Neutral Citation No. [2016] NICh 5 | *Ref:* **HOR9854**

Judgment: approved by the Court for handing down | *Delivered:* **04/02/2016**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

IN THE ESTATE OF DAVID CHESNEY, DECEASED

BETWEEN:

ELIZABETH DUFFIN, JAMES CRAWFORD AND MARY AGNES DEMPSEY AS PERSONAL REPRESENTATIVES OF DAVID CHESNEY, DECEASED

Plaintiffs

and

ELAINE MARY McELHILL, HEATHER ANNE CHESNEY, RICHARD JAMES DEMPSEY, HILARY ANNE CAMPBELL, MELISSA ANNE HADFIELD, JOHN CRAWFORD AND DAVID CHESNEY

First Named Defendants

and

DAVID DUFFIN

Second Named Defendant

and

JAMES L RUSSELL, JACQUELINE J S RUSSELL AND HELEN M S RUSSELL T/A JAMES L RUSSELL L& SON

Third Party

_____

HORNER J

Introduction

[1] Elizabeth Duffin, James Crawford and Mary Agnes Dempsey ("the Plaintiffs") are the personal representatives of David Chesney, deceased ("the

Deceased") who died on 26 July 1987 at the age of 71 years. The deceased made his last Will at the offices of James L Russell & Sons, Solicitors ("Russells") on 2 April 1987. A grant of probate was granted to the executors named in the Will, Mr Boyd and Mr Craig, on 25 February 1998. Mr Craig died on 4 June 1995 and Mr Boyd died on 15 February 2003. Both executors died intestate and there was therefore no chain of executorship. Accordingly, from 15 February 2003 there were no personal representatives of the deceased's estate. On 4 January 2011 a grant of administration with Will annexed de bonis non was made in favour of the plaintiffs.

[2] The last Will and Testament of the deceased provided, inter alia:

> "I bequeath all my estate to my sister Ellen Jane Chesney for life. On her death or if she pre-decease me then I direct my farms in Ballymacilroy and Cloghogue to be sold. I direct that the option to purchase same be given to my nephew David Duffin at the value placed on same for duty purposes, said option to be exercised within 3 months of the death of the survivor of me and my said sister."

[3] Ellen Jane Chesney died approximately 20 years subsequent to the testator on 19 September 2007. On 15 November 2007 by written notice David Duffin ("Duffin") informed the deceased's solicitors, Russells, that he wanted to exercise the option. At that stage there was no-one in place to represent the deceased's estate.

[4] A dispute has arisen between Duffin and the first, second, third, fourth, fifth, sixth and seventh defendants ("the Defendants") who are the grandnephews and grandnieces of the deceased with the exception of the children of the deceased's nephew, James Chesney. The Defendants say that the purchase price, namely "the value placed on the same for duty purposes" is the value placed upon the farms at Ballymacilroy and Cloghogue ("the Land") for the purposes of the assessment of the inheritance tax liability of Ellen Jane Chesney's estate ("the Defendants' construction"). Duffin says that the phrase means the value placed upon the estate of the deceased for the purposes of the assessment of the inheritance tax liability of the deceased's estate at the time of the deceased's death ("Duffin's construction"). On the Defendants' construction Duffin may have to pay somewhere in the region of £425,000-£580,000 to exercise the option. On Duffin's construction he will have to pay £100,000. There is also a dispute about whether or not Duffin has validly exercised the option granted to him under the deceased's Will. The Defendants maintain that he has not and that consequently it has expired due to the passage of time. Duffin says he validly exercised the option within the permitted period of time. A further issue has arisen about a slurry tank constructed on the deceased's lands by Duffin and which cost Duffin £62,263.73 and in respect of which he received a grant of £37,358.23. He therefore made a nett contribution of £24,905.50 from his own funds for its erection. This last issue was the subject neither of

evidence nor of detailed argument from all the parties. The court does not intend to make any ruling in respect of it.

[5] Russells have been joined as a third party by Duffin. He says that Russells must have been negligent if the Defendants' construction is correct as Russells agree that the deceased did not intend that Duffin should pay the value of the land on the basis of the Defendants' construction. The personal representatives have taken a neutral stance on this central issue.

The respective cases

[6] It is important to record briefly the respective submissions made by the different parties in respect of the issues in dispute.

(a) The personal representatives.

The personal representatives have not made any submissions in respect of the valuation issue. They do point out that for IHT purposes, the IHT return on the estate of Miss Chesney is incorrect in placing a value of £67,700 on her interest which was derived from James H McKinney's valuation of 28 January 2009. They accept that the proper return should have been in the sum of £580,000. In respect of the exercise of the option they point out that –

(i) If the correct price was £100,000, then the parties were agreed as to price.

(ii) If the correct price was £580,000 then there was no consensus because Duffin never intended to purchase the land for such an amount.

On the issue of whether the option has been validly exercised the personal representatives are silent.

(b) The Defendants make the case.

(i) The method chosen by the deceased to fix the price payable under the option granted to Duffin was a method to ensure that the fluctuations in the value of the Land from the date of the Will were taken into account in the price that Duffin had to pay.

(ii) The deceased did not intend to confer a substantial benefit upon Duffin on any fair reading of the Will by requiring the use of the assessment of the value of the Land at the time of the deceased's death, given that the aunt could survive the deceased for a period of time and the value of the Land could rise.

(iii) They make no submissions in respect of the exercise of the option.

(c) Duffin makes the case that the objective meaning of the relevant provision in the Will is that he should be able to purchase the Land at the value placed on the same for duty purposes and this relates to the deceased's Will, the deceased's property and the deceased's death. In respect of the option, he claimed that this was validly exercised by him because there were no personal representatives in whom title vested and he served it on Russells who had authority to accept service as the deceased's solicitors. Otherwise the option was incapable of being validly exercised.

(d) Russells argued that the clear meaning of the option is that the valuation for duty purposes should take place as at the deceased's death. They say that the option was validly exercised within the 3 month period. Accordingly they support both Duffin's construction and the claim that the option was validly exercised.

The Evidence of David Duffin

[7] Mr Duffin was the only witness to give sworn testimony before me. Allowing for his obvious nerves as this was his first time in court, he came across as an honest, down to earth farmer, whose word could be relied upon. There was no hint of any dissembling on his part. He made no attempt to mould his testimony to his advantage. The court is satisfied that it received from him the unvarnished truth. The deceased and his aunt were truly fortunate in their twilight years to have the support of their loving nephew who cared for them and helped look after their needs.

Legal discussion on the construction of Wills

[8] In Perrin v Morgan [1943] AC 399, at 406 Lord Simon said as follows:

> "… the fundamental rule in construing the language of a Will is to put on the words used the meaning which, having regard to the terms of the Will, the testator intended. The question is not, of course, what the testator meant to do when he made his Will, but what the written words he uses mean in the particular case, what are the `expressed intentions' of the testator."

Theobald on Wills (17th Edition) at 15-001 states:

> "In construing a Will the object of the court is to ascertain the intention of the testator as expressed in his Will when it is read as a whole in the light of the extrinsic evidence admissible for the purpose of its construction."

[9] In Re Knight [1957] Ch 441, at 453 the court said:

> "Matters of construction must in the end of all depend upon the impression made upon the reader's mind by the words that have been used. Such, indeed is the purpose of language."

[10] It must also be noted that no Will has a twin and that searching for precedents as to how other judges interpreted a phrase is likely to prove an unrewarding and fruitless task. A Will is ambulatory and speaks from death: see Article 17 of the Wills and Administration Proceedings (NI) Order 1994 ("the 1994 Order").

[11] In Heron v Ulster Bank & Others [1974] NI 44 Lowry LCJ gave the following advice:

> "I consider that, having first read the whole Will, one may with advantage adopt the following procedure:
>
> 1. Read the immediately relevant portion of the Will as a piece of English and decide, if possible, what it means.
>
> 2. Look at the other material parts of the Will and see whether they tend to confirm the apparently plain meaning of the immediately relevant portion or whether they suggest the need for modification in order to make harmonious sense of the whole or, alternatively, whether an ambiguity in the immediately relevant portion can be resolved.
>
> 3. If ambiguity persists, have regard to the scheme of the Will and consider what the testator is trying to do.
>
> 4. One may at this stage have resort to rules of construction, where applicable, and aids, such as the presumption of early vesting and the presumptions against intestacy and in favour of equality.
>
> 5. Then see whether any rule of law prevents a particular interpretation from being adopted.
>
> 6. Finally, and, I suggest, not until the disputed passage has been exhaustively studied, one may get help from the opinions of other courts and judges and similar words, rarely is binding precedents, since it has been well said that `no Will has a twin brother' but more often as examples (sometimes of the highest authority) of how

> judicial minds nurtured in the same discipline have interpreted words in similar contexts."

[12] The Will of the deceased was made on 2 April 1987. It follows that the relaxation of the rule in relation to the use that can be made of extrinsic evidence in interpreting a Will brought into effect by Article 25 of the 1994 Order, is of no effect. Circumstantial extrinsic evidence however is admissible under the "armchair principle". Under this exception the court can take notice of the circumstances surrounding a deceased at the date of his Will:

> "You may place yourself so to speak, in the deceased's armchair, and consider the circumstances by which he was surrounded when he made his Will to assist you in arriving at that intention." Per James LJ in Boyes v Cook [1880] 14 Ch D 53, at 56.

[13] However speculation by third parties as to what the deceased may or may not have meant is not admissible. It is not evidence. The court does not recognise an expert in guessing what the testator meant: see *Theobald on Wills* at 14-025. In this respect, I find the affidavit evidence of Mr Crossey unhelpful and of no evidential value.

[14] Section 3 of the Settled Land Act 1882 provides:

> "A tenant for life –
>
> (i) May sell the settled land or part thereof, any easement right or privilege of any land, over or in relation to the same and .."

This means that Duffin's aunt, who survived the deceased, was able instead of letting the land to Duffin to sell it as the tenant for life at the best price that could reasonably be obtained, or to let the land for a period of time and then, before her death, to sell it.

[15] An option to purchase "is an agreement whereby the owner of the property is committed to selling it to the person given the option, if that person chooses to exercise it. Until the latter does exercise it, however, there is no contract for the sale of the land …": see paragraph 8.03 of *Wylie Irish Conveyancing Law* (3rd Edition).

Any provision in the Will in relation to the exercise of the option must be complied with strictly: see Cassidy v Baker [1969] 103 ILTR 40. However, the court should try to interpret the terms of the option in an agreement in a manner consistent with what a reasonable person would understand them to mean. As Lord Hoffman said in Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896, at 912-913:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract …
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean …."

Discussion

(a) Construction of the Will

[16] The relevant circumstances in respect of the construction of the Will include:

(a) Duffin was a bachelor farmer renting the Land from the deceased, his uncle, with whom he shared the same Christian name, presumably being named for him.

(b) The deceased did not know whether he was likely to predecease his sister or how long she would survive him if he died first.

(c) The executors had to have the land valued for duty purposes on his death (see solicitor's note).

(d) The deceased did not know if he predeceased his sister whether she would, as tenant for life, sell the lands.

(e) Duffin, in the event of his aunt surviving the deceased and retaining the lands, was obliged to pay to her a rent for using the lands which provided her with an income.

[17] I consider that a fair and objective reading of the relevant portion of the Will under consideration conveys the sense that "the value placed on the same for duty purposes", refers to and relates to the assessment at the time of the deceased's death. That was my immediate impression from reading the disputed section of the Will in particular, and the whole Will in general.

[18] Further consideration of the rest of the Will and the legacies given to the other beneficiaries does nothing to undermine that understanding. Such an interpretation is in accordance with the scheme of the Will and what the deceased was trying to achieve. It makes no sense that the valuation for duty purposes should relate to the death of the person who acquired the life interest.

[19] Further, there is no rule of construction or rule of law which suggests that the deceased did not intend that the value of the land for duty purposes was to be assessed at the date of his death.

[20] There is further support from the following:

(a) The notes of solicitor when making the Will refer expressly to the option based on the CGT valuation being exercised within 3 months of the deceased's death. It is therefore no surprise that Russells support the construction being put forward by Duffin.

(b) It makes no sense to construe "for duty purposes" as referring to the duty payable on the death of anyone other than the deceased.

(c) The suggestion that the deceased required Duffin to pay market value is not a good one. If he had intended Duffin to pay the market value and therefore enable the other beneficiaries to share in any increase in the value of the lands, he could expressly have said so. Further, it ignores the requirement for Duffin to pay rent to his aunt until he was able to exercise the option on her death.

(d) Clearly Duffin's aunt considered that this was the intention of her brother, the deceased, as she said so at the time. I have no doubt that Duffin's evidence as to what she told him of the deceased's intention shortly after his death is both true and accurate.

(e) Some further comfort that this is a correct interpretation is derived from the understanding of the accountant, Mr McKeown, who appears to have been closely involved in the deceased's financial affairs. He is in no doubt that "the value placed on same for duty purposes" related to the valuation on the deceased's death. As I have previously recorded Russells were of a similar understanding, namely that the valuation was to assessed on the duty payable at the deceased's death.

(f) The relationship between the deceased and Duffin suggest that the deceased would want to confer a bounty on Duffin, not burden a man in his latter years with a substantial debt which he might need to incur in purchasing the Land which is likely to have increased in value, especially as he has had to pay rent throughout to his aunt for his continuing use of the Land.

(g) The legacies under the Will are significantly less than the value of the Land for duty purposes at the date of the deceased's death.

In the circumstances I have no hesitation in preferring the construction put forward by Duffin.

(b) The Option

[21] I am of the opinion that the option was validly exercised. Duffin had three months to exercise the option on the death of his aunt, the life tenant. There were no executors or personal representatives in place. Duffin did all that he could do in the circumstances. He formally notified the solicitors for the deceased and the life tenant. He could do no more. I consider that a reasonable person having all the background information would consider that where there were no personal representatives in place, service on the solicitor acting for the estate and the life tenant would be sufficient. To reach any other conclusion would be to conclude that the option was incapable of being exercised at all. I am therefore not surprised that the Defendants chose not to make any counter-submission on this issue.

Conclusion

[22] In answer to the questions raised in the originating summons, the court answers as follows:

(a) Whether on the true construction of the Testator's Will dated 2nd day of April 1987 the option referred to therein was a valid option capable of being exercised? Yes.

(b) If the answer to question (a) is yes, then is David Duffin in the events that have happened entitled to purchase the Testator's farm at Ballymacilroy and Cloghogue? Yes.

(c) If the answers to questions (a) and (b) are yes, on what terms including price does the Testator intend the option to be exercised? Mr David Duffin is obliged to pay the value placed upon the lands for inheritance tax purposes upon the death of the Testator, that is the sum of £100,000.

(d) Whether the payment by David Duffin of monies purportedly in exercise of an option to purchase the deceased's lands amounts to an estoppel against the executors whereby he can enforce the option to purchase said lands? Does not arise

[23] I will hear counsel on the issue of costs.