Neutral Citation No. [2015] NICh 8

Ref: **DEE9506**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **17/04/2015**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE MATTER OF THE ESTATE OF RAYMOND WALTER BECKETT DECEASED

Between:

BEATRICE MAEVE BECKETT
AND
SHANE LAWTON BECKETT

Plaintiffs

AND

ANTHONY ROBERT WILLIAM MCMILLAN
AND
EVANGELINE JEMIMA HERD

Defendants

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DEENY J

[1] This is an application brought by Andrew Walker and Company, solicitor for Evangeline Jemima Herd (Ms Herd), on 17 February 2014. The matter was determined by the Master in favour of Ms Herd and she appeals from his order to this court. The application was that the claim of the first plaintiff Beatrice Maeve Beckett (Mrs Beckett) against Anthony Robert William McMillan and Evangeline Jemima Herd brought pursuant to the Inheritance (Provision for Family and Dependents) Order (Northern Ireland) 1979 be dismissed for want of prosecution pursuant to Order 3 Rule 6(2) of the Rules of the Court of Judicature (Northern Ireland) 1980. In the alternative, the summons brought on behalf of Ms Herd sought dismissal of the claim for want of prosecution pursuant to the inherent jurisdiction of the court or, in the further alternative, pursuant to Order 34 Rule 2 of the aforesaid Rules. That last point was not pursued at the hearing, I think rightly, by Mr Willian Sinton who appeared for Ms Herd. Mr Joseph O'Keefe appeared for Mrs Beckett. The court had the benefit of able written and oral argument from both counsel.

[2] The facts of the matter are unusual. Beatrice Maeve Beckett, as she avers in an affidavit of 7 February 2000, was born on 15 March 1939. On 6 August 1958 she married the late Raymond Walter Beckett who was a little older than her, having been born 31 October 1935. They had two sons Anthony Elton Beckett, born 7 December 1960, and Shane Lawton Beckett, born on 29 April 1963. Mr Shane Beckett was the second plaintiff in the original proceedings under the Inheritance Order. In the fullness of time Mrs Beckett separated from Mr Beckett. She avers that she did so after having tolerated "lengthy adulterous relationships in which the deceased was involved for many years". The deceased was a farmer in a substantial way of business, farming about 222 acres of land in the County of Antrim.

[3] At a later date the deceased began cohabiting with the second defendant Ms Herd and they were living together as man and wife at the time of his death on 27 May 1997. He left a will of 8 February 1996 and in that will he effectively left everything to Ms Herd, his then partner, to use the word that had become fashionable in the course of that decade. Probate of that will was granted on 13 August 1999 to the defendants and Mrs Beckett issued proceedings on 7 February 2000 under the Inheritance Order; no doubt in doing so she was protecting herself by bringing those within six months of the grant of probate to the estate of the deceased. I pause to say that the fact that that requirement is in the Order of 1979, is a relevant consideration which I have taken into account, namely that such claims are meant to be brought expeditiously.

[4] What happened afterwards is most unusual in relation to the expiry of time. The first defendant, Mr McMillan, was a solicitor executor who has remained inactive throughout this matter. Ms Herd was not only the co-executor and active executor and former partner of the deceased but, as I have mentioned, his sole beneficiary. However, the other son of the deceased, Anthony Elton Beckett, remained on good terms with his father's partner and, indeed, it is averred farmed these lands with her for a considerable period of time since the death of his father.

[5] I am satisfied on the affidavit evidence put before me, including an affidavit of the second named defendant Shane Lawton Beckett, that extensive negotiations took place between the parties with regard to the estate of the late Raymond Walter Beckett. I am satisfied that, most unusually, these negotiations went on for a period of 10 years. They were ultimately disposed of by an agreement of 20 April 2010. That agreement purported to record an amicable agreement between the parties, witnessed by solicitors. It noted the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979 claim of Mrs Beckett and her son Shane. But it did not include any binding agreement with regard to Mrs Beckett. I was told that Mr Shane Beckett did agree that his claim would be not pursued further because of the settlement he was to get. The settlement was again a rather unusual one. He was to get £280,000 without interest but that was to be paid to him by no less than 120 consecutive monthly payments of £2,333.33 commencing on 15 January 2010 and continuing on 15th day of each month. I observe that the start date pre-dates the date

of the actual agreement. So that happened, the parties entered into that agreement but then Ms Herd did not honour her part of it and that is not in dispute. She made no such periodic payments. There were other provisions about security over lands which have not been honoured either, partly because a number of charges were made over the lands to which I will turn in a moment.

[6] Shane Beckett (and his wife, it seems) then sued his brother and Ms Herd in proceedings commencing in 2011 and ultimately obtained a judgment on 23 September 2014 from the Master, which was not appealed, granting him his £280,000, with interest thereon at the 5% rate provided for in clause 5 (default) of the agreement of 2010 leading to Ms Herd (only) being ordered to pay a total sum of £327,833.

[7] In 2013 Mrs Beckett brought a summons before the court, that is on 26 November 2013, for an order making reasonable provision for her but citing that it was an interlocutory order within the earlier proceedings which she had brought; thus it was treated by the court office and indeed by the solicitors acting for her. This prompted the summons before me on behalf of Ms Herd to dismiss for want of prosecution.

[8] Before I say anything further about the facts of the matter I will turn to the test to be applied by me in dealing with an application of this kind. Both counsel had submitted very full and helpful skeleton arguments which I have read and considered, relating to the appropriate tests and Mr O'Keefe relied in particular, and I think, reasonably so, on the judgment of Sheil J, as he then was, in Crangle v Napier and Others 10 October 1997. In that Sheil J helpfully reviewed the authorities and in particular cited with approval, it was, of course, a persuasive authority for him as it is for me, the judgment of Peter Gibson L.J. in Shtun v Zalejska (1996) 3 AER 411 C.A. at 417:

> "(1) In a case where there has been no contumelious conduct by the plaintiff, the court, if it is to strike out an action for want of prosecution, must be satisfied:
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> (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and
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> (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants, either as between themselves and the plaintiff, or between each other, or between them and a third party (see Birkett v James [1977] 2 All ER 801 at 805, [1978] AC 297 at 319 per Lord Diplock).

(2) The delay that must be shown to have caused such risk or such likelihood of prejudice is the delay after the issue of proceedings (see [1977] 2 All ER 801 at 808, [1978] AC 297 at 322).

(3) But where the plaintiff delays in issuing proceedings and by such delay causes prejudice, the additional prejudice which must be shown to justify dismissal of the action need not be great, provided that it is more than minimal (see [1977] 2 All ER 801 at 809, [1978] AC 297 at 323).

(4) Further, once the plaintiff is guilty of further delay, the prejudice caused by the totality of the period of his delay can be looked at (see Roebuck v Mungovin [1994] 1 All ER 568 at 575, [1994] 2 AC 224 at 234 per Lord Browne-Wilkinson).

(5) The prejudice may take a variety of forms, but one recognised form is the impairment of the memory of witnesses (see Birkett v James [1977] 2 All ER 801 at 808, [1978] AC 297 at 322). Another form consists of the prejudice to the defendant through having a serious claim hanging indefinitely over him (see Biss v Lambeth, Southwark and Lewisham Health Authority [1978] 2 All ER 125 at 132, [1978] 1 WLR 382 at 389 per Lord Denning MR). But the court should only in exceptional cases treat the anxiety which accompanies all litigation as alone being sufficient to justify dismissing an action (see Dept. of Transport v Chris Smaller (Transport) Ltd [1989] 1 All ER 897 at 905, [1989] AC 1197 at 1209-1210 per Lord Griffiths).

(6) Save in exceptional cases, an action will not be struck out for want of prosecution before the expiry of the relevant limitation period (see Birkett v James [1977] 2 All ER 801 at 808, [1978] AC 297 at 321)."

Mr Sinton, in his submissions, also relied on the decision of the House of Lords in Grovit et al. v Doctor et al. [1997] 2 AER 417 to the effect, per Lord Woolf at page 424e, that the court had a discretion within its inherent jurisdiction to dismiss a claim as an abuse of process even if the test under the want of prosecution cases was not met.

[9] Now, bearing those matters in mind and the other submissions of counsel, one sees what the position is here. There has no doubt been inordinate delay in this case. Inordinate in this context means excessive or unregulated. The word comes from the Latin ordinare, the verb to regulate or to arrange. Undoubtedly there has been great delay here in pursuing this matter and normally there would be no doubt that Mr Sinton would be right in saying that such a delay over a period of some ten years should defeat such a claim and, particularly, a claim relating to the Inheritance (Family Provisions) Order. Furthermore he can point to the fact that the estate of the deceased has been distributed and that there is authority for the proposition, that it is most unusual, at least, perhaps hitherto unrecorded, to allow a claim to continue where the estate has been distributed. Against that, to summarise his submissions, Mr O'Keefe points to the clear affidavit evidence, not in substance disputed by the second defendant Ms Herd, that throughout this long period of time these people were in fact negotiating to try and resolve this family dispute. The matter was not, so far as I recollect, before this court, in any way for case management otherwise it would have been urged along with considerably more expedition. But it remained between the parties and, as explained in the affidavit of Shane Beckett, elaborate consideration was given to the dispute. It is a principle acknowledged increasingly by the courts that the resolution of disputes between the parties is a laudable objective of justice and therefore attempts to do that can amount to an excuse. But obviously any plaintiff who puts themselves in that position is vulnerable to being defeated because they have let it go so long. One can, and normally should, negotiate with one hand while making sure one preserves one's rights and gets one's case ready for hearing with the other hand and that is what should have been done. But there is an excuse for the delay.

[10] There is a further delay after 2010 when the agreement was entered into. Mrs Beckett, strictly speaking, was not a party to that agreement but she was happy with it because her son Shane was to get £280,000. While, therefore, she was not in substance a party, as Mr Sinton pointed out, the son's position as an adult son of a deceased would not normally have warranted such an allocation to him under the inheritance claim and so it seems to me not unreasonable that the mother took the view that she was content with that outcome. Of course, her other son was to benefit at one remove in time from the settlement also, through Ms Herd dealing with him. It seems to me that the fact that she was not formally abandoning her claim at that time is not inconsistent with her renewing it later. She comes to renew it in 2013 and that is very belated indeed and a high obstacle for her to get over. But she comes to restore it, to pursue the claim because of the complete failure of Ms Herd to honour the agreement of 2010. Here Mr O'Keefe, it seems to me, makes a point of great relevance. He accuses the defendant of having acted in bad faith; she never made any of these payments. It seems to me that it is evidence of bad faith sufficient to justify counsel alleging it and sufficient for the court to take a poor view of Ms Herd's conduct in that regard. It is not that she *bona fide* paid the monies at first and then got into difficulties. She made no attempt to honour the agreement that she had entered into. Indeed her subsequent affidavit to this court seems to me a little lacking in candour too, because, while she acknowledges that she has various claims

against her, she is a little vague about what they were, though in fairness Mr Sinton, on her instructions, elaborated on that in the hearing before the court.

[11] The sad position seems to be that, the deceased having left 222 acres of land with a fairly modest debt of £200,000 to the Ulster Bank, having done that and left that to Ms Herd, she proceeded to buy other property, implicitly at the wrong time and incur other debts and borrowings, incur further charges against these farmlands and it is now suggested she may be completely or largely impecunious. Indeed there was a case before this court in January, settled between the Northern Bank and her, by which she will give up possession of some of these lands to the Northern Bank in six months' time. That is to secure a debt of some £1.4 million. Mr Sinton also points to all monies charges on the other lands and I will have to return to this point. So the position here is that the delay is inordinate but an excuse is advanced for the first period, of negotiating, and for the second period, she was hopeful that her son would recover his money and it was only when that began to look doubtful that she sought to revive this claim. I am inclined to think she just about gets to the excusable level although it is a very finely balanced judgment. But as the authorities show it must not only be inordinate and inexcusable delay but a further requirement exists and I therefore propose to address that, namely, that such delay would give rise to a substantial risk that it is not possible to have a fair trial between the parties or that serious prejudice to the defendant is likely. There I think Mr O'Keefe succeeds. The onus is on the plaintiff to prove her case. If recollections are dimmed as they are bound to be, that cannot be held against Ms Herd. But rather as in one of the cases cited by Mr Justice Sheil in the Crangle case, namely National Insurance Guarantee Corporation Limited v Robert Bradford and Company Limited (1970) 114 Solicitor's Journal 436, this is a case, a documented case not like an accident case or an oral contract case, but one that can still proceed and that is because of the simple fact that we know that this deceased owned substantial farmlands and left his widow to whom he was still married at the time of his death, with whom he had lived for some 31 years, he left her nothing. It would be hard to see how she could not normally recover something and, perhaps, something substantial out of the estate. So I am not satisfied that there is a sufficient prejudice to Ms Herd where the essential facts and the assets are still readily ascertainable.

[12] Both counsel, however, acknowledge that the court has a remaining discretion. I do not accept Mr Sinton's argument, although properly put before the court, that it is an abuse of process for Mrs Beckett to proceed. If there is abuse here it is on the part of Ms Herd in apparently gambling away, in effect, what she had got from her former partner and then in not honouring a legally binding agreement into which she had entered. I do not think the phrase 'abuse of process' could properly be attributed to Mrs Beckett. I was therefore minded to refuse the summons of the second defendant and dismiss it and allow Mrs Beckett to proceed.

[13] There were two aspects of the matter which had not been fully argued before the court. I allowed counsel to make additional written submissions in relation to those two aspects of the matter.

[14] Firstly, the court should not make an order that is futile, which beats upon the air in Lord McDermott's phrase. If Mrs Beckett is permitted to continue with her action can she still recover, in law, from Ms Herd? It seems to me that she can. She does face the significant obstacle that the estate has been distributed, which per Megarry VC in Re Salmon [1981] Ch. 167 is an important factor. But it is not an absolute bar. Article 4(4) of the 1979 Order reads as follows:

> "An order under this Article may contain such consequential and supplementary provisions as the court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between one beneficiary of the estate of the deceased and another and may, in particular, but without prejudice to the generality of this paragraph –
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> (a) order any person who holds any property which forms part of the net estate of the deceased to make such payment or transfer of such property as may be specified in the order;
>
> (b) vary the disposition of the deceased's estate effected by the will or the law relating to intestacy, or by both the will and the law relating to intestacy, in such manner as the court thinks fair and reasonable having regard to the provisions of the order and all the circumstances of the case;
>
> (c) confer on the trustees of any property which is the subject of an order under this Article such powers as appears to the court to be necessary or expedient."

[15] I note the use of the word 'holds' in Article 4(4)(a). I leave open the question of whether that could extend as far as a bona fide purchaser for value from the estate. However, that is not the situation here. The situation here is as set out at page 410 of Tyler's' Family Provision (3rd Edition) dealing with the equivalent English provision:

> "This enables the court to make an order in respect of property forming part of the net estate, but not under the control of the personal representatives, for example where property is held by a survivor of a joint tenancy or by a statutory nominee or a beneficiary in the estate who has received the property from the personal representatives."

Ms Herd is in the position of such a beneficiary and while the claims of Mrs Beckett are very likely to be subject to prior charges to lenders there is at least one folio which is currently not charged. No application for interim relief in regard to that folio has as yet been made.

[16] This conclusion is reinforced by Article 22 of the 1979 Order which while granting immunity to a personal representative who has distributed any part of the estate after the end of 6 months does nevertheless provide that:

> "This paragraph shall not prejudice any power to recover by reason of making of an order under this order or any part of the estate so distributed."

[17] The other issue on which I invited further submissions from counsel was the situation that would arise if the plaintiff's son, Shane Beckett, succeeded in enforcing his judgment in whole or in part against Mr Herd. The plaintiff had not pursued her claim previously because he was to receive this large sum of money from Ms Herd, albeit over a period of time. Mr Sinton's answer to this difficulty is that if he did recover that may put the plaintiff in the position of being estopped from proceeding with her claim. This would be on the basis that Ms Herd had acted to her detriment by agreeing to pay the money to Shane Beckett in reliance upon Mrs Beckett's representations that she would not proceed with her family provision claim if Shane Beckett's settlement was met. I think there is merit in this submission.

[18] In the alternative, Mr O'Keefe submits that the court has a wide discretion which the court could take into account if in fact Shane Beckett did recover on foot of his judgment in whole or in part. See Article 5(1) (g) of the 1979 Order. I consider there is merit also in this submission. At this stage we do not know whether Shane Beckett will recover. If he does so I will take any such recovery into account at the ultimate hearing of these proceedings either by way of estoppel or by way of factoring it into the exercise of the court's discretion.

[19] In conclusion, therefore, I consider that in the unusual and exceptional facts which exist here the very considerable delay on the part of the plaintiff should not prevent her from continuing to pursue her claim under the Inheritance (Provision for Family and Dependants) Order (NI) 1979 and I dismiss the summons of the defendant Evangeline Jemima Herd.