Neutral Citation No. [2017] NICh 6 | *Ref:* **HOR10207**

Judgment: approved by the Court for handing down | *Delivered:* **21/02/2017**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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2016 No. 8016

BETWEEN:

BERNADETTE HEANEY AS EXECUTRIX OF THE ESTATE OF GRACE McEVOY (DECEASED)

Plaintiff;

-and-

MICHELLE McCARTNEY
and
JACQUELINE McEVOY

Defendants.

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HORNER J

A. INTRODUCTION

[1] Bernadette Heaney, the plaintiff, is the sole executrix of the estate of Grace McEvoy deceased ("the deceased"). She brings proceedings against Michelle McCartney and Jacqueline McEvoy, the defendants, seeking an order for possession of property at Rathfriland Road, Newry, County Down ("the property") where the defendants currently reside. The defendants dispute the right of the plaintiff to seek possession on a wide variety of grounds and seek, inter alia, to have this case referred to the Supreme Court.

B. BACKGROUND FACTS

[2] On 3 April 2015 the deceased died. She left a Will dated 1 January 2015 witnessed by Bernadette Heaney and Paul Tiernan, both of whom are described as solicitors. They are also husband and wife according to the defendants. The Will contained the following provisions:

(a) The plaintiff was appointed executrix.

(b) She was authorised to charge a professional fee for all work undertaken by her as executrix.

(c) The deceased's property was to be divided equally amongst her twelve children. In particular the house was to be sold and the first defendant in particular was required to vacate it and the net proceeds of the sale divided equally "between my twelve children".

[3] At the time of her death the deceased had 5 people living with her, two of her children, one of whom was the second-named defendant and 3 grandchildren, one of whom was the first-named defendant. The other child of the deceased, Patrick, a brother of the second defendant and uncle of the first defendant, has played no part in these proceedings. I understand that the property continues to be occupied on the same basis.

[4] The executrix at the end of 2015 issued proceedings on behalf of the estate against the defendants seeking an order for possession of the property pursuant to Order 113 of the Rules of the Supreme Court (NI) 1980. This was to permit the property to be sold and the proceeds to be divided equally among the children in accordance with the deceased's wishes captured in her Will. In the meantime the defendants retained Rafferty and Co, solicitors, to act on their behalf. Ms Bernadette Rafferty was the solicitor in that firm who acted and she instructed Mr John Coyle, barrister-at-law to represent the defendants' interests. Presumably on the basis of the information given to them, the legal team commenced proceedings for reasonable provision under the Inheritance (Family Provision and Dependents) Order (NI) 1979 ("the inheritance claim") on 26 January 2016. No other legal proceedings were instituted.

[5] In the application the second defendant claimed that:

(a) She was last in employment as a shop assistant in 1992.

(b) She suffered a variety of medical complaints leading to depression and that she had had bowel cancer.

(c) She was in receipt of State benefits although she paid no rent to the deceased for the accommodation, she did help with the bills and looked after the house.

Rafferty & Co secured legal aid for both the inheritance claim and for the Order 113 proceedings.

[6] The defendants fell out with their legal team. It would appear that the second-named defendant objected to disclosing all documents relating to the financial settlement with her former husband and that the defendants' legal team thought that as a consequence the defendants in general and the second-named defendant in particular, had lost all confidence in them. An application was made to come off record by Rafferty and Co (and Mr Coyle). The application was successful and an order was made under Order 67 Rule 5(1) on 6 May 2016 by the Chancery Master.

[7] New solicitors, Thompson Crooks ("TC") came on record for the defendants. Mr Gary Rocks of that firm acted for the defendants. He instructed Mr J C Hussey, barrister-at-law, as counsel. The defendants told the court that they had made clear to both legal teams that the Will was defective, that the deceased did not have capacity, that she had not signed it and that there were various problems including who witnessed the Will. Further it is claimed that the plaintiff is not a solicitor as described in the Will. No evidence of this was adduced to the court. It is true that there is no Bernadette Heaney of Tiernans registered as a solicitor in Northern Ireland, but there is a Bernadette Heaney who operates lawfully as a solicitor in the Republic of Ireland. It would seem from information provided by the Law Society that the Plaintiff is on the Roll of Solicitors in Northern Ireland but that she did not have a practising certificate at the time she witnessed the Will. Accordingly under Article 4 of the Solicitors (NI) Order 1976 she was not qualified to act as a solicitor. None of these matters formed the basis of any legal proceedings brought either against the estate of the deceased or against the plaintiff, the executrix. Meanwhile the plaintiff as I have recorded issued proceedings at the end of 2015 on behalf of the estate against the defendants seeking an order for possession of the property pursuant to Order 113 of the Rules of Supreme Court (NI) 1980.

[8] The inheritance claim came on for hearing. Skeleton arguments were submitted. On 26 September 2016 the parties reached agreement and asked for the inheritance claim to be stayed on terms which were set out in a schedule to the court order, in other words, they agreed a Tomlin Order. The terms provided for the withdrawal of the inheritance claim with the costs of the executrix to be paid by the estate of the deceased. The defendants also compromised the Order 113 proceedings by agreeing not to defend them and which were to be adjourned to the first available date in January 2017. Each of the defendants signed these terms as did the executrix. The terms of settlement related to both the inheritance claim and to the Order 113 proceedings.

[9] But the defendants did not vacate the property. They remain in occupation together with, I understand, 2 other children of the second-named defendant and the second defendant's brother. The defendants are determined to defend the Order 113 proceedings despite the earlier agreement not to do so. They have now dismissed their second legal team. They have reported the solicitors and counsel to the Law Society and the Bar of Northern Ireland respectively, I am informed. They claim that they were forced to sign the agreement by counsel. They allege that their legal team was bribed and that they had conspired with the other side. They further

alleged that the plaintiff's solicitors, Tiernans, for whom both witnesses work, conspired with the other siblings to create the fraudulent Will.

[10] The fact that these wild and scurrilous allegations have been made against professional men and women in open court is to be regretted. However it will be for other tribunals to adjudicate upon them conclusively. On the information before me, they appear either baseless or irrelevant. Further the defendants have raised a number of other bizarre claims about the technical defects they allege which are present in the Will and which invalidate it, such as the fact that the deceased did not write all of the Will herself.

[11] The defendants want this court to refer the case to the Supreme Court, which of course this court has no power to do. They want to challenge the "fraudulent Will", they seek to set aside the compromise agreement which they signed and the court order which they agreed to, but above all they want to remain in the property and to do so without paying any rent. The first defendant says that they will buy out the other siblings but she has no apparent means to do so. When challenged as to how she could possibly pay for her continuing use and occupation of the property, never mind the interests of her other siblings, she says that she has some matrimonial claim which has been adjourned and which she proposes to re-activate. However, my reading of the ancillary relief proceedings is that the matrimonial agreement which she entered into was to operate as a clean break. From the evidence presented to this court, she has no prospect of being able to pay a use and occupation rent never mind raise the £140,000 necessary to buy out all the other siblings' interests.

C. DISCUSSION

[12] There is no dispute that the defendants signed the terms that resulted in the Tomlin Order being made. They agreed not to challenge the application for possession of the property under Order 113. They are of full age and they had legal advice. They are bound by their signatures, whether they bothered to read the terms or not: see L'Estrange v Graucob [1934] 2 KB 394. If they have any complaint, then it is a matter that they should address to their legal team. If their counsel and solicitor have failed in their duty, and there is no independent evidence that their legal team did fail in their duty, then those complaints should be addressed to the solicitors and counsel. As I have stated, I understand that they have already complained to the Law Society and to the Bar of Northern Ireland. If either the solicitors and/or the barrister(s) acted contrary to the terms of their retainer, then they will be liable in damages in negligence and/or contract.

[13] In Plumley v Horrell [1869] 20 LT 473 Lord Romilly MR said:

> "Prima facie everybody would suppose that a compromise means that the question is not to be tried over again. That is the first meaning of compromise.

> When I compromise a law suit with my adversary, I mean that the question is not to be tried over again."

[14] If the defendants seriously intend to try and set aside the consent order, then they must:

(a) either commence new proceedings to have the agreement set aside; or

(b) seek leave to appeal to the Court of Appeal out of time: see MG McG v McG [2009] NIFam 6 and Valentine on Civil Proceedings: The Supreme Court at 12.10.

No new proceedings to set aside the consent order have been instituted. The appeal is without merit for the reasons I will give. I would refuse leave, if asked: see section 35(2)(f) of the Judicature (NI) Act 1978.

[15] The finality of a compromise agreement can also apply to matters which could have been brought forward and litigated. Thus issues such as capacity and the deceased's signature could have been raised by the defendants in either the inheritance claim or the Order 113 application. Both the defendants freely admit they were aware of these matters and they say that they had raised them with their lawyers but their lawyers had disregarded their concerns. It is important to note the rule in Henderson v Henderson as is set out by Sir James Wigram VC at [1849] 3 Hare 100 at 115. He said:

> "[W]here a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to the points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

[16] This statement was subsequently reviewed by the House of Lords in Johnson v Gore Wood and Co (A Firm) [2002] 2 AC 1. Lord Bingham emphasised in his judgment that there was public interest that there should be "finality in litigation" and that "a party should not be twice vexed in the same matter". He went on to say:

> "It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based approach which takes account of the public and private interest involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

[17] Lord Millet had also referred to the discussion on this matter at 6.16-6.17 of Foskett on Compromise (8th Edition).

[18] Leaving aside the terms which were agreed between the plaintiff as executrix and the defendants, I can see no basis on which the defendants can defend the present Order 113 proceedings. They have no right, legal or equitable, to remain in the property. The plaintiff as executrix is entitled to possession of the property to sell it as the deceased directed in her Will and to divide the proceeds of the sale equally among all the issue of the deceased. The fact that she may not have been able to practice as a solicitor in Northern Ireland does not invalidate the Will and/or the terms of settlement which the defendants agreed. It will however be a matter for the Law Society to consider and to whom I intend to refer this judgment. No doubt it will take such action, if any, which it considers appropriate in the circumstances.

[19] It is also important to bear in mind what will happen should the defendants succeed in their claim to set aside the Will. There is no previous Will of the deceased. The estate will have to be dealt with on an intestacy. The same outcome will be achieved as under the present Will, namely each of the siblings will receive a 1/12th share and the property will have to be sold to ensure that each is paid their due share. The defendants will not be permitted to remain on the property rent free to the disadvantage of their fellow siblings. Therefore it does not matter one iota whether the Will is set aside. The same outcome is inevitable.

[20] However there is one matter which I drew to the attention of both sides. A clause in the Will states that the executrix, the plaintiff, who purports to be a solicitor, is authorised to charge a professional fee for all the work undertaken by her

as executrix. But of course, she is also a witness to the Will. Such a clause pertaining to a solicitor and which permits her to charge for her services as an executrix is construed as a legacy and is void as she is an attesting witness: see Re Barber [1886] 31 Ch D 665 and Article 8 of the Wills and Administration Proceedings (NI) Order 1994.

D. CONCLUSION

[21] The whole system of civil justice depends on finality. Whether litigants appear in person or are represented, the rules remain the same. When a case is compromised, as here, the litigants must abide by the compromise agreement. If the defendants feel that their solicitors or barristers have not acted in accordance with their retainer, then they can take proceedings against them. There are no grounds disclosed that would allow the defendants in this case to set aside the compromise agreement they signed. But, just as importantly, even if they were to set aside the compromise agreement and the Tomlin Order and they were allowed to challenge the validity of the Will, they would be in no better position. If the Will is found to be invalid, then an intestacy will arise. The second defendant is only entitled to 1/12th of the property. The property will have to be sold and she and the first defendant will have to leave. I do not consider that there is any defence of the Order 113 proceedings disclosed on the papers. None of the residents enjoy any rights, legal or equitable, which would allow them to remain in possession of the premises. The property will have to be sold and the defendants will have to leave. Both defendants seem unable to understand that they are receiving preferential treatment and that by remaining on the property, rent free, a great injustice is visited on the other siblings. The only issues for this Court can be:

(a) the length of any stay; and

(b) the issue of costs.

I will give the parties time to digest this judgment and I will then hear them on 28 February 2017 if they are unable to reach agreement as to how long the defendants should have to find alternative accommodation and what the appropriate order for costs should be.