THE HIGH COURT

[2010 No. l0220P]

BETWEEN/

EILEEN GUNNING

PLAINTIFF

AND

BRIAN SHERRY

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 28th February, 2012

1. The defendant in these proceedings is a solicitor who is the legal personal representative of James Gunning, deceased, late of Chrysanthemum Cottage, Blacklion, Greystones, Co. Wicklow. The late Mr. Gunning was the father of the plaintiff, Ms. Eileen Gunning. Mr.Sherry was appointed the personal representative of Mr. Gunning's estate by order of this Court dated 31st July, 2003. The previous grant of probate dated 3rd September, 1985, was revoked by court order on the same day.

2. Mr. Sherry now moves the court for an order striking out these proceedings as an abuse of process and as an attempt to re-litigate matters which are now *res judicata*. Mr. Sherry further entreats the Court to make an Isaac Wunder order, so that Ms. Gunning would be declared a vexatious litigant who would need the prior leave of this Court before she could issue any fresh proceedings.

3. The late Mr. Gunning died in 1984 and by his last will and testament dated 25th June, 1982, he devised one half of his estate to his wife, Sarah Gunning. The remainder of the estate was to be divided between his two daughters, Mary and Eileen. The latter was appointed executrix of the estate on 3rd September, 1985. Chrysanthemum Cottage represented the estate's principal asset. It was an old cottage situate on about one third of an acre which, according to the valuation evidence tendered in the Circuit Court in November, 2008, was worth about €800,000 (and possibly even more) at the height of the property boom.

4. Given that the role of the mother and her two sisters form a central part of this narrative, to avoid confusion I propose henceforth to describe them as Sarah, Eileen and Mary. Inasmuch as I do this, no discourtesy to either Ms. Eileen Gunning or Ms. Mary Gunning or the late Ms. Sarah Gunning is intended.

5. The property appears to have been occupied by the Gunning family for quite some time, perhaps upwards of 100 years. Yet the title to the property has proved to be troublesome. It would appear from Land Registry dealings in the late 1990s concerning an application or first registration exhibited in these proceedings that James Gunning's father, Patrick, took a lease of the property from Isabel Jane Orpin and Florinda Kingdon Ward on 9th January, 1935, at a rent of £5 per annum, which lease expired on 15th November, 1985. Patrick Gunning left the property to his wife Mary, with remainder to his son, James Gunning. By the time of his death, James was in exclusive possession under the terms of the lease, as Mary (i.e., the grandmother of Eileen and Mary) died in December, 1957. The terms of the lease would suggest that the Orpin family are (or were) entitled to the fee simple remainder. As I will later note, Eileen claims to have purchased the fee simple reversion from the successors in title of the lessors, but insofar as she did so, it was during the currency of her executorship, so that she held that interest on trust for the benefit of the estate of her late father.

6. To complete the picture, it should be noted that an extension to the cottage consisting of a bedroom and a bathroom was built by Eileen at some stage during the course of the 1990s following receipt of a grant from the (then) Eastern Health Board. I also observe that Mr. Sherry gave evidence to the Circuit Court in November 2008 whereby he expressed the opinion that the Orpin estate were entitled to the fee simple remainder.

7. What is clear is that the plaintiff's parents, James Gunning and Sarah Gunning, moved into the property in about 1948 and that Mr James Gunning resided there until his death in 1984. After that, Sarah Gunning remained in occupation until 1999 and, indeed, she had lived on her own in the cottage until about from the date of her husband's death from 1984 to 1990. During this period Eileen had moved to Saudi Arabia to work as a nurse and got married in Cyprus in April, 1986. Eileen returned to Ireland in December, 1987 and her husband joined her later. Eileen and her husband lived in Wexford until January 1991, when the marriage broke up. At that point, Eileen and her young daughter, Fatima, moved back to the cottage with her mother's permission.

8. There would appear to have been some acrimony between Eileen on the one hand and Sarah and Mary on the other. At all events, Sarah moved out of the cottage in 1999 and went to live with Mary in the latter's house in Dublin. These developments put in train a series of events which has led to bitter and acrimonious litigation which it is now necessary to chronicle.

The first set of Circuit Court proceedings

9. The first set of proceedings was an ejectment civil bill on the title in the Circuit Court bearing record number 154/01 brought by Sarah Gunning against Eileen Gunning whereby the former sought possession as against the latter. These proceedings were commenced on 5th March 2001. In her endorsement of claim, Sarah alleged that she remained in sole and exclusive occupation of the property from her husband's death in 1984. She alleged that in 1990 she invited Eileen and her daughter, Fatima, to move into the cottage. She further alleged that Eileen and Fatima lived in the cottage pursuant to that licence and that the licence was determined by letter dated 15th December, 2000. It was then pleaded that Sarah was entitled to possession by virtue of the determination of that licence. Eileen filed a defence which traversed all the particulars of that claim.

10. The proceedings were heard by His Honour Judge O'Hagan in July, 2002. In his judgment he determined that Sarah was not in adverse possession, but he also ruled that Eileen had taken no steps to administer the estate in her capacity of executor. He further

held that Eileen resided in the cottage "as trustee for the rest of the family and she had not acquired a title to the said property". It is clear from this judgment that Judge O'Hagan did not consider that time ran in favour of Eileen so far as the Statute of Limitations 1957 given her status as executorix and the fiduciary duty which she owed in that capacity to the other beneficiaries.

11. The Court order recited that Sarah had not acquired title by adverse possession and dismissed the claim.

The first set of High Court proceedings
12. In the next set of proceedings Sarah sought an order pursuant to s. 26(2) of the Succession Act 1965 ("the Act of 1965") removing Eileen as executrix of the estate of her late father. Smyth J. found that Eileen had never served Sarah with the requisite notice under s. 56(1) of the Act of 1965 whereby the former would have been entitled to appropriate the family home in satisfaction of her share in the estate as surviving spouse. As this had never been done, time had not run as against Sarah. Smyth J. also found that Eileen had sought during her executorship to have herself registered as the true owner of the property. Her intention was "to have herself registered as owner of the premises is in complete conflict with her role as executrix." Smyth J. continued:-

> "...it is a very necessary and serious step to take to remove the defendant from her role [as executrix] but I am satisfied that it must be done. It is the only way in which this matter can be dealt with properly and impartially."

13. Eileen was accordingly removed from her role as executrix. She appealed that decision to the Supreme Court, but it appears that she subsequently withdrew the appeal in June 2004. The death of Sarah Gunning and its implications

14. Letters of administration duly issued to Mr. Sherry in April, 2006. In the meantime Sarah had unfortunately died in April, 2005. She left one half of her estate to Mary and one half to Eileen's daughter, Fatima. Since Sarah's estate was entitled to 50% of the estate of her late husband, the practical effect of that is that, subject to payment of legal costs out of the estate of James Gunning (which, unfortunately, are likely to be considerable) and other expenses associated with the administration of the estate, Mary is now entitled to a 50% share, Eileen to a 25% share and Fatima to a 25% share of the cottage.

15. No steps have ever been taken to challenge the validity of the wills of either James or Sarah. Nor have proceedings ever been brought by either daughter pursuant to s. 117 of Act of 1965 seeking to vary the provision made for either child under the will or either James or Sarah. In these circumstances, I am bound to accept the duly probated wills as absolutely binding and I must further ensure that the wills are administered in the manner provided for by law.

The second set of Circuit Court proceedings
16. In the second set of proceedings Mr. Sherry sought possession of the cottage from Eileen. In his ruling in November 2008 His Honour Judge White (as he then was) granted possession of the property to Mr. Sherry in his capacity as legal personal representative. While Eileen claimed that she had acquired the reversionary fee simple in 2001 from Ms. Pleione Tooley (who is, it appears, the successor in title to the interests of Ms. Orpin and Ms. Ward, the original lessees of the property), Judge White, following the decision of Smyth J. in the July 2003 decision, held that inasmuch as she had acquired that reversionary interest while acting as executrix, she held the fee simple reversion on trust for the entire beneficiaries. He further ordered Ms. Eileen Gunning to hand over the title deeds, including the deed of consent from 2001 which, she claimed, had vested in her the fee simple reversion.

17. Ms. Gunning appealed the order for possession, but the order of the Circuit Court was affirmed by Murphy J. in January 1999. By virtue of the provisions of s. 39 of the Courts of Justice Act 1936 (as re-enacted and applied to the courts operating under Article 34 of the Constitution by s. 48 of the Courts (Supplemental Provisions) Act 1961), no appeal to the Supreme Court lies against that decision: see, e.g., *Eamon Andrews Productions Ltd v. Gaiety Theatres Ltd*. [1973] I.R. 295 at 304, *per* Henchy J. and *P. v. P.* [2001] IESC 76, [2002] 1 I.R. 219, per Murray J. As the Supreme Court made clear in *P. v. P.*, absent fraud, that decision (as a decision of the High Court on appeal from the Circuit Court) is absolutely binding upon me and I would otherwise have no jurisdiction to re-open a *res judicata*, a matter that has been finally and conclusively adjudicated upon by law. This principle has been recently reaffirmed by the Supreme Court in the context of re-litigating matters already determined by court order, even if that order was made by consent: see *Charalambous v. Nagle* [2011] JESC 11, per Denham J.

The present proceedings
18. Ms. Eileen Gunning commenced the present proceedings on 8th November, 2010. Some flavour of the nature of the case can be gleaned from the opening three paragraphs of the general endorsement of claim:-

> "1. Abuse of privilege and power to steal and dispossess me, Eileen Gunning, of Family Home at Blacklion, Greystones, Co. Wicklow.
>
> 2. Colluding with others to cover up the facts to steal my home and property on false and fraudulent documents.
>
> 3. Colluding with others to destroy, deface and conceal the fact that Home and Property was very valuable in a sought after area of Greystones, Co. Wicklow."

19. The defendant issued the present motion seeking to strike out the proceedings as an abuse of process on 21st February, 2011. That motion was first heard by me in May, 2011. In the course of that hearing I explained to Ms. Gunning that I was bound by the earlier decision of Murphy J. affirming the order of Judge White and, accordingly, that I would have to strike out the present proceedings as an abuse of process unless Ms. Gunning could establish that the earlier High Court order had been procured by fraud. I originally fixed the hearing date for 27th June, 2001. On that date I adjourned the matter and fixed the hearing date for the end of July, 2011.

20. At this point Ms. Gunning conceived the notion that I was biased against her and that I should recuse myself. She issued an *ex parte* docket on 23rd July, 2011, grounded on an affidavit where she claimed that I had shown "a clear and unrelenting bias towards me Eileen Gunning in the company of many witnesses/victims of the legal profession from all over Ireland." I again adjourned the defendant's strike out application to enable her to apply to the President of the High Court to have me recused. Keams P. nominated Cross J. to hear that application and in a ruling delivered in October 2011, the latter rejected Ms. Gunning's contentions having read the transcripts of the hearings to date.

21. At the hearing of this matter on 7th February, 2012, Ms. Gunning again asked me to recuse myself on the ground of bias. I refused, taking the view that my competency to sit had already been independently adjudicated upon by Cross J. and there had been no appeal against that decision.

22. When this application was refused, both Ms. Gunning and Mr. Gill made submissions to me of highly generalised nature. I pointed out to Ms. Gunning that she was entitled to lead evidence of fraud and if, she wished to do so, this was now her opportunity. This she declined to do, with Mr. Gill saying that she needed more time for this purpose. They applied for a further two month adjournment. I ultimately refused to accede to this request, as, by reason of multiple adjournments, Ms. Gunning had been on notice for the best part of eight months of the nature of the evidence that would be required.

23. In the absence of any evidence that the earlier decisions were wrong m some way - much less evidence of fraud - it follows that the earlier decision of this Court affirming the Circuit Court decision must stand. Nevertheless, it may be useful to inquire what possible grounds of fraud might conceivably exist or have existed.

24. Ms. Gunning maintains that she is the full owner of Chrysanthemum Cottage and that the prior court orders which authorised Mr. Sherry as the legal personal representative of the estate of her late father to distribute the assets of the estate were obtained by fraud. However, given that neither the will of her father or, indeed, that of her mother was ever challenged, she can claim to be that full owner only either by reason of having purchased the fee simple reversion to the property or by having acquired a possessory title under by virtue of the Statute of Limitations. We may now consider these two possibilities. Purchase of the fee simple reversion to the property

25. As we have already noted, in the second set of Circuit Court proceedings, Ms. Gunning claims to have purchased the fee simple reversion from Ms. Tooley in 2001. Even though no formal title documents were put before this Court, let it be assumed in Ms. Gunning's favour that she purchased this reversionary interest. If this is correct, then she purchased the fee simple reversion for her own private benefit while still executrix of her father's estate.

26. In this situation, however, it has been the law for the best part of 130 years that in such circumstances the purchaser qua fiduciary holds the fee simple reversion in trust for all the beneficiaries of the estate: see *Gabbett v. Lawder* (1881) 11 L.R. Ir. 295. In that case the administrator of an intestate estate held certain lands under a lease as trustee. The fee simple reversion was offered to the administrator of the estate, but he declined to purchase it at the price named. The reversion was later sold at a public auction for a lower sum to the administrator who bought it for himself. Chatterton V.C. held that in these circumstances the administrator became a constructive trustee of the reversion for the persons beneficially entitled to the personal estate of the deceased, although he was entitled to the costs incurred by him in purchasing the reversion.

27. In her treatise, *Equity and the Law of Trusts in Ireland* (Dublin, 2011) (5th Ed.) Professor Delany comments thus (at 225):-

> "...where a fiduciary purchases the reversion of a lease...it is probable that a trust will only arise in the circumstances outlined by Chatterton VC in *Gabbett v. Lawder* or where the fiduciary has clearly taken advantage of his position as lessee to obtain this benefit. However, having regard to the tenor of the authorities in this area, the onus will undoubtedly lie on the fiduciary to establish that he has not acted improperly, particularly where he occupies the position of trustee."

28. If, therefore, Ms. Gunning did indeed purchase the fee simple reversion in her own name in 2001, she did so at a time while she was still the executrix of her father's estate. In these circumstances, she plainly held it on trust for the benefit of all the beneficiaries. To come within any possible exceptions to *Gabbell v. Lawder* (assuming for the moment that there are such), it would have been necessary at an absolute bare minimum for her to show that the other beneficiaries had full knowledge of her actions and that they had freely and fully consented to such a state of affairs.

29. There is no evidence whatever in any of the documentation before me which suggests that Eileen ever consulted with Sarah or Mary in relation to this matter or that the latter gave their full consent to her purchasing that fee simple remainder for her own personal benefit. Moreover, everything suggests the contrary. After all, Smyth J. removed Eileen as executrix, essentially because he found that she was endeavouring to go behind the backs of the other beneficiaries by attempting to liaise with the Orpin estate by purchasing the freehold reversion for her own benefit or, alternatively, by having herself registered as full owner by means of a possessory title with the Land Registry.

30. In sum, therefore, even if Eileen managed to buy out the fee simple reversion in the manner that she claimed, this does not give her any superior title, because, as a matter of law, she holds that reversionary interest on trust for the beneficiaries of her father's estate given that this was acquired at a time when she was executrix. This is not evidence of fraud, but it is rather the application of a rule of law designed in itself to prevent fraud.

Possessory title

31. The other possibility is that Eileen has set up a possessory title as against the estate of both her late father and mother and the interest of her sister Mary. At the hearing before me, Ms. Gunning contended that the applicable limitation period was six years. She was, however, unwilling to answer my query as to when time might have run in her favour and she offered no evidence on this point. In the interests of fairness, I will nonetheless endeavour to examine this point.

32. While the normal limitation period in the case of immoveable property is twelve years, the limitation period in the case of claims as against the estates of deceased persons is six years: see s. 45(1) of the Statute of Limitations 1957 (as inserted by s. 126 of the Succession Act 1965). Time only runs, however, from the date "when the right to receive the share or interest occurred." However, as Smyth J. found in 2003, time did not run from that point because the requisite statutory notices prescribed by s. 56(1) of the Act of 1965 had not been served on the other beneficiaries and because Eileen has taken no steps to administer the estate.

33. More fundamentally, however, the special six year limitation period applies only to claims against the estate of the deceased. In the case of claims by the personal representative on behalf of the estate the ordinary limitation period of 12 years prescribed by s. 13 of the Act of 1957 applies: see the decision of McMahon J. in *Drohan v. Drohan* [1981] ILRM 473 and that of the Supreme Court in *Gleeson v. Feehan* [1993] 2 IR 11 3.As McMahon J. noted in Drohan, the special limitation period of six year has no application to a claim by personal representative to recover a deceased's assets against a person holding adversely to the estate. The time period, therefore, in respect of any claim by any person holding adversely against the estate of James Gunning remains that of 12 years.

34. Quite independently of any question of whether time can run in favour of an executrix as against the beneficiaries of an estate, the earliest possible date on which time might have run in favour of Eileen was 1999 when her mother Sarah left the property. Time was, however, interrupted by virtue of the fact that Sarah purported to terminate Eileen's licence to remain in the dwelling in December, 2000 and then commenced proceedings in March, 2001 whereby she sought an order for possession. Even if it be said that time commenced again when Judge O'Hagan dismissed that claim in July 2002, it was interrupted again no later than February, 2007 when Mr. Sherry commenced proceedings against Eileen as the legal personal representative of the estate of the late James Gunning.

Such periods of adverse possession as might have run in favour of Eileen do not approach the requisite period of 12 years.

35. A claim based on adverse possession has, accordingly, not been made out and even making every possible factual assumption in Ms. Gunning's favour, there would appear to be no basis on which it could be made out.

Whether the Court should make an Isaac Wunder order in respect of Ms. Gunning
36. There remains the question of whether the court should make an Isaac Wunder order in respect of Ms. Gunning. If such an order were to be made, it would have the effect that she would be precluded from commencing any fresh proceedings in this Court without the prior leave of the President of the High Court or any judge nominated by him for this purpose. The inherent jurisdiction of this Court to make such an order is well established: see, e.g., *Riordan v. Ireland* (No.4) [2001] 3 IR 365, *Burke v. Judge Fulham* [2010] IEIIC 448 and Moore, "Isaac Wunder Orders" (2001) *Judicial Studies Institute Journal* 137.As Irvine J. explained in *Burke*, the whole purpose of the *Isaac Wunder* jurisdiction is to regulate the constitutional right of access to the courts, albeit in a manner which is proportionate and strictly necessary to protect the proper administration of justice and the rights of third parties who might otherwise be oppressed by abusive litigation.

37. This jurisdiction was also summed up by Keane C.J. in *Riordan* (No.4):-

> "It is, however, the case that there is vested in this court, as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to reopen litigation or to pursue litigation which is plainly grow1dless and vexatious. The court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public office as well as by private citizens. This court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to reopen issues already determined or to pursue groundless and vexatious litigation...."

38. While there is no doubt but that this power should be exercised sparingly, I have come to the conclusion that this is an appropriate case in which to exercise this jurisdiction. This is now the fourth case in which aspects of the ownership of the cottage has been the subject of litigation. I was informed during the hearing that Ms. Gunning had issued a further set of proceedings which apparently concern these matters, but which proceedings have yet to be served. The present proceedings were in themselves abusive in that they represented an attempt to re-open matters conclusively determined by this Court in January 2009. Not a shred of evidence was adduced by Ms. Gunning in support of her claim that the earlier orders were obtained by fraud, despite numerous opportunities having been afforded to her to do so. The costs of this exercise are likely to be borne, either directly or indirectly, by the estate of the late James Gunning, thus reducing the sums avail able for distribution to the beneficiaries. The effect of this litigation has been further to frustrate the orderly distribution of the estate of the late Mr. Gunning who, it will be recalled, died some twenty-eight years ago, but whose estate still remains to be distributed.

39. In this regard it may be noted that in *Charalambous* the Supreme Court strongly hinted that repeated attempts to re-open matters which are *res judicata* merited the making of an *Isaac Wunder* order. As Denham J. put it:-

> "This case, based on a consent order, together with others brought by the appellant, has been in the courts for years. The respondent has been negatively affected by these years of litigation by the appellant. I would ask the parties to address the issue as to whether an *Isaac Wunder* order is appropriate in all the circumstances.

40. While it is true that the plaintiff has issued only one (or perhaps two) sets of proceedings in her own name, the fact remains that the case of Chrysanthemum Cottage has likewise been in the courts for years. The very fact that these proceedings were commenced without a willingness to support the claim of fraud is itself evidence of abuse. A considerable amount of judicial time and resources have been expended in considering the rights of the parties to this dispute. The other beneficiaries to the estate have been adversely affected by this on-going litigation. Further litigation can only add to the misery which this tragic dispute over home ownership has caused.

41. I will accordingly make an Isaac Wunder order in respect of Ms. Eileen Gunning to the effect that she is precluded from commencing any further new proceedings which directly or indirectly concern Chrysanthemum Cottage without prior leave of the President of the High Court or some other judge nominated by him. I will further direct that such leave is to be sought by an application in writing addressed to the Chief Registrar of the High Court. For the avoidance of doubt, I should make clear that this order only applies to new proceedings concerning the Cottage, including the possession and ownership of the Cottage and the administration of the estates of her late parents. Specifically, it does not apply to any existing proceedings and nor does it apply to any appeal to the Supreme Court against my decision in these proceedings which Ms. Gunning may wish to take. In addition, the order does not affect any other proceedings (not involving the Cottage or the administration of the estates of her late parents) which Ms. Gunning may wish to take,

Conclusions
42. There is no doubt but that the present state of affairs is a most unfortunate one. At a human level one would have to feel some sympathy for Ms. Gunning, since the effect of the court order is that the house in which she grew up and which she has made her home again since early 1991 is to be sold. Ideally, herself and her sister would have reached a *modus vivendi* whereby the house would not be sold. It is clear from the correspondence put before me that this was under discussion in June 2010, but this did not prove possible.

43. But sympathy alone cannot cloud legal rights and interests. Mary is entitled by law to seek to realise her 25% share of her father's estate and that is presently the task of the defendant as the legal personal representative of the estate of James Gunning. This Court, sitting in its appellate capacity, has already determined this matter in January, 2009 in a manner which is final and conclusive. Absent fraud, that decision is absolutely binding on me.

44. There is, moreover, no fraud. As I have repeatedly pointed out, Ms. Gunning was given numerous opportunities by way of adjournment to enable her to assemble evidence to show that there was fraud. In the event, she did not call a single witness and elected to depart from the court along with Mr. Gill before the hearing had ended. Nor, indeed, is there any evidence which I can discern to show that the earlier decisions were wrong, much less tainted by fraud.

45. Regrettable and tragic as this general state of affairs is, the ultimate result is not in doubt. Since these proceedings involve an attempt tore-litigate matters which have been already judicially determined, the proceedings must accordingly be struck out as an abuse of process.

APPROVED: Hogan, J