

BETWEEN

WILLIAM KENNY

PLAINTIFF

AND

ALISON KENNY

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 12th day of February, 2019

1. This is a claim by the plaintiff in respect of the proceeds of a mortgage protection policy (amounting to a sum of approximately €95,000) by way of an alleged resulting or constructive trust on account of the discharge of payments made by the plaintiff in respect of the annual premium.

The People Involved

2. Keith Kenny (*"the deceased"*) died on 14th January, 2013, and is survived by three daughters (*"the daughters"*), including the defendant who was granted letters of administration to the estate of the deceased on 3rd October, 2013. The deceased separated from his wife in 1998 and was ultimately divorced. The daughters are now aged over eighteen and the defendant has the responsibility of administering the estate of the deceased including the discharge of any debts and then the distribution of the remaining net assets of the intestate deceased.

3. The plaintiff is the father of the deceased and the grandfather of the defendant. The plaintiff's wife did not take any part in these proceedings. Unfortunately, since this issue arose the grandparents now have no ongoing personal contact with the daughters. The Court had urged a rapprochement but without success.

Purchasing the apartment

4. In 2000, the plaintiff purchased a one-bedroom apartment known as Apartment 28, Smithfield Gate, Dublin (*"the apartment"*) for IR£160,000 (€203,158.00). The plaintiff and the deceased borrowed IR£130,000 and were jointly and severally liable for the mortgage repayment. The plaintiff paid the difference of IR£30,000 to purchase the apartment. The plaintiff explained that the deposit and all mortgage repayments came from his joint account with his wife (*"the joint account"*) at all times. He also outlined how their then lender, First Active plc, firstly, required that the apartment be bought in both his and the deceased's names, as they wanted someone younger, in addition to the plaintiff, to be responsible for the mortgage repayments, and secondly, required mortgage protection policies to be assigned so that the outstanding mortgage repayments would be met in the event that either of the plaintiff or the deceased died.

5. The plaintiff admitted that neither he nor the deceased specifically discussed or agreed what would happen on the death of either of them in relation to the apartment or the mortgage protection policies taken out on the life of each of them for the duration of the mortgage. The plaintiff was insistent that he discharged the mortgage repayments and the mortgage protection policy annual premium from the joint account. In his direct examination, the plaintiff stressed that everyone in the family knew of the arrangements that the apartment was bought in joint names at the request of First Active. On cross-examination he accepted that this consensus of the alleged knowledge was actually his assumption that the deceased told the daughters about the plaintiff's interpretation of all arrangements, although the daughters were young at that time of purchase in 2000. The plaintiff tended in evidence to portray matters as he would like them to be in his favour and from the view that he knew and knows best for all family members including for his grandchildren.

Re-mortgaging the apartment

6. In 2007, the plaintiff decided to re-mortgage the apartment with Permanent TSB in order to release the increased equity which had arisen. It took quite a few questions and time in cross-examination for the plaintiff to clarify what he did with the proceeds of the mortgage release arrangements with Permanent TSB. The outstanding mortgage due to First Active was discharged and the plaintiff somewhat hesitantly placed a figure of €100,000 on the sum which he applied to building a mezzanine floor in the factory premises of W&R Kenco Aluminium Windows Limited (*"the company"*).

7. Both the plaintiff and the deceased, when applying for the re-mortgage facility from Permanent TSB, acknowledged in forms signed by them that they did not wish "to take out mortgage protection assurance" and they also confirmed "1. *The dwelling is not intended for use as my or my dependant's principal residence as my principal and my dependant's principal residence is situated*" elsewhere. In those circumstances, the mortgage protection policies which had been assigned to First Active continued in place after 2007 but remained unassigned.

The Company

8. The company was incorporated in July 1981. The plaintiff gave evidence that he thought that the deceased was a director for only a year but later acknowledged that the entry in the register of the Companies Registration Office of a notice of change of director filed in August 2008, related to the deceased and that the deceased ceased to be a director in or around November 2011. The company has little, if any, relevance to the issues to be determined other than by way of background.

9. A liquidator was appointed to the company in May 2012. This, according to the plaintiff, followed the economic turmoil in 2008 and the inability of the company to compete with the black economy in fitting aluminium fixtures in houses. The deceased had been employed in the company. The plaintiff and his wife were, at all times, directors and shareholders of the company. The plaintiff repeated that the company did not pay any of the premia for the life assurance policies from 2000 onwards.

Death of the deceased

10. A letter from Aviva Life and Pensions Ireland Limited (*"Aviva"*) dated 22nd January, 2014, and produced to the Court, confirmed that a monthly premium of some €36 was paid from April 2000 to January 2013, in respect of the policy for the life of the deceased. A total of €5,594.54 had been paid from a specific account identified by the plaintiff as being the joint account which he had with his wife.

11. By letter dated 10th October, 2013, having been informed of the death of the deceased by brokers at the request of the plaintiff, Aviva informed O'Donohoe Solicitors, engaged to act in the administration of the estate, that Ulster Bank (the successor to First Active) had confirmed no further interest in the life policy.

12. By letter dated 24th October, 2013, O'Donohoe Solicitors relayed this information to the solicitors for the plaintiff and further confirmed that Aviva did not have any notice of the plaintiff's interest in the policy covering the life of the deceased.

13. The plaintiff was understandably preoccupied with the death of the deceased. However, it emerged in cross-examination that neither the plaintiff nor the deceased contemplated death and least of all what would happen to the proceeds of the life policies after First Active (now Ulster Bank) ceased to have an interest.

The Apartment Now

14. The plaintiff explained that Permanent TSB took possession of the apartment in or around 2018, because of his default in repayments. The plaintiff estimates that the market value of the apartment at the time when Permanent TSB took possession was between €220,000 and €230,000 and that there was some €269,000 still owed to Permanent TSB.

Resulting trust

15. The plaintiff argued that in this case a resulting trust arose. Biehler describes resulting trusts as occurring:-

"where a person provides the purchase money for property, whether real or personal, which is conveyed or transferred to another person or to himself and the other person jointly, it is presumed that the latter holds the property on a resulting trust for the person who provided the purchase money." (6th edition, p. 173).

16. As stated by the Denham J. in *Stanley v. Kieran* [2011] IESC 19, quoting Dr. Chambers in *Resulting Trusts* (1997), "All resulting trusts come into being because the provider of property did not intend to benefit the recipient." (para. 27). Gibson J. in *Carreras Rothmans Ltd v. Freeman Matthews Treasure Ltd* [1985] Ch 207 held that "if the common intention is that property is transferred for a specific purpose and not so as to become the property of the transferee, the transferee cannot keep the property if for any reason that purpose cannot be fulfilled." (p. 222).

17. A resulting trust may be rebutted by the presumption of advancement between a father and a child. The defendants rely on the case of *Re Roberts* [1946] Ch 1 where a father had made payments on a policy of assurance taken out on his son's life. Evershed J. held that:-

"It is well-established that a father making payments on behalf of his son prima facie, and in the absence of contrary evidence, is to be taken to be making and intending an advance in favour of the son and for his benefit." (p. 5).

18. The presumption of advancement can itself be displaced by evidence that the father did not intend to make a gift to his child. The plaintiff argues that there is no evidence here that there was any intention to give a gift to the deceased. At the time of the purchase the deceased was 37 years old and independent. Furthermore, the plaintiff relied on the English case of *Stack v. Dowden* [2007] 2 AC 432 where the property was in the joint names of both parties (who had been partners) but one party alleged a greater contribution to the purchase price and mortgage repayments. The House of Lords held that a party had to prove that the parties held a common intention that their beneficial interests be different to their legal interest. In considering the parties' common intention, Lady Hale stated:-

"Many more factors than financial contributions may be relevant to divining the parties' true intention. These include: any advice or discussions at the time of the transfer which cast light on their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses." (para. 69)

19. The plaintiff argued that the mortgage protection policies had a clear and specific purpose: the benefit of the policy was assigned to the lending institution so that in the event of the death of the mortgage holder the mortgage could nevertheless be discharged. The plaintiff tended to suggest that the existence of the joint tenancy was a convenience and that in reality the premises would have been held by the deceased for his mother in the event of the plaintiff's death. Ultimately, the plaintiff submitted that the transaction was entered into solely in order to comply with the requirements of the lending institution. The deceased did not have and did not understand that he was acquiring any beneficial or other interest in the property during the lifetime of the plaintiff.

20. The defendant disputed this assertion and argued that the plaintiff's evidence was strongly indicative that the property and any insurance policy was a gift to the deceased and that there was no intention to withhold ownership of the property. In support of this the defendant relied on the following facts:-

(i) At the time of the purchase, the plaintiff was putting in place financial supports for the deceased through his company;

(ii) The plaintiff gave evidence that he recognised that it was more likely that he would predecease his son and he understood that if this had happened, the deceased would have inherited the property as the surviving joint tenant. Furthermore, the mortgage protection policy would have been used to pay off the indebtedness on the apartment. In such circumstances, neither the property nor the proceeds of the policy would form part of the plaintiff's estate.

21. Furthermore, the defendant claimed that no evidence was given by the plaintiff about the deceased's understanding of the transaction and that the Court is being asked to infer the intentions of both the plaintiff and the deceased.

Constructive trust

22. Biehler describes a constructive trust as one:-

"which arises by operation of law and which ordinarily comes into being as a result of conduct and irrespective of the intention of the parties. In general terms it can be described as a trust which is imposed by equity in order to satisfy the demands of 'justice and good conscience' and to prevent deriving profit from fraudulent conduct or taking unfair advantage of a fiduciary position." (6th edition, p. 228).

23. Keane states that a constructive trust is:-

"deemed by the law to exist, not where someone intends to create a trust or is presumed to have so intended, but in circumstances where it would be unconscionable for a person to deny another person's beneficial interest in a specific property." (3rd edition, para. 13.01)

24. The plaintiff effectively relied on a model of remedial constructive trust which may arise in circumstances where a person would be unjustly enriched if they were permitted to attain property, as was recognised by the Supreme Court in *East Cork Foods Ltd v. O'Dwyer Steel Co.* [1978] IR 103. Keane identifies three essentials to a claim of 'unjust enrichment':-

- (i) The defendant has been enriched;
- (ii) This enrichment was at the expense of the plaintiff; and
- (iii) The enrichment was unjust. (para. 13.67).

25. There was also reference to Gilligan J.'s judgment in *In Re Varko Limited* [2012] IEHC 278 (unreported, High Court, 3rd February, 2012). He noted that the 'new model constructive trust' had been met with limited approval in this jurisdiction. He quoted Barron J. in *N.A.D v. T.D.* [1985] ILRM 153 who stated:-

"The constructive trust is imposed by operation of law independently of intention in order to satisfy the demands of justice and good conscience. Its imposition is dependent upon the conduct of the person upon whom the trust is imposed and prevents him from acting in breach of good faith. There is no fixed set of circumstances in which such a trust is imposed." (para. 39).

26. Gilligan J. noted that Barron J. held that *"a prerequisite in constructive trusts of this type was that there must be an element in the conduct of the person upon whom it is imposed which would make it inequitable for them to be allowed to assert his legal rights."* (para. 40).

27. The thrust of the plaintiff's case is that it would be *"inappropriate"* and *"grossly inequitable"* to allow the defendant take advantage of the plaintiff's error in not reassigning the mortgage protection policy.

28. The defendant, referring to Gilligan J.'s judgment, noted that no conduct on the part of the deceased was impugned and that no action on the part of the defendant or the other daughters led to the insurance company stating that the proceeds of this policy were to be paid to the estate and not to any third party. Furthermore, the plaintiff in evidence confirmed that the deceased, by signing up to the mortgage, was taking on a risk and that the lender would have had recourse against him. Thus, there can be no element of unjust enrichment as if the deceased, or his estate, derived a benefit, it reflected the risk taken and the deceased's involvement.

Unexplained

29. To succeed in his claim for a resulting trust, the plaintiff must rebut the presumption of advancement that arises with regard to a father and child by demonstrating that his intention was not to make a gift to the deceased. The plaintiff was unable to explain in a meaningful way what would have happened if he had died before the deceased. On the one hand, he expected that his wife would be entitled to the apartment and the proceeds of the policy on his life in order to redeem the mortgage to give her ownership. On the other hand, he was prepared to accept that the deceased would have been entitled to some equity in the apartment because he was a joint owner. If he was so entitled he would have been burdened also with the negative equity in the apartment. There is a further incongruity in the plaintiff's stance when one considers that the mortgage protection policy was referenced to the original loan advanced in 2000 by First Active for IR£130,000. The loan from Permanent TSB was for €270,000 in 2007. The deceased's primary exposure to Permanent TSB had been increased over and above his limited exposure in 2000. The plaintiff failed or refused to acknowledge the exposure of the deceased in his portrayal. He conveniently glossed over the difference which can occur when market values drop significantly.

30. Did the plaintiff gift to the deceased an actual or potential interest in the apartment and the policy on the plaintiff's life? The plaintiff singularly failed to answer the question about gifting. In fact, the plaintiff confused matters by referring to his belief that there was some s. 23 relief in respect of the apartment and the mortgage for his tax liabilities together with a VAT recovery aspect. The Court concludes that the plaintiff never agreed or settled with the deceased what would happen with the proceeds of the mortgage protection policy that remained unassigned. The extent of the evidence in favour of the plaintiff's claim is that he paid from the joint account the premium due in respect of the mortgage protection policy for the life of the deceased.

31. Can the plaintiff rely on the discharge of premia for the policy assuring the life of the deceased to establish ownership of the policy? There is an inconsistency in the plaintiff's stance. Does he intend to deny the estate of the deceased an interest in the apartment jointly held with the proceeds of the life policy applied to discharge the mortgage on the apartment? In this claim, he certainly seeks to deny the right of the estate of the deceased to the proceeds of the life policy. The premia for the policy covering the life of the deceased were discharged from his joint account held with his wife without any notice in writing or orally to the deceased about the deceased's alleged non-existent interest in the apartment and in the policy on the life of the deceased. Unfortunately for the plaintiff, his lack of attention to detail and his undisciplined thought process in 2013 and 2018, has led to the plaintiff's obstinate prosecution of these proceedings to trial.

32. The deceased had a considerable primary liability for the loan from Permanent TSB and there is no unjust enrichment of his estate by the discharge of limited premia by the plaintiff. I cannot find a breach of good faith by the deceased. It is not grossly inequitable to allow the law operate as Aviva has indicated.

Conclusion

33. It is far-fetched to imply an arrangement enforceable against the estate of the deceased arising from the discharge of the premia for a policy covering the life of the deceased discharged from an account jointly held by the plaintiff with his wife. The height of the plaintiff's case relates to the total premia paid in respect of which he may or may not make a claim. In this regard, I will hear counsel in relation to an application for the estate to repay to the plaintiff and his wife (grandmother of the defendant), the sum of €5,594.54, being the sum total of the premia payments.