to the defendant's brother (hereinafter called 'Daniel P. O'Shea, Jr.') on the 23rd September, 1985, subject to a joint right of residence in favour of Daniel P. O'Shea, Sr. and the defendant's mother, Margaret O'Shea.

8. It is common case that upon the death of Daniel P. O'Shea, Sr. on the 21st of September, 1986, Margaret O'Shea took a sole right of residence for her life by survivorship.

9. Daniel P. O'Shea, Jr. died intestate and without issue on the 15th November, 1994.

10. The plaintiff alleges that Margaret O'Shea, as sole beneficiary of Daniel P. O'Shea, Jr's estate, acquired a proprietary interest in the lands.

11. Before this court, notwithstanding a previous averment to the contrary, the defendant conceded that Margaret O' Shea held a proprietary interest in the lands in question.

12. On the 24th May, 2009, Margaret O'Shea died testate. In her last will and testament dated the 8th April, 2009, she bequeathed her entire estate to the defendant.

13. The plaintiff alleges that the defendant therefore acquired Margaret O'Shea's interest in the lands.

14. The defendant asserts that as personal representative of Margaret O' Shea's estate, she never affected an assent, transferring any interest in the lands to herself as sole beneficiary. As a result, the defendant reasons that no interest was or could have been transferred to her in her personal capacity as beneficiary.

15. The defendant argues that the case cannot succeed against her, either as personal representative of her mother's estate or in her personal capacity, as sole beneficiary. She makes this assertion on the following basis:

> (1) In relation to the defendant's capacity as personal representative of Margaret O'Shea's estate, the defendant argues that the case is statute-barred by s. 9 of the Civil Liability Act, 1961. As a result, this claim cannot succeed without an effective claim against the estate, because a declaration that the debt remains unsatisfied is an implicit but essential part of a well-charging declaration and cannot be made against anyone but the estate, as the sole entity liable for the debts of the testatrix.
>
> (2) The defendant argues that the claim cannot succeed against her in her personal capacity, as a beneficiary, as she has no proprietary interest in the land, whether in law or in equity, having made no assent to herself, as sole beneficiary.

THE ASSIGNMENT

16. The plaintiff contends that on the 15th of March, 2010 by an ordinary resolution of Elmpath Holdings Limited, the benefit of the judgment mortgage described above was assigned to the plaintiff.

17. Said transfer is recorded in the minutes of the board meeting, which was convened in order to seek approval of the shareholders for the transfer of all assets of Elmpath Holdings Limited to the plaintiff in the wake of the company's dissolution.

18. The plaintiff therefore asserts that it is the appropriate applicant in the instant case, being the assignee of the judgment mortgage in question.

19. The defendant contends that the purported assignment was not sufficient to transfer a legal or an equitable interest in either a charge or a judgment mortgage over the lands and therefore, holds that the plaintiff has no interest in the judgment mortgage and no standing to bring such an application. The defendants contend that the plaintiff cannot seek relief without joining Elmpath Holdings Limited or the Minister for Finance to the proceedings.

LAW

20. The Judgment Mortgage (Ireland) Acts 1850 and 1858 were repealed and replaced by the new simplified, statutory provisions contained in Part II of the Land and Conveyancing Law Reform Act 2009 (henceforth "the Act of 2009") .

21. It is accepted however, that S 6 of the Judgment Mortgage Act 1850 governs the registration of judgment mortgages created before 2009.

22. Turning to the first issue, that is, whether the defendant is the correct responding party to proceedings: the court is cognisant of the defendant's arguments that if the plaintiff was to sue her as personal representative of her late mother's estate, they would be statute-barred from doing so, under S 9 of the Civil Liability Act, 1963. This seems to be common case between parties, as the plaintiff has repeatedly asserted, during proceedings and in subsequent written submissions, that it is suing the defendant in her capacity as sole beneficiary of her mother's estate and the only person entitled to an interest in the land.

23. With regards to suing the defendant in her personal capacity, the defendant makes two assertions:

> a) That there has been no assent, express or implied, made by the defendant as personal representative of her mother's estate, to herself as sole beneficiary and;
>
> b) Therefore, she does not currently enjoy any proprietary interest in the land, whether in law or in equity.

24. Section 10 of the Succession Act 1965 was referred to, which provides:

> *"1) The real and personal estate of a deceased person shall on his death, notwithstanding any testamentary disposition, devolve on and become vested in his personal representatives."*
>
> *"3) The personal representatives shall be the representatives of the deceased in regard to his real and personal estate and shall hold the estate as trustees for the persons by law entitled thereto."*

25. The case of *Gleeson v. Feehan* [1997] ILRM 522 was also opened to the court to bolster the defendant's assertion. In this case, Keane CJ held that a personal representative may be properly regarded as a trustee, holding the estate for the benefit of those who are ultimately entitled to it. It was also held at p. 537:

> *"It is, however, clearly contrary to elementary legal principles to treat the persons entitled to the residuary estate of a deceased person as being the owners in equity of specific items forming part of that residue,* ***until such time as the extent of the balance has been ascertained*** *and the executor is in a position either to vest the proceeds of sale of the property comprised in the residue in the residuary legatees or, where appropriate, to vest individual property in specie in an individual residuary legatee. Precisely the same considerations apply to the rights of a next-of-kin in relation to the estate of a person who dies intestate. Until such time as the extent of the residue after payment of debts available to the beneficiaries is ascertained, there is no basis in law for treating them as* ***entitled in equity*** *to any specific item forming part of the estate." (Emphasis added).*

26. The plaintiff relied upon the above finding to suggest that the equitable interest in the property vested in the defendant beneficiary, as soon as the distribution of the estate was possible; that the moment she, in her capacity as personal representative, was in a position to deal with the estate, she also, as sole beneficiary, became entitled, in equity, to the land in question.

27. However, it seems to this court that Keane CJ did not intend for this interpretation of his comments to prevail. After the above mentioned quote, he notes:

> *"It is no answer to these fundamental propositions to say that the beneficial interest in the property must reside somewhere during the course of administration and that, since the executor or administrator is not beneficially entitled, it must vest in the residuary legatee or (in a case such as the present) the next-of-kin".*

To temper things further, Keane CJ then quotes Viscount Radcliffe's judgment in *Commissioner of Stamp Duties (Queensland) v. Livingston* [1965] AC 694:

> *"This dilemma is founded on a fallacy, for it assumes mistakenly that for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable. There is no need to make this assumption. When the whole right of property is in a person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property, any more than there is for the property of the full beneficial owner. What matters is that the court will control the executor in the use of his rights over assets that come to him in that capacity; but it will do it by the enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets."*

A proper reading of *Gleeson* therefore, does not lend to the assumption that the defendant, as the sole beneficiary of the estate acquired a beneficial right in the property, as soon as she, as her late mother's personal representative, was in the position to distribute the assets (if that time has come to pass at all).

28. S 52 of the Succession Act 1965 was opened to the court as follows:

> *"(2) Without prejudice to any other power conferred by this Act on personal representatives with respect to any land of a deceased person, the personal representatives may at any time after the death of the deceased execute an assent vesting any estate or interest in any such land in the person entitled thereto or may transfer any such estate or interest to the person entitled thereto, and may make the assent or transfer either subject to or free from a charge for*

the payment of any money which the personal representatives are liable to pay".

"(5) An assent not in writing shall not be effectual to pass any estate or interest in land".

29. S 54 was also referred to:

"(1) An assent or transfer made by a personal representative in respect of registered land shall be in the form required under Section 61 of the Registration of Title Act 1964, and shall be subject to the provisions of that Act."

"(2) The Registration of Title Act, 1964 is hereby amended by the substitution of the following subsection for subsection (3) of section 61:

'(3) (a) An application for registration made by a person who claims to be by law entitled to the land of a deceased registered full owner, accompanied by an assent or transfer by the personal representative in the prescribed form, shall authorise the Registrar to register such person as full or limited owner of the land as the case may be.

b) On the determination of the estate or interest of an owner who is registered as limited owner of land pursuant to such an assent or transfer, the assent or transfer shall, on application being made in the prescribed manner, authorise the Registrar to register, as full or limited owner, as the case may be, the person in whose favour the assent or transfer was made, or the successor in title of that person, as may be appropriate.

c) It shall not be the duty of the Registrar, nor shall he be entitled, to call for any information as to why any assent or transfer is or was made and he shall be bound to assume that the personal representative is or was acting in relation to the application, assent or transfer correctly and within his powers' ".

30. The plaintiff contends that the case of *Mohan v. Roche* [1991] 1 IR 560, requires that an implied assent should be presumed by virtue of the fact that the defendant is both the personal representative and the sole beneficiary.

31. In *Mohan*, Letters of Administration were granted to the widow of Michael Roche, when he died intestate in 1967. The couple's nine children released and conveyed their interest in their father's property to their mother. Mrs. Roche died in 1989 and her son, Thomas Roche, became her personal representative. Thomas Roche attempted to sell the property in question, but the purchaser stated that the title was defective, as Mrs. Roche, as administratrix of her husband's will, never made an assent in her favour, as sole beneficiary. Keane J held that where a property had devolved and the personal representative was also the entity that was beneficially entitled to it, then an assent was not required. It has been suggested, however, that this case may be restricted to its particular facts. Indeed, the Law Society issued a Practice Note on this decision in December 1997. The Law Reform Commission in its report on Land Law and Conveyancing Law 1998, also noted that *Mohan v Roche* only applies in limited circumstances, which greatly mirrored those enumerated by the Practice Directions. Their recommendations included the restriction of the ratio to cases where:

1. Where the administrator alone is beneficially entitled to the estate of an intestate deceased and all liabilities of the estate have been discharged or have become statute-barred;

2. Where the executor alone is beneficially entitled to the un-administered part of the estate of a testate deceased and all the liabilities of the estate have been discharged or have become statute-barred.

32. The defendants posit that *Mohan v. Roche* does not apply in the instant case, as the property in question is registered land. *Dolan v. Reynolds* [2011] IEHC 334 was opened to the Court in order to illustrate this point.

33. In this case, after the death of her husband, Matthew Reynolds, Evelyn Reynolds, as personal representative, held the property in question, on trust for herself and her five children. The children transferred their interest to her by Deed of Family Settlement and the plaintiff accepted a sum of money in lieu of her interest. No assent was ever executed by Evelyn Reynolds, vesting the subject property in herself as beneficiary. In the absence of same, Matthew Reynolds continued to be named as the registered owner. Therefore, when Evelyn Reynolds passed away intestate, she did so without having completed the administration of her husband's estate. The plaintiff therefore submitted that the property did not form part of Evelyn Reynolds' estate when she died and the property remained the un-administered estate of Matthew Reynolds. Abbott J held at p. 22:

"The courts should be reluctant to interfere with such an extensive scheme which has had and continues to have the effect of greatly simplifying the complexities of conveyancing. Hence, I am very reluctant to accept that the solution proposed in the judgment of Keane J. in Mohan v. Roche in the case of the absence of an assent of non-registered land, should be followed as it would fly in the face of the principle of the conclusiveness of the register and the express provisions of s. 72 of the 1964 Act specifically listing burdens which may affect registered land whether those burdens are or not registered. To concede an extension of the Mohan v. Roche principle to registered land would be for the courts to create an additional burden affecting land of a type outside s. 72 and would constitute an unwarranted usurpation of the powers of the Oireachtas."

34. Abbott J went on to note that in *Coughlan*: Property Law (2nd Ed, p. 429), it is stated that it is unlikely that *Mohan v. Roche* can be read as having any application to registered land.

35. It would seem, therefore, that in the case of registered land, an assent is required to be made by a personal representative in order to vest property in the party entitled thereto, even if said party is, in fact, the personal representative herself.

CONCLUSION

36. Taking into consideration the comments made in *Gleeson* and *Dolan*, the court is of the opinion that the defendant does not enjoy any interest in her mother's estate, in her capacity as sole beneficiary, in the absence of an assent made under S 52 of the Succession Act 1965 and in accordance with S 61(3) of the Registration of Title Act 1964.

37. The court does not find it appropriate to extend the remit of *Mohan v. Roche* to encompass the facts of this case, as the property in question is registered land.

38. As a result, it is held that all interest in the land vests, as it stands, in the defendant, in her capacity as the legal personal representative of her mother's estate.

39. As any claim against the defendant in this capacity is necessarily statute-barred, as is common case between parties, the court hereby refuses the reliefs sought by the plaintiff.

40. Accordingly, the court does not deem it necessary to deal with the issue of the validity of the debt's assignment.