THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 32

Record Number: 2014 No. 866

Ryan P.
Peart J.
Hogan J.

BETWEEN:

WILLIAM NAYLOR (OTHERWISE HOARE)

PLAINTIFF/RESPONDENT

- AND -

JEAN MAHER

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 7TH DAY OF FEBRUARY 2018

1. On the 30th September 2005 Michael Hoare (now deceased) executed a Will ("the first Will") in which, *inter alia*, he devised his farm of lands comprised in Folios 21455 and 18131 of the Register of Freeholders County Tipperary to the plaintiff, his son. Just over one year later on the 9th November 2006 he executed another Will, revoking the first Will, and *inter alia* leaving these lands instead to the defendant, his daughter, but making a bequest to the plaintiff of the sum of €150,000.

2. These are the relevant testamentary provisions which have given rise to these proceedings and associated acrimony between the parties, not to mention the vast expense in terms of legal costs of a twenty one day trial in the High Court, and now the additional costs of this appeal.

3. In these proceedings the plaintiff sought to have the second Will condemned on the basis of duress and/or the undue influence which he claimed had been exerted over the deceased by the defendant, or alternatively on the basis that the deceased held the lands upon an equitable trust for him, and therefore that he was precluded from leaving the lands to the defendant under the 2006 Will. An additional claim that his father lacked testamentary capacity was withdrawn prior to the third listing of the case for trial in July 2011, the case not having got on for hearing on two previous occasions, though at the commencement of the trial the plaintiff attempted to reintroduce the capacity claim, but was not permitted to do so by the trial judge.

4. Following a hearing that lasted some twenty one days, the High Court (O'Keeffe J.) rejected the claims of duress and undue influence, but upheld the claim made by the plaintiff on the basis of promissory estoppel, and concluded that in order to satisfy the plaintiff's equity he should be awarded the entire of the lands. The result therefore was that the 2006 Will was upheld, save in respect of the devise of these lands to the defendant, thereby leaving in place the pecuniary legacy of €150,000 to the plaintiff, and the other pecuniary legacies. In my view it is reasonable to presume that this legacy of €150,000 to the plaintiff was intended to make up for the fact that the lands devised to him under the previous Will were being left instead to the defendant under the 2006 Will.

5. The defendant does not appeal against the finding of promissory estoppel. The gravamen of her appeal is that the trial judge erred in deciding that the plaintiff's equitable claim should be satisfied by the transfer of the entire of the lands to the plaintiff. She submits that a proportionate satisfaction of the equity would have been to compensate the plaintiff with a sum of money sufficient to repay him the amount he had lost by having moved back from Dublin to assist his father on the farm, or by the transfer of something less than the entire of the lands. Evidence was adduced that a sum of €163,000 represented the plaintiff's loss in purely monetary terms, and the defendant submitted that the bulk of such loss is adequately compensated for by the legacy to him of €150,000.

6. The defendant also appeals against the order made in favour of the plaintiff in respect of the entire of his costs in the High Court which were ordered to be paid out of the deceased's estate. She does so on the basis of clear findings by the trial judge that there was no basis established by him to support the claims of duress and undue influence. She points out that a considerable amount of evidence was given and submissions made in relation to the failed claims of duress/undue influence. Her estimate is that approximately 65% of the trial was taken up with these issues. She submits that in such circumstances, and in accordance with the principles in *Veolia Water UK plc. v. Fingal County Council (No.2)* [2007] 2 I.R. 81, the plaintiff should be found entitled at most to just 35% of his High Court costs.

7. The judgment of the trial judge extends to some 104 pages containing 430 paragraphs. Within it he provides a detailed account of the family history and relationships. He gives a careful and detailed summary of the plaintiff's evidence of the representations made to him at different times over the years by his father that the farm would be his upon his father's death, and of his reliance upon them. He summarises the evidence of the numerous witnesses called to give evidence, as well as the legal submissions made by counsel. As far as the plaintiff's claim to the lands is concerned the trial judge reaches his conclusions at paras. 403-412. Albeit a lengthy passage of the judgment, it is convenient to set out those paragraphs in their entirety, rather than risk an unsatisfactory summary:

> "403. I accept the evidence of the plaintiff which by its nature covered the greater part of his life. His evidence primarily extended to his claim to the deceased's farm as he had no direct involvement in relation to the will of 9th November, 2006. His evidence was not exaggerated, but controlled. Due allowance must be made by the court for his youth and age at all material times and his poor school attendance record coupled with his reading and writing difficulties. I find that his evidence was truthful.
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> 404. From the outset I find that he did more than his fair share of work prior to going to Dublin in 1972. He had a natural aptitude at farming and this was availed of by the deceased who did little manual work on the farm from the 1970s onwards. The plaintiff in going to Dublin in 1972 was not doing so for a short period but is likely to have had an open mind

in pursuing a career in Dublin or away from the family home and farm. The plaintiff when in Dublin worked diligently and was most resourceful in the jobs he obtained and in the income he made. Even though he was young at the time, the plaintiff is likely to have had the capacity to succeed in non-farming careers as he had commenced to show.

405. When the plaintiff's brother indicated he was going to leave the family farm, the plaintiff's mother or the defendant (it does not matter who) contacted the plaintiff and asked him to return home. I conclude this was done on the expressed wishes of the deceased, who required the plaintiff's assistance to run the farm. The plaintiff had increased his earning capacity by the various jobs he did. In contrast, when he returned home the income he got from the deceased was small and significantly lower to what he was getting in Dublin. Whilst it may be considered strange that a youth of 17/18 years would assume the opportunity to return to the early family farm [sic] at such a young age it must be remembered it was the Ireland of the 1970s where job mobility was not common. I accept his evidence that a short time after his return the deceased promised or represented to the plaintiff that the lands would be his upon the deceased's death. This promise or representation was repeated on various occasions by the deceased to the plaintiff. The context in which the promises were made have to be appreciated including the deference and respect afforded to the deceased by the plaintiff.

406. Promises were made by the deceased in the context of the low income being paid by him to the plaintiff and the deceased being anxious to secure reliable long term assistance in the management of the farm. Such a long-term aspiration of the deceased would be totally consistent with the lifelong farmer (the deceased) endeavouring to secure within the extended family a permanent and trusted labour supply to assist in the management and working of the farm. This promise or commitment by the deceased becomes more understandable against the background of the plaintiff being acknowledged by the deceased as his stepson and even more so with the plaintiff now acknowledging him as the natural child of the deceased, a fact now known to the surviving members of the family.

407. I also accept the evidence of the witnesses called on behalf of the plaintiff who recalled promises, assurances or statements made by the deceased that the land would be the plaintiff's; by virtue of the plaintiff's contribution to the deceased's farming activities.

408. Whilst the plaintiff was likely to have been a teenager when the first of these promises was made, the court concludes these promises/representations were intended by the deceased to be relied upon by the plaintiff and were in fact relied upon by the plaintiff. It was also reasonable for the plaintiff to so rely.

409. The plaintiff in coming back from Dublin and in working on the farm from then onwards acted to his detriment. This ongoing and lifelong commitment by the plaintiff constituted a serious and substantial detriment for him. Furthermore, the nature or effect of the promises/representations made by the deceased did not change in the early 1980s when the deceased changed his method of farming. The plaintiff continued to do the work of whatever character and however arduous the deceased required of him.

410. Furthermore the work done by the plaintiff does in the court's opinion constitute a detriment suffered by the plaintiff. When required the plaintiff was also willing to expend monies (however small) on behalf of the deceased.

411. The defendant has urged on the court to measure in some equitable manner, the input/contributions of the plaintiff in the management of the farm. I do not think that such evaluation is appropriate in this case. I have already set out my findings on the nature of the promises/representations to the plaintiff and the intended and actual reliance on same. The commitment of the plaintiff to the defendant was lifelong and was not altered by a change or reduction in farming methods or in the advanced age of the deceased. The court does not adopt the method of compensating the plaintiff as suggested by Mr. Rea. Such measure is inappropriate and does not do justice to the plaintiff. The court also prefers the valuations placed on the land by Mr Rigney (to the extent, if any, it is relevant).

412. It has also been submitted that the court should have regard to the lands given by the defendant to the plaintiff in his lifetime and to the fact that some of the land was sold to third parties and that the farm unit has been reduced from the original size when the promise was first made. The court is satisfied it can and will implement the promise in respect of the remaining lands and in this respect, it relies on the judgments adopted in this judgment and the facts as found by the court."

8. As I have said already, the focus of this appeal is the trial judge's conclusion that the plaintiff was entitled to the lands on the basis of promises made to him, and his acting in reliance upon them – in other words on the basis of a promissory estoppel. The defendant has essentially argued that the plaintiff should instead be compensated by the payment of money representing the detriment in money terms that he suffered by reason of returning home from Dublin and working the farm. In that situation the defendant would take the lands under the 2006 Will. She submits that the sum of €150,000 bequeathed to the plaintiff under the 2006 Will is, according to the evidence given by Mr Rea, a specialist agricultural adviser, roughly the amount of the detriment suffered by the plaintiff as a result of moving back to the farm from Dublin where he had been gainfully employed and the value of the services rendered by him, and that this should be seen as a sufficient satisfaction of his equity. An alternative argument was that he should receive only a partial transfer of the lands.

9. The trial judge considered those submissions and rejected them in favour of finding the plaintiff entitled to the entire of the lands. He concluded also that there was no basis in law for depriving the plaintiff of the legacy of €150,000 left to him under the 2006 Will which had been admitted to probate. In that regard he stated:

"423. This Will [*i.e.* the 2006 Will] contained a bequest in favour of the plaintiff for the sum of €150,000.

424. The defendant had submitted that the court had extensive powers to do what it thought was just in all the circumstances of the case. The court has already concluded that the plaintiff is entitled to succeed in respect of his claim to have the balance of the lands at Derrylahan owned by the deceased transferred to him as a result of the promises and commitments made by the deceased to him.

425. The question further arises should the bequest to the plaintiff still stand. In the course of her evidence, Ms. Kinsella-Leavy [the solicitor who was instructed in relation to the preparation and execution of the 2006 Will] stated that the deceased informed her that he had made provision for all the other stepchildren other than Terry Naylor. Whatever disposition/gifts he may have made to the other siblings, it is clear that his promises/commitments to give the farm to the deceased were not fulfilled at the time of his death (excepting the lands that were transferred to him indirectly by the

deceased), although he told Ms. Kinsella-Leavy that such provision had been made.

426. The court is not aware of any basis for excluding the plaintiff from the benefit of the bequest in whole or in part. This remains the conclusion of the court. The unfulfilled commitment and obligation of the deceased to the plaintiff pursuant to the various commitments made by him, is a matter and entitlement that is separate from the bequest."

10. As I have said, the defendant has appealed in relation to two issues; firstly, the awarding of the entire lands to the plaintiff which, it is said, is disproportionate to the detriment suffered by the plaintiff acting in reliance on the deceased's promises; and secondly, the nature of the costs order made by the trial judge whereby the plaintiff was awarded all the costs of the proceedings to be paid out of the estate even though a significant portion of the lengthy hearing in the High Court was taken up with issues of duress and undue influence on which the plaintiff lost. I will deal with the issues in that order.

The satisfaction of the plaintiff's claim

11. Essentially the defendant argues that the award of the entire farm to the plaintiff is excessive and disproportionate to the detriment suffered. Her submissions have referred to two diverging strands of jurisprudence as to the appropriate method of satisfying an equity in circumstances such as here, one holding sway in the United Kingdom, and the other in Australia. It is submitted that the topic has not thus far been the subject of authoritative determination in this jurisdiction.

12. This divergence is described in submissions by reference to how it is treated in *Snell's Equity*, 33rd ed. at 12-048. The learned authors state therein under the heading "two competing approaches":

> *"Beyond this common ground, however, uncertainty arises as the courts have yet to choose clearly between two competing approaches. On the first approach the starting point is that B's expectation will be protected, and a departure from this is permitted only if it is clear that such an order would impose a disproportionate burden on A. On this view, then, the concept of proportionality has only a negative role to play. On the second approach, there is no presumption in favour of making B's expectation good, and the extent of relief will be determined principally by the need for such relief to do no more than ensuring that B suffers no detriment as a result of B's reasonable reliance on A; although B may be left to suffer some detriment if A can show that such an outcome would not on the facts "shock the conscience of the court".*

13. The binary choice represented by the differing approaches demonstrated by the contrasting *jurisprudence* in the United Kingdom and Australia is not a choice that I consider it necessary to make in order to achieve a just result for the plaintiff in accordance with equitable principles. The facts and circumstances of each case will determine how that ultimate objective is achieved: it is not necessary, so to speak, to shoehorn the Court's overall disposition of the case into one or other approach.

14. In the present case it is clear from, for example, para. 408 of the trial judge's judgment that he was satisfied that the plaintiff was entitled to the lands on the basis of the promises made to him, and his reliance upon those promises when acting to his detriment. The trial judge was satisfied that the second approach whereby the plaintiff would simply be recompensed in purely monetary terms would not be a sufficient satisfaction of his claim, and that he should receive the lands as promised to him. I respectfully agree with that conclusion. As I have said the plaintiff altered the course of his life by moving back home to the farm. That altered life that he has led ever since ought not in good conscience be taken from him and replaced by mere money. The sum that he would receive could not replace or compensate him for the life that would otherwise be taken away from him. The trial judge was impressed by the plaintiff and was satisfied that, despite his limited education, he was the sort of man who would in all probability have made a success of his life in Dublin or elsewhere, and away from farming. The change that he was encouraged by his father and family to make, and which saw him return home to look after the farm, was a significant change that cannot be justly reflected in mere money terms.

15. In addition, it is important also to state that the representations made to the plaintiff by the deceased that he would get these lands, and the reliance which the plaintiff placed upon them, in truth amount to a contract which ought to be fulfilled. The deceased should be kept to his contract - *'pacta sunt servanda'*. The satisfaction of the plaintiff's equity by receiving a transfer of the lands will attend to this, and does not offend good conscience.

16. The Court when exercising its equitable jurisdiction, as in the present case, must be guided by correct equitable principles, which necessarily includes a consideration of proportionality and fairness between the parties. The Court is not confined to a consideration of how much money will suffice to compensate him for the loss of his entitlement to the lands. The present case is a good example of where the court's consideration of how the plaintiff's claim in equity to the lands ought to be satisfied must embrace more than simply how much money the plaintiff has lost by making a decision to move back to the family farm, and remaining there in reliance upon the representations made to him. The detriment to him is not confined to a reduction of income or other purely monetary loss. He altered the course of his life. One cannot forecast how his life might have evolved had he remained working in Dublin or, indeed, in any other urban environment, but it is reasonable to presume that he would not have spent his life as a farmer. But there will be other cases where the circumstances presented may indicate that it is just that the particular equity found to exist would be justly satisfied by a pecuniary award.

17. There are no doubt, many attractions to spending most of a lifetime in farming. It is unnecessary for present purposes to consider whether it has been more enjoyable and rewarding for the plaintiff than the life he may have had if he had not returned to a farming life. It suffices to say that he returned to a very different life, and wishes for that to continue.

The bequest of €150,000

18. While I have expressed my respectful agreement with the trial judge's conclusions in relation to the plaintiff's entitlement to have the lands transferred to him, I differ from him in relation to the bequest to the plaintiff of €150,000 under the 2006 Will which was upheld. The trial judge stated that he did not think that there was any basis for excluding the plaintiff from the benefit of this bequest. I disagree. In my view the equitable jurisdiction of the court is sufficient to provide a just result in accordance with equitable principles if the Court is satisfied that it would not be a fair and just result if the plaintiff received not only the lands as promised by the deceased, but also the bequest of €150,000 under the 2006 which was clearly intended by the deceased to be in substitution for the lands. The promises by the deceased amounted to a contract whereby the plaintiff would receive the lands. It was never part of that contract that the plaintiff would receive an additional €150,000. On the facts as found by the trial judge, it is clear that when he executed the 2006 Will the deceased's intention was to replace the devise of the lands in the earlier Will with the bequest of €150,000. The earlier 2005 Will did not contain such a bequest to the plaintiff. Clearly under normal circumstances the deceased was entitled to make such pecuniary bequests as he wished. But one cannot in the present case look at that bequest in isolation from the surrounding facts. In my view, there is no doubt that in the 2006 Will the bequest was in substitution for the lands

which he was no longer to receive. The Court's task in doing justice between the parties is to attempt to put the plaintiff in the same position as if the lands had been left to him under the Will as had been the deceased's promise and in reliance upon which the plaintiff undeniably changed his position with long-term consequences for him, and not to permit a situation to occur whereby the plaintiff would achieve an unintended windfall in addition to the lands. In my view a result which would see the plaintiff receive both the farm and the bequest is disproportionate to what is reasonably required to satisfy the plaintiff's claim and it would not accord with fairness and justice for him to receive both. It would not constitute a fair and just result in the very unusual circumstances of this case. Equity should and, in my view, in this case can fashion a means of achieving a just result for the parties in accordance with equitable principles.

19. Viewed thus, this is really a case which calls for the application of the maxim that he who seeks equity must do equity. It has long been recognised that in cases of this kind the remedy "must be moulded in accordance with what the exigencies of the particular case" require: see *Spence v. Crawford* [1939] 3 All E.R. 271, 288, per Lord Wright.

20. This principle has found expression in a series of cases where, for example, property has been ordered to be returned following claims for recession based on undue influence. In those cases, an allowance is properly made for the work done on the property by the defendant: see the discussion in *Cheese v. Thomas* [1994] 1 W.L.R. 129, 137, *per* Sir Donald Nicholls V.C. Likewise, in *O'Sullivan v. Management Agency and Music Ltd.* [1985] Q.B. 428, 468 Fox L.J. stated that a court should have the power to make an allowance to a fiduciary, as otherwise

> "….A hard and fast rule that the beneficiary alone can demand the whole profit without an allowance for the work without which it could not have been created is unduly severe…."

21. While the trial judge was clearly mindful that the result for the plaintiff was that he would receive both the lands and the bequest of €150,000, he felt that there was no basis on which he should be deprived of the latter. That is where I differ. In my view justice between the parties requires that the plaintiff should receive a transfer of the entire lands, but conditioned on his executing a disclaimer of so much of the bequest of €150,000 left to him under the 2006 Will as he would stand to receive. This disclaimer is necessary so that the court can do justice to both parties and reflects in a practical way the application on the facts of the present case of the equitable maxim I have just discussed. Any other conclusion, would, I think, in the words of Fox L.J. in *O'Sullivan*, be "unduly severe."

22. I have expressed myself in this way because given the extent of the legal costs incurred in these proceedings there will inevitably be an abatement of all pecuniary bequests, including that to the plaintiff. The execution of such a disclaimer by the plaintiff will see his bequest fall into the residue, and will be distributed accordingly in accordance with the terms of the Will.

Costs appeal

23. The trial judge awarded the plaintiff the entire of his costs of the proceedings to be paid out of the estate, notwithstanding that a great deal of the trial was taken up with evidence and submissions on the issues of duress and undue influence upon which the plaintiff failed completely. The defendant submits that under *Veolia* principles the trial judge ought to have awarded the plaintiff only a portion of his costs, being those applicable to the issue on which he succeeded so that the costs on issues on which he failed are not borne by the estate to the detriment not only of the residuary legatee, but of the other beneficiaries by way of inevitable abatement. The Court is asked to bear in mind that the defendant's costs (she being the executor) will have to be discharged from the estate also.

24. Under Ord. 99 of the Rules of the Superior Courts the normal rule is that costs will follow the event, unless the Court can be satisfied that there is some identifiable special reason why in the exercise of the court's discretion some other order should be made. Lengthy and complex cases often involve multiple issues only some of which are successfully argued. While the successful party will have succeeded, and in that sense the "event" for costs purposes has been achieved, nevertheless he/she may have failed on many issues that have occupied a significant number of days of hearing. In such circumstances the question arises as to what order for costs is fair to the losing party. The present case is such a case, where issues upon which the plaintiff has failed in the High Court occupied a great deal of time, and consequently added significantly to the costs incurred by the parties.

25. The question of how costs should be awarded in such cases arose for consideration by Clarke J. (as he then was) in *Veolia Water UK plc. v. Fingal County Council (No.2)* [2007] 2 I.R. 81 in the High Court. He concluded that it was first necessary to determine who was the winning party, in other words what was "the event" to which costs would normally follow under the rule. There is no difficulty in the present case for the Court to conclude that the event for costs purposes was that the plaintiff succeeded in his primary claim that he had an entitlement to the lands. He went on to state that the Court should then consider whether it was safe to assume that the costs were increased by the successful party having raised issues upon which he did not succeed. Again, in the present case there is no difficulty in the Court being satisfied that the length of the trial, and therefore the amount of the costs, was greatly increased by the plaintiff's pursuit of the failed issues of duress/undue influence. At para. 13 of his judgment Clarke J. stated:

> "13. … Where the matter before the court involved oral evidence and where the evidence of certain witnesses was directed solely towards an issue upon which the party who was, in the overall sense, successful, failed, then it seems to me that, ordinarily, the court should disallow any costs attributable to such witnesses and, indeed, should provide, by way of set-off, for the recovery by the unsuccessful party of the costs attributable to any witnesses which it was forced to call in respect of the same issue. A similar approach should apply to any discrete item of expenditure incurred solely in respect of an issue upon which the otherwise successful party failed.
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> 14. Similarly, where it is clear that the length of the trial of whatever issues were before the court was increased by virtue of the raising of issues upon which the party who was successful in the ordinary sense, failed, then the court should, again ordinarily, awards to the successful party an amount of costs which reflects not only that that party should be refused costs attributable to any such elongated hearing, but should also have to, in effect, pay costs to the unsuccessful party in relation to whatever portion of the hearing the court assesses was attributable to the issue upon which the winning party was unsuccessful.
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> 15. Thus, for example, in *O'Mahony v. O'Connor* [2005] IEHC 248, [2005] 3 IR 167 for the reasons set out in that judgment, I concluded that the issue under consideration should be resolved in favour of the plaintiff (who was defendant on the issue concerned). However, it is also clear from the judgment that in respect of a significant number of issues raised at the hearing I found against the plaintiff. At a subsequent hearing I concluded that the original hearing was lengthened by approximately one day by virtue of the fact that the plaintiff had raised those additional issues. The hearing took in total three days. In the circumstances I determined in respect of an application for costs that it was appropriate to award the plaintiff the costs of the issue but confined to a single day's hearing. That single day was

calculated on the basis that the plaintiff was entitled, in general terms, to be regarded as the winner of the issue in that he had, as defendant on the issue, successfully resisted the making of the orders sought against him. However I was also of the view that the plaintiff was, *prima facie*, obliged to pay the defendant one day's costs to reflect the fact that the defendant had been, unnecessarily, but the cost of an additional day's hearing by virtue of the plaintiff having raised on meritorious issues.

16. Apart from the fact that such an approach seems to me, in general terms and subject to the overriding discretion to which I have already referred, to be calculated to meet the justice of similar cases, it also seems to me that such an approach has the merit of discouraging parties from raising additional unmeritorious issues. This applies to cases where a plaintiff may prolong litigation by relying on additional unmeritorious grounds further to the grounds upon which the plaintiff may be successful. It equally applies to a case such as *O'Mahony v. O'Connor* … where the defendant on the issue (i.e. the plaintiff and the overall proceedings) though successful in the overall sense in resisting the application, nonetheless prolonged the hearing by a significant margin by raising unmeritorious grounds of defence."

26. These principles have been applied frequently since they were pronounced, and by now can be considered to be authoritative though pronounced in a judgment given in the High Court. They are principles which should guide the court in the exercise of its discretion. But it is still a matter of discretion to be exercised on the basis of the particular facts and circumstances of any particular case.

27. The present case though lengthy is not a commercial case. It is a dispute arising from the failure of the deceased to honour his obligations to the plaintiff. It is an unusual case, and a type of case to which, many years before *Veolia* was decided, certain discrete principles relating to costs were stated, namely those in In *re Morelli deceased: Vella v. Morelli* [1968] IR 11. A question that this Court should consider is the extent to which the principles stated by Clarke J. in *Veolia* should inform the Court's consideration of the costs in the present case in the context *of Vella v. Morelli*, being a judgment of the Supreme Court, and therefore binding authority on this Court. That was a case where the deceased had made a will in 1950 in which she bequeathed her estate to the plaintiff and defendant equally, but some 5 years later made another will leaving her estate in its entirety to the defendant. The plaintiff brought proceedings to have the second will condemned on the grounds that it was not duly executed, that the deceased had not known and approved its contents prior to execution, and also that the will had been obtained by the undue influence of the defendant. Pre-trial the issue of undue influence was withdrawn, and the trial proceeded only in relation to due execution. The proceedings failed and the 1955 will was upheld. The trial judge awarded the defendant his costs but not those of the plaintiff . The majority held that it had an absolute discretion to displace the costs order made in the High Court, but would exercise that discretion in accordance with the principles which it considered appropriate to the facts of the case.

28. In his judgment in the Supreme Court, Budd J. stated the following: having considered the case of In re Cutliffe's Estate [1959] P 6:

"I have some difficulty in following, or discovering, what is the logical reason for making a distinction between the two types of case dealt with. Why should a party be allowed his costs out of the estate where the testator or those interested in the residue have caused the litigation, but not where the circumstances lead reasonably to an investigation in regard to the propounded document? That an investigation of the circumstances under which a will is made should be held, where the circumstances reasonably call for it, is something required in the public interest. It is important to the whole community to see that wills which have not been properly executed are not admitted to probate. If the fact is that there is a situation which calls for an investigation of the circumstances surrounding the making of the will, why should the factor that the testator or those interested in the residue have caused the litigation be regarded as a determining reason for allowing costs out of the estate to the unsuccessful party, and why should the absence of the same factor have the other result even though an investigation be clearly called for? I am not quarrelling with the first principle which sounds a reasonable proposition. But in the second instance the unsuccessful party may be just as free from blame as in the first instance, and it is equally in the public interest that suspicious circumstances surrounding the making of a will should be investigated whether the testator or not. On the face of it, it would appear as reasonable to allow the unsuccessful party his costs out of the estate in the latter instance as in the former, and that is said to have been the old Irish practice. It would seem pertinent to discover how well the suggested practice was established, how long it continued, and whether it was ever departed from and, if so, why."

29. Having looked at previous case law to discover the provenance of the practice to which he was referring Budd J. concluded as follows:

"It would not, I think, be contested that, where the case is a proper one for investigation and the litigation was conducted bona fide, there arises a situation in which some sort of special order concerning costs may properly be made. A question, however, arises about the proper order to make and, if there is a doubt about the matter, it is obviously desirable that there should be some general principles laid down as a guide to a trial judge so as to secure some uniformity of practice, and, in particular so that litigants can be advised and may know how they stand when they wish to contest or support a will in an action. Speaking for myself, I am by no means satisfied that some new practice has found general acceptance in recent times; nor do I think that any good reason has been shown for departing from the old Irish practice. In our country the results arising from the testamentary disposition of property are of fundamental importance to most members of the community and it is vital that the circumstances surrounding the execution of testamentary documents should be open to scrutiny and be above suspicion. Accordingly, it would seem right and proper to me that persons, having real and genuine believing, or even having genuine suspicions, that a purported will is not valid, should be able to have the circumstances surrounding the execution of that will investigated by the court without being completely deterred from taking that course by reason of a fear that, however genuine their case may be, they will have to bear the burden of what may be heavy costs. It would seem to me that the old Irish practice was a very fair and reasonable one and was such that, if adhered to, would allay the reasonable fears of persons faced with making a decision upon whether a will should be litigated or not. If there be any doubt about its application in modern times, these doubts should be dispelled and the practice should now be reiterated and laid down as a general guiding principle bearing in mind that, as a general rule, before the practice can be operated in any particular case the two questions posed must be answered in the affirmative".

30. Having considered the trial judge's lengthy and detailed judgment, I am left in no doubt that it was reasonable for the plaintiff to seek to have investigated the circumstances whereby lands that he had been promised would be left to him by the deceased ended up being left to the defendant under the 2006 will. It was essential that he receive careful professional advice in relation to that matter, given the seriousness of the matter from his perspective. It seems to me that it was perfectly reasonable for such an investigation to be called for, and for the proceedings to be commenced. I appreciate completely that in the end the trial judge was

satisfied that there was no evidence that the deceased had been unduly influenced or put under duress. But that does not mean that the circumstances were to say the least open to the reasonable suspicion that some undue influence may have been brought to bear upon Mr Hoare to make the 2006 will in the terms that he did, thereby revoking the 2005 will. I would therefore conclude that it was reasonable for the proceedings to be commenced.

31. Looking at the matter as of the date of commencement it was also reasonable in my view that the plaintiff would be advised that his claim should be brought not only on the basis of an operative estoppel whereby the deceased was not entitled to leave the lands to the defendant, but also on the basis that it was at least possible that the plaintiff might prove on the balance of probabilities that there was undue influence. The facts and circumstances certainly justified a reasonable suspicion in that regard.

32. There is no doubt also that the plaintiff acted responsibly by withdrawing his claim based on capacity. There is no doubt also that the trial judge was impressed by the sincerity and genuineness of the plaintiff. He made no criticism of his bona fides in this litigation.

33. Nevertheless, one must look beyond the question of whether the plaintiff acted reasonably by including a claim based on undue influence in his proceedings at the time they were instituted. I have concluded that it was reasonable to do so. One must then consider whether, as the pleadings were delivered, and preparations were being made for the hearing including by the provision of affidavits of scripts, the engagement of expert witnesses and the preparation of witness statements and so forth, the plaintiff, acting reasonably, ought to have perceived that the case on undue influence was not greatly supported by any evidence proposed to be given, and have considered that in such circumstances that part of the claim, like the capacity claim, was too weak to succeed. It seems to me that prior to the commencement of this hearing, it ought to have been realised that there was a likelihood that the undue influence claim would not succeed, and therefore in my view it was not reasonable to press on with that issue which took up a significant part of the entire hearing. While it was reasonable to have commenced that claim as part of the proceedings, it is in my view hard to justify its continuation to a conclusion in the light of evidence available.

34. In that regard I would refer to the memorandum of attendance upon Mr Hoare which was made by Ms. Kinsella-Leavy and which was disclosed in advance of the hearing. I would also refer to the statement of evidence of John O'Connor, solicitor who was called by the plaintiff as an expert on, *inter alia*, the issue of undue influence. His statement, and indeed his evidence given by reference to that statement of evidence did not address directly the question of undue influence in this case, except by reference to what he considered to be good professional practice by a solicitor when attending upon a vulnerable testator when taking instructions for a will. There is no doubt that he was of the view that he would have acted differently to Ms. Kinsella-Leavy had he been the solicitor attending upon Mr Hoare, but in my view much of his statement and his evidence related to the issue of capacity, and in so far as it addressed undue influence it did not, and indeed could not, deal with or comment upon any evidence of undue evidence because there was none, except perhaps by way of inferences to be drawn from the available facts as to the manner in which Ms. Kinsella-Leavy was contacted and came to attend upon Mr Hoare, she never having acted for him previously. There were certain criticisms of Ms. Kinsella-Leavy's failure to have found out what solicitor had prepared the 2005 will, and to have explored thoroughly why after such a short period the testator was making a new will. But against that, Ms. Kinsella-Leavy's evidence was very clear that there was no ground for any suspicion by her that Mr Hoare was under any undue influence, or that he was not acting of his own free will. Without going into detail in relation to her statement and her evidence, it can be stated that she was completely satisfied that he was capable of giving instructions for his new will, and of understanding exactly what he was doing.

35. The evidence that Mr O'Connor and Ms. Kinsella-Leavy would be giving was known before the trial commenced. The weakness of the claim of undue influence ought to have been taken account of by the plaintiff, and perhaps have caused him to withdraw that part of his claim in addition to withdrawing the capacity claim. He was of course entitled to press on as he did, but he must in my view, notwithstanding *Vella v. Morelli* to which I return in para. 34 below, take some of the consequence of so doing by suffering some deduction in the amount of costs that he is entitled to have paid out of the estate. He should not suffer a total deduction, but some reasonable discount should be applied to reflect his failure on the issue of undue influence, albeit that it was reasonable for him to have included such a claim as part of the proceedings when instituting same.

36. If *Vella v. Morelli* is applied strictly and without modification there would seem to be no question but that the plaintiff though unsuccessful eventually in relation to undue influence should be awarded all of his costs out of the estate, since it was reasonable to have raised undue influence, and he acted in a *bona fide* manner. Nevertheless, particularly in the light of *Veolia,* it is important to make a distinction between the present case and *Vella v. Morelli*. Each case is different on its facts. In *Vella v. Morelli* the plea of undue influence was withdrawn at trial. That case proceeded only on the issue of due execution. It can be safely assumed that the hearing was therefore relatively short. That is in sharp contrast to the present case where the trial lasted some twenty two days, and where a significant amount of time, and therefore costs, were devoted to the issue that failed. That feature is an important distinction and therefore this Court is not bound to follow precisely the guidance which that decision would otherwise require.

37. In the present case, I am satisfied that the Court's discretion should be exercised in a way that recognises the justification for the plaintiff bringing and pursuing his claim on the basis of undue influence and of estoppel, yet makes some allowance to the estate for the fact that significant time was occupied by the failed claim of undue influence. The public interest referred to by Budd J. in *Vella v. Morelli* of having suspicious circumstances surrounding the execution of wills investigated where the grounds for such suspicion are objectively reasonable is still an important consideration, and should not be jeopardised by the fear of an adverse costs order. Nevertheless, such proceedings should not be recklessly commenced and pursued without good reason. Such litigants need to be careful not to bring spurious claims in the hope of gaining some advantage from a deceased's estate. In much the same way as a plaintiff in a medical negligence action should not bring proceedings against a doctor without having a reasonable basis for doing so (usually in the form of an expert opinion stating that there is some prima facie basis for considering the doctor to have been negligent) so in cases such as the present there should be some reasonable basis for a reasonable suspicion that the deceased may have been unduly influenced in making his/her will such that the matter should be investigated.

38. In my view, having regard to the decision in *Vella v. Morelli*, yet tempered by the more recent principles in *Veolia*, and taking into account the unusual length of the hearing in this case, and the undisputed fact that a significant amount of time was occupied by the failed issue of undue influence, it is appropriate that some deduction be made to the amount of costs to which the plaintiff should be entitled to have paid from the deceased's estate.

39. It was urged upon this Court that any such deduction should be left to the decision of the Taxing Master so that he could arrive at a precise deduction following a close examination of the evidence to determine exactly the length added to the trial by the failed issue, and its impact on the costs. I do not favour leaving that question to the Taxing Master. To do so may well lead to further controversy between these parties, and the exhaustion of yet more costs. That should be avoided. To that end, having heard the parties, having considered the case in some detail, as well as the helpfully comprehensive judgment of the trial judge, I consider that the plaintiff should suffer a deduction of 25% from the costs to which he would otherwise be entitled, and therefore that he should be awarded 75% of his costs in the High Court.

40. For all these reasons I would therefore dismiss the appeal, and affirm the order of the High Court, save to vary same by requiring the plaintiff as a condition of receiving a transfer of the entire lands, to execute a disclaimer in respect of so much of the bequest of €150,000 as he would otherwise receive, and also substituting for the costs made an order for 75% of the High Court costs in favour of the plaintiff, to be taxed and ascertained in default of agreement.