THE HIGH COURT

[2018 No. 12 SP]

BETWEEN

ANDREW SHANNON

PLAINTIFF

AND

HENRY SHANNON

DEFENDANT

JUDGMENT of Mr. Justice Michael MacGrath delivered on the 19th July, 2019.

1. On the 12th April, 2019, this Court delivered judgment in the above proceedings, a construction suit brought by the plaintiff, as the executor of the estate of John Shannon, deceased. The plaintiff is also a nephew of the deceased. The defendant is a beneficiary under the Will. The court determined that the specific devise to the defendant comprised the lands in Folios 22769 County Cork, and Folio 60662 County Cork, and that the will was not void for uncertainty. This was a finding in favour of the construction advanced by the defendant.

2. This aspect of the judgement deals with the question of costs. The defendant seeks his costs against the plaintiff pursuant to O. 99 of the Rules of the Superior Courts, which contains the general rule that costs should follow the event. It is also submitted that while the general principles of O. 99, as amended, apply to all actions, nevertheless the court when considering to award costs out of the testators estate in a probate action should be guided by the principles enunciated by Budd J. in *Vella v. Morelli* [1968] I.R. 11, as endorsed by the Supreme Court in *Elliott v. Stamp* [2008] 3 I.R. 387, where the questions to be considered were described as being *"(a) Was there reasonable ground for litigation? And (b) Was it conducted bona fide?".*

Submissions

3. The defendant submits that the plaintiff does not satisfy this test because there was no reasonable ground for the litigation and it was not conducted in a *bona fide* manner. He points to the delay in the bringing of the proceedings; only after he had instituted proceedings in the Circuit Court seeking to have the estate administered. It is also submitted that in truth the only beneficiary of a successful outcome of the proceedings was the plaintiff himself and therefore he had a conflict of interest. The defendant points to the expense which he has incurred in defending the proceedings. He further submits that the plaintiff made no effort to inform him of his entitlements under the will. The deceased died on the 25th March, 2013. Not only was he not informed of the contents of the will, the plaintiff failed to take any appropriate steps to extract the grant of probate in the estate. The defendant was required to instruct a solicitor to seek a copy of the will and correspondence was entered into over a period of three months. On 18th August, 2014 the plaintiff agreed to produce a copy of the will. Over the course of the next two years the solicitor acting for the defendant failed to persuade the executor to extract the grant and to administer the estate.

4. The plaintiff had instructed a solicitor to act on his behalf in March, 2015 but matters did not progress and that solicitor ceased to act for him in August, 2016. The grant of probate did not issue until the 22nd August, 2017. The defendant submits that if the plaintiff was of the view that there was a legitimate question to be determined and that if he was acting *bona fide*, he would have instituted these proceedings soon after the death of the deceased and that the institution of these proceedings was as a countermeasure to his Circuit Court action.

5. Further, it is submitted that the costs, if they are to be paid out of the estate, should be paid from the residue pursuant to s. 46 (3) and the First Schedule, Part (ii) of the Succession Act 1965. It is accepted that this will deprive the plaintiff of a portion of the residue but the defendant states that this is solely as a consequence of his own actions.

6. Insofar as the conduct of the defendant is concerned, it is submitted that any act or actions taken by him regarding the construction of a roadway on the lands was not unlawful and ought not be taken into account in the determination of the issue of costs.

7. The plaintiff submits that he acted in the proper exercise of his duties as executor, that he was required to bring the proceedings and that he acted in a *bona fide* manner. He contends that the costs should be paid out of the testator's estate, but that the costs should not be ordered from the residue, as that would substantially deprive him as a residual legatee of any benefit under the testator's will. He relies particularly on the actions of the defendant in entering upon the premise and constructing a roadway which may have implications under the Planning Code and in respect of labouring lands. In the alternative, it is submitted that no order as to costs ought to be made.

8. While the plaintiff accepts that the principles in *Elliot* apply where the validity of a will is challenged, it is argued that different considerations arise where there is no such challenge. Reliance is placed on the decision of Herbert J. in *O'Connor v. Markey* [2007] 2 I.R. 194 where he applied *dicta* in *Buckton v. Buckton* [1907] 2 Ch. 406. There Kekewich J. divided administrative actions into three categories for the purposes of determining the question of costs.

9. The first category was addressed be Kekewich J. as follows:-

> *"the applicants are trustees of a will or settlement who asked the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate. It is, of course, possible that trustees may come to the Court without due cause."*

10. Thus in that category, the costs of all the parties as necessarily incurred for the benefit of the estate, should be paid out of the estate.

11. In the second category, although the application is made not by trustees but by beneficiaries by reason of some difficulty of construction or administration, which would have justified an application by trustees, the operation of the first rule applies. Such application is necessary for the administration of the trust and the costs of all parties are necessarily incurred for the benefit of the

estate regarded as a whole.

12. The third category concerns a situation where an application is made by a beneficiary who makes a claim adverse to other beneficiaries and:-

> *"usually takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ and would strictly fall within the description of litigation… once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs".*

13. The plaintiff submits that:-

> i. this case falls within the first of the three categories where the executor seeks the assistance of the court in construing a will in the interests of the beneficiaries and therefore the costs should be ordered to be paid out of the estate;
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> ii. costs should be distributed proportionately between the residue and the specific devise;
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> iii. that the plaintiff's difficulties in administering the estate were compounded by the opinion of the solicitor who drew the will, and who gave evidence that the testator did not intend to leave all his lands to the defendant but intended that an outside farm would be left to the plaintiff. While this evidence was deemed to be extrinsic and was not admitted in evidence, counsel for the plaintiff submits that the expression of such an opinion by the solicitor who drafted the will, and the only person with direct knowledge of the testator's testamentary intention, fully warranted an application to court for guidance.

14. In the event that an order for costs out of the estate is made, reliance is placed on the decision in *Dean v. Bulmer* [1905] P 1, where Jeune P. stated that "*the court has power now to order the costs to be paid out of any part of the estate, which power, I think extends as well to life interests as to capital sums from a portion of the estate*". Reliance is also place on the decision of Herbert J. in *O'Connor v. Markey* as to the manner in which costs were dealt with.

Decision

15. It appears to me that the rules in relation to costs, both in O. 99 and as discussed and developed in *Elliot* and *O'Connor* are designed to achieve a just result. It is true that this is a construction suit, and all things being equal, costs are more likely to be ordered to be paid out of the estate. There was considerable prevarication in the institution of these proceedings by the plaintiff however and he was not only the executor but was also seeking a construction of the will that would have benefited him.

16. On the other hand, the evidence suggests there was a close personal relationship between the deceased and the plaintiff. The defendant elected not to give evidence and the closeness of the relationship between the deceased and the defendant is not evident. There may also have been an unexpressed expectation on the part of the plaintiff that he would benefit under the deceased's will. It is also the case that the opinion of the solicitor who drafted the will was that the testator had intended that a portion of the real estate would pass to the plaintiff. I have also formed the opinion, as expressed in the court's judgment, that I consider the plaintiff to be a man of honest endeavour.

17. Insofar as the defendant is concerned, despite the fact that there was an issue in relation to the construction of the will, it may be contended that he took action of a pre-emptive and presumptive nature in entering the lands and carrying out works thereon before matters had been clarified. To counter this it must also be acknowledged that he went to considerable efforts to bring matters to a head and that he succeeded on his interpretation.

18. On one view, particularly in the context of the opinion and subsequent evidence of the solicitor who drafted the will, these proceedings were necessary in order to clarify matters and that as executor, he had an obligation to do so. On that view, then costs of both sides ought to be payable out of the estate in line with the principles in *O'Connor*. The validity of the will is not challenged, rather its meaning and therefore *Elliot* is distinguishable in this regard. Thus, it may not therefore be necessary to consider whether there was reasonable ground for litigation and whether it was conducted *bona fide*. Having said that, however, it seems to me that the development of jurisprudence in this area illustrates the courts attempts to effect justice between the parties. This is borne out by dicta of Herbert J. in *O'Connor* where he observed:-

> *"In my judgment, though the plaintiff should have his costs out of the estate, this could well result in the sort of unjust and anomalous situation which the Court of Appeal had sought to avoid in In re Knapman; Knapman v. Wreford (1890) 18 Ch. D. 300. If these costs fell to be paid out of the real and personal assets of the deceased in the order provided by s. 46(3) and the first schedule, part II of the Succession Act 1965, the burden would fall on the residuary bequest to the successful second defendant thereby depriving her of all or a material part of the benefit preserved to her by the judgment of this court in exoneration of the devise to the unsuccessful first defendant. In In re Knapman justice was achieved by allowing a set off of the costs of the executrix against the legacies bequeathed to the unsuccessful plaintiffs. It was a rule of the courts of equity that where assets were otherwise insufficient, costs in an administration action could be charged on specifically devised real estate (see Jackson v. Pease (1874) L.R. 19 Eq. 96). In my judgment following the approach adopted by the Court of Appeal in In re Knapman the costs of the plaintiff in the instant case should be a charge on the real estate specifically devised to the first defendant. This property was valued by property consultants and valuation surveyors, on the 10th July, 2002, at approximately €685,000 to €700,000. The first defendant should not be entitled to require that the property be vested in him by the assent of the plaintiff otherwise than subject to this charge for the purpose of making good this loss to the assets of the testator."*

The principles discussed above are illustrative of a development of jurisprudence to ensure in so far as it is possible, that no injustice is caused.

19. While the defendant has sought an order for costs against the plaintiff in accordance with O. 99, I do not believe that it would be just to require the plaintiff to pay the costs of the both sides. The parties have directed the courts attention to the value of the estate. The value of the devise is a multiple of the value of the residue.

20. Considering the alternatives – they are as follows:-

> 1) Costs be awarded against the plaintiff. As I stated, I believe that that would result in a great injustice to him.

2) Costs of both parties be awarded out of the estate. It seems to me that this would work an injustice against the defendant who is the successful party. This is also likely to result in an injustice to the plaintiff if the costs were to be taken from the residue.

3) Costs be awarded out of the estate but charged against specific assets. In my view, that too would be unjust, particularly to the defendant.

21. Having considered the above principles, the overall value of the estate as divided between the specific devise and the residue, the overriding requirement of the court to do justice between the parties in the manner in which it exercises its discretion, albeit a discretion which is heavily influenced by the above stated principles, I have come to the conclusion that the fairest and most just result is that I make no order as to costs. Each party will therefore be responsible for its own costs.