

**Neutral Citation No: [2017] NICH 22**

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

**Ref: HOR10374**

**Delivered: 19/7/2017**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**CHANCERY DIVISION**

**2014 No. 56090**

**BETWEEN:**

**ISHTARA PROPERTIES LIMITED**

**Plaintiff;**

**-and-**

**MARIE O'HARE (AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF  
MARY O'HARE, DECEASED)**

**Defendants.**

**AND BY ORDER DATED 16 DECEMBER 2004**

**BETWEEN:**

**ISHTARA PROPERTIES LIMITED**

**Plaintiff;**

**-and-**

**MARIE O'HARE AS PERSONAL REPRESENTATIVE OF MARY O'HARE  
DECEASED**

**Defendant.**

## HORNER J

[1] The plaintiff's claim is for specific performance of an agreement dated 4 March 2014 to sell lands at Chancellors Road, Newry comprised in Folio 20309 County Armagh ("the Land") for £55,000 with the completion date of 14 March 2014. The defendant was originally sued in her personal capacity and as an executrix of the estate of Mary O'Hare deceased ("the deceased").

[2] The Land formed part of the estate of the deceased who died on 26 November 2003. The defendant obtained a Grant of Probate on or about 11 September 2008 in respect of the estate of the deceased. The grant was amended on 11 May 2010. The defendant is one of three siblings who benefit following the deceased's death. There are doubts as to whether the two other siblings have legal capacity.

[3] A £15,000 deposit due under the contract has been paid. However the balance of £40,000 has not been accepted although the plaintiff is willing to pay it. The plaintiff's solicitor served a completion order dated 14 March 2014. This was followed by a Notice to Complete dated 24 March 2014. The plaintiff seeks specific performance of the agreement for the sale of the Land.

[4] It would appear from the affidavit of Paul Kinney, a Director of the plaintiff that the plaintiff has purchased other property from the defendant's sibling, Brian O'Hare at Glenveagh, Chancellors Road in the vicinity of the Land. He is a brother of the defendant.

[5] On 24 February 2014 John F Gibbons and Co wrote confirming that they acted on behalf of the defendant in her own capacity and as executrix and that they had been instructed to sell the land for £55,000. However completion did not take place and J F Gibbons and Co wrote on 27 May 2014 saying that they had no instructions about completion.

[6] A summary judgment application under Order 86 was instituted on 2 June 2014. In an affidavit dated 23 June 2014 Mr Paul Kinney set out various details in order to fulfil his duty of candour to the court. He said this was one of four plots of land, the other three having been acquired by Ishtara. The Land was left by the deceased to the defendant and her two siblings, Brian and Anne. Judgment was given by Deeny J but this was set aside subsequently on consent. I am not clear as to the basis on which the parties agreed to set aside the judgment.

[7] There is a sum of over £1m in inheritance tax allegedly due to HMRC following the deceased's death. This is subject to a challenge. I am informed that it is likely to be concluded by the end of July and that there is a good chance it will be successful. I have no material on which to judge if this is correct or not. If the appeal is unsuccessful then the estate will be grossly insolvent. The estate had been assisted by Paul Kinney who is an accountant and partner with PWC. It is further alleged

that P J Bradley, valuer, had advised the O'Hare estate as to the true value of the Land.

[8] Mr Kinney claims that:

- (a) The sale of the land was for the specific purpose of satisfying the amount due to HMRC;
- (b) He loaned the O'Hares the necessary money to discharge the lien which the O'Hares' former solicitors claimed over the Land.

[9] On 16 September 2014 the matter was listed for review before Deeny J, then the Chancery Judge. Arrangements were made for the defendant to be examined by a consultant psychiatrist. She appeared to be incapable of giving instructions. It appeared that a controller might have to be appointed. The report of Dr Loughrey, a consultant psychiatrist dated 18 July 2014 sets out in detail the defendant's psychiatric history. At times she had been unable to give instructions due to mental health issues and this had been confirmed by Dr O'Reilly. Dr Loughrey noted that:

- (a) She was on a formidable array of medication.
- (b) She was in a delicate and unstable mood state.
- (c) He did not think she was able to give instructions.

Leave was granted to discontinue against the defendant in a personal capacity. However no controller was appointed. The Official Solicitor was asked to become involved. The Official Solicitor refused to do so as she was not prepared to obtain a new Grant of Probate.

[10] Mr Gibbons, solicitor, was retained for this specific transaction. He was not, I understand, the family's solicitor or a solicitor who had acted before for the defendant. He has no notes of the transaction which is certainly not in accord with best practice. He was introduced to the defendant, it is claimed, by Paul Kinney of the plaintiff.

[11] The difficulty in the case is that the estate is on the face of it grossly insolvent. In those circumstances no one is prepared to take on the burden of acting as administrator. Solicitors have been acting, namely Stephen Begley, but it seems this was on the basis of instructions given by Brian O'Hare as the plaintiff is thought not to have capacity. Certainly I did not understand Mr Coyle who appeared for the defendant in a representative capacity instructed by Stephen Begley to argue that this was a misunderstanding of what had happened. Mr Coyle was confident that the appeal to the HMRC would be determined in favour of the estate and that in those circumstances a personal representative would be appointed who could give

him and his instructing solicitor instructions. As I have said I am not in a position to judge whether or not this confidence is misplaced.

[12] Mr Stephen Begley, solicitor who appears on behalf of the defendant swore on an affidavit alleging that:

- (a) The valuation obtained did not include the driveway.
- (b) Its actual value given its key position was £500,000 and rising according to a report from an independent firm of valuers.

He asserted that this vulnerable woman, the defendant, entered into a contract as executrix without an independent valuation and without independent legal advice. There is prima facie evidence that the defendant did not have capacity. There is also prima facie evidence that she was very vulnerable and that she would have been susceptible to pressure. The independent legal advice which she received is compromised by, inter alia, the failure of Mr Gibbons to make any notes whatsoever in relation to the transaction and the advice etc given to the defendant. Certainly there appears to be no love lost between, for example, Mr Begley and Mr Gibbons.

[13] A defence was served on 21 May 2015 by the defendant although the case made by her solicitor is that she does not have capacity to give instructions. It was not surprising in those circumstances that an application has followed to strike out the defendant's defence on the basis that there is no legally appointed executrix or personal representative of the deceased, the defendant is unable to give instructions, she has no legal capacity and that there should be judgment in favour of the plaintiff.

[14] The foregoing is the briefest of summaries, but it serves to highlight the following issues which arise, but which have not been the subject of a court ruling on the merits and which will not be the subject of any adjudication if the plaintiff's application for judgment is successful. These include:

- (a) The claim that the defendant had no capacity when she entered into the agreement for the sale of the Land.
- (b) Even if the defendant did have capacity, she was a vulnerable person and that any sale is vitiated by, inter alia, undue influence.
- (c) She did not receive adequate independent legal advice and her solicitor may not have been truly independent.
- (d) The sale may be at a gross undervalue.

[15] These are all allegations which are up in the air. No one will take on the burden of defending these proceedings because of the outstanding tax bill and the

potential insolvency of the estate. However it is not in the public interest to allow these allegations to remain unresolved. It is not fair to those involved some of whom are professional persons who are heavily dependent on having unsullied reputations. It is in the public interest and indeed it is in everyone's interest that these matters are properly and fairly litigated in court and that a judge gives a reasoned decision. This is for a number of reasons:

- (i) The Chancery Court is a court whose duty it is, *inter alia*, to protect vulnerable parties. In this case there is *prima facie* evidence that even if the defendant did have a capacity, then she was a very vulnerable person. The defendant's case deserves a court determination on the merits.
- (ii) Mr Gibbons' reputation and professional standing has been challenged in the clearest of terms. He deserves the opportunity to have his reputation vindicated in court.
- (iii) The reputation of Mr Kinney and Ishtara have been the subject of attack and they too deserve the opportunity to remove any stain on their professional reputations.

[16] This is a case which should be dealt with on the evidence and with the evidence of each side being tested on cross-examination. It is in everyone's interest that the truth should be uncovered. This is not going to be the case if there is a judgment in default or a summary judgment. It is vital in those circumstances that there should be a *legitimus contradictor* to allow these contentious issues to be fully litigated and adjudicated upon. This is in accordance with Order 1 Rule 1A.

[17] Unfortunately the Official Solicitor has refused to act and will not take out a Grant of Probate. HRMC may have the most to lose because if there is specific performance of the sale ordered, then an asset which might be available to satisfy their present tax demand will disappear from the estate.

[18] However in order not to delay matters I have spoken to the Attorney General and provided him with a brief history (and a copy of this judgment) and he has agreed that in the particular circumstances of this case the public interest demands that he represent the estate so that these disputes can be resolved in open court after oral and documentary evidence and legal argument. He will therefore arrange for a Grant of Probate to be extracted and will come on record for the defendant. I will list this case to be reviewed in October to allow:

- (a) The Grant of Probate to be extracted by the Attorney General.
- (b) The Attorney General to take detailed instructions having considered the papers which should be delivered to him forthwith by Mr Stephen

Begley. At the hearing in October directions can be given by the judge for a trial in the New Year.

[19] The hearing date in September is necessarily vacated. Costs are reserved to the trial judge.