

Neutral Citation No: [2019] NICH 4

Ref: McB10862

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

Delivered: 27/02/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF THE ESTATE OF THOMAS KERR DECEASED

BETWEEN:

RONALD KERR

Plaintiff;

-and-

AGNES JEAN JAMISON

Defendant.

McBRIDE J

Introduction

[1] The administration of the estate of Mr Thomas Kerr deceased has given rise to a multiplicity of protracted legal proceedings. Notwithstanding the fact the entire dispute was apparently settled and a court order was made on consent on 11 March 2010 (“the 2010 proceedings”), this court is now asked to determine whether the defendant, who was not a party to the 2010 proceedings, entered into an agreement on 11 March 2010 whereby she agreed to assign all her interest in a dwelling house at 71 Saintfield Road, Ballygowan (“the premises”) to her niece, Tracey Kerr.

[2] By writ dated 6 January 2017, the plaintiff, who is the personal representative of the deceased’s estate, seeks the following relief:

- (a) A declaration that the defendant is bound by the terms of an agreement dated 11 March 2010 entered into between her and the other beneficiaries of the estate of the deceased whereby they all agreed to transfer their respective interest in lands and premises situate and known as 71 Saintfield Road, Ballygowan to Tracey Kerr.
- (b) An order that the defendant take all necessary steps and execute all necessary documents to transfer her interest.

- (c) Alternatively damages for breach of contract.
- (d) Such further or other relief as the court may deem just and equitable.

[3] The plaintiff was represented by Mr Michael Lavery of counsel. The defendant was a litigant in person.

[4] The defendant had formerly been represented by solicitors who came off record on 5 September 2017. The defendant entered a Memorandum of Appearance but failed to file a defence. As a result of the defendant's failure to file a defence the plaintiff filed a notice of motion dated 28 March 2018 seeking judgment in default of defence and a declaration that the defendant was bound by the terms of an agreement dated 11 March 2010 together with an order that the court appoint an appropriate person to execute all necessary documents to give effect to the said agreement. This application was grounded on the affidavit of the plaintiff sworn on 9 April 2018.

[5] During the course of case management the defendant's daughter corresponded with the court on behalf of the defendant. This correspondence, which attached two letters from the defendant's GP dated 5 March 2018 and 27 September 2018 explained that the defendant, aged 86 had significant health problems which meant she was unable to attend court.

[6] Upon receipt of this correspondence the court office wrote to the defendant on 20 June 2018 and again on the 3 October 2018 advising her that the matter would, in the absence of a defence being filed, proceed to full hearing on 19 December 2018 and would proceed in her absence if she failed to attend. She was further advised that, in the event a defence was filed she could then apply to have her evidence taken on commission.

[7] In replying correspondence the defendant informed the court that she was not medically fit to attend and stated that she wanted to retain her share of the estate.

Factual background and history of proceedings

[8] The deceased Thomas Kerr died on 27 November 1995 survived by six siblings namely Ronald Kerr, the plaintiff, Myrtle Mayne, Samuel Kerr, Margaret Elizabeth Kerr, John Charles Kerr and Agnes Jean Jamison, the defendant. Tracey Kerr is the daughter of the plaintiff and a niece of the defendant.

[9] The deceased at the date of his death was the sole legal and beneficial owner of the premises which were subject to a right of residence and support in favour of Margaret Elizabeth Kerr.

[10] After the death of the deceased the plaintiff applied to have purported Wills of the deceased dated 10 March 1994 and 11 September 1995 admitted to Proof in Solemn Form. On foot of the purported Will dated 10 March 1994 Tracey Kerr was bequeathed the premises absolutely. By the purported Will dated 11 September 1995 Tracey Kerr was granted a right to reside in the premises rent free for life.

[11] By consent order dated 22 February 2016 Weir J dismissed the plaintiff's application to have these purported Wills admitted to Proof in Solemn Form and condemned the plaintiff in costs.

[12] As a consequence of this court order the deceased's estate fell to be administered under the rules of intestacy under which each of the deceased's siblings was entitled to an equal share in his estate.

[13] On 8 August 2007 ("the 2007 proceedings") two of the deceased's siblings Samuel Kerr and Myrtle Mayne extracted Letters of Administration and in their capacity as personal representatives brought a writ action for possession of the premises against Tracey Kerr who was in occupation. Tracey Kerr defended these proceedings and issued a counterclaim for a declaration that she had acquired title to the premises by way of proprietary estoppel.

[14] The 2007 proceedings were listed for hearing on 11 March 2010. They were resolved by way of a Tomlin order and the court order recorded the terms of settlement as follows:

"It is hereby agreed between the plaintiffs of the first part, the defendant of the second part and all those beneficiaries other than the plaintiffs who are entitled to benefit under the intestacy of Thomas Kerr deceased ("the beneficiaries") of the third part that:

(1) Margaret Kerr (known as Peggy) shall release her right of residence and support conferred by the Will of Thomas Henry deceased dated 3 January 1982.

(2) The plaintiffs shall resign as personal representatives of the estate of Thomas Kerr deceased and be replaced by a person to be nominated by the beneficiaries (hereinafter 'the new personal representative').

(3) The new personal representative shall pay to the plaintiffs I (sic) full and final settlement of all claims under the said estate the sum of £82,500 inclusive of the costs of the action and the costs of the administration of the estate to date (but does not

include the costs incurred in respect of the proceedings 1997 No. 6 Family Probate and Matrimonial).

(4) The new personal representative shall assent to the vesting of 71 Saintfield Road, Ballygowan and environs ('the property') on the beneficiaries but subject to and conditional upon the said charge being executed in favour of the plaintiffs as per paragraph 3.

(5) The said charge shall become due and payable on 11 September 2010.

(6) On 11 June 2010 if the said payment of £82,500 or any part thereof has not been made to the plaintiffs any balance thereof shall carry interest at the prevailing court rate until payment.

(7) The plaintiffs shall be responsible for all costs of the administration of the estate to their removal. The legal representatives of the new personal representative shall be responsible for all costs incurred thereafter including the preparation of the said charge.

(8) The beneficiaries other than the successors of Joyce Kerr ('the deceased's beneficiary') shall indemnify the plaintiffs and hold harmless in respect of any claim that the estates of the deceased's beneficiaries may have.

(9) Any inheritance tax due in respect of the property shall be borne equally by the plaintiffs and beneficiaries.

(10) The costs of the defendant shall be taxed in accordance with Schedule 2 to the Legal Aid Advice and Assistance (Northern Ireland) Order 1981."

[15] Although the defendant was not a named party to the 2007 proceedings, she purportedly signed the Tomlin order.

[16] On 13 April 2015 the plaintiff was granted leave to apply for a grant of letter of administration in the estate of the deceased.

[17] On 26 January 2016 the plaintiff applied to the court:

- “(a) For an order that the grant herein made this 8 day of August 2007 be revoked.
- (b) For an order appointing Ronald Kerr, personal representative of the estate of the deceased.
- (c) If necessary that an order ad colligenda bona be made appointing the said Ronald Kerr.
- (d) For a declaration the said personal representative be at liberty to transfer to the first named defendant the property at or about 71 Saintfield Road, Ballygowan pursuant to the terms of a Tomlin Order agreed by all the parties and dated 11 March 2010. ...”

[18] This application was grounded on the affidavit of Kelly Shaw, solicitor for the plaintiff, sworn on 11 January 2016.

[19] On 29 January 2016 Master Hardstaff ordered that the grant of representation made on 8 August 2007 be revoked and cancelled and granted leave to Ronald Kerr to apply for a grant of representation.

[20] On 7 July 2016 the plaintiff, by summons brought before the Master, sought a declaration that the plaintiff be entitled to execute an assent of the premises into the name of Tracey Kerr and for an order that the court execute all the necessary deeds and transfer documents on behalf of the defendant. This summons was grounded on the affidavit of Kelly Shaw solicitor sworn on 5 July 2016 and the defendant filed a replying affidavit sworn on 27 October 2016 together with a letter from her GP dated 16 September 2016.

[21] The Master adjourned these proceedings generally on 12 January 2017 as the plaintiff had by that time issued the present writ action which sought essentially the same relief on the same factual grounds.

[22] The present case was listed for hearing on 19 December 2018 and proceeded as an undefended action as the defendant had not filed a defence. She did not appear and was not represented at the hearing.

The Evidence

Evidence on behalf of the Plaintiff

[23] The plaintiff's application was grounded on the plaintiff's affidavit sworn on 26 March 2018. In this affidavit he averred that all the beneficiaries including the defendant had agreed in writing on 11 March 2010 to transfer their respective interests in the premises into Tracey Kerr's name. He further averred that the defendant now refused to comply with the terms of this agreement and in all the circumstances asked the court to appoint an appropriate person to execute the necessary documents to give effect to the agreement. Although the plaintiff was present in court he declined the opportunity to give oral evidence.

[24] The court heard oral evidence from Ronan Lavery QC and Ms Kelly Shaw, solicitor.

[25] Mr Ronan Lavery QC gave his evidence in a dispassionate, professional and straightforward manner. He informed the court that he had acted as junior counsel on behalf of Tracey Kerr in respect of the 2007 proceedings. Ms Kelly Shaw was his instructing solicitor and he was led by Mr Michael Lavery QC.

[26] He volunteered that he did not have a very clear recollection of what happened on 11 March 2010, which is not surprising given the lapse of time since that date, and had therefore refreshed his memory before giving evidence by reading Ms Shaw's affidavit sworn on 6 December 2018, the defendant's affidavit sworn on 27 October 2016 and his solicitor's attendance note dated 11 March 2010.

[27] In answer to questions by the court Mr Lavery QC recalled that his father had conducted the negotiations and ultimately agreement had been reached that the premises were to be transferred to Tracey Kerr, absolutely. This was to be achieved by Ms Kerr paying £82,500 (to include costs) to Myrtle Mayne and Samuel Kerr and the premises being assented to the other beneficiaries. These terms were then recorded in a Tomlin order which was incorporated into a consent court order. His understanding was that after the property was assented to the other beneficiaries they would then each transfer their respective interests in the premises to Tracey Kerr in accordance with agreements ("the agreements") they had each entered into outside court on 11 March 2010. Under these agreements which were recorded in documents which bore the heading "Record of Attendance" each of the non-party beneficiaries which included the defendant, agreed to transfer his or her interest in the premises to Tracey Kerr.

[28] His recollection was that all of the non-party beneficiaries had been advised to seek independent legal advice before signing the agreements and each of them had declined to do so.

[29] In relation to the circumstances surrounding the signing of the agreement by the defendant ("the agreement"), Mr Lavery QC accepted that he could not at this remove recall whether he was present when she signed it and therefore could not assist in answering the question whether the contents of the agreement were read and explained to her before she signed it. He stated however that he "imagined" his father would have read the agreement out to the defendant but he could not be sure about this. Mr Lavery QC stated he could not recall whether the defendant was present in court when the case was announced as settled but accepted, after being shown a log note of the hearing, that the court had not been informed that the defendant and the other beneficiaries had entered into agreements to transfer their respective interests in the premises to Tracey Kerr. He further accepted that the Tomlin order did not refer to the agreements and he was unable to proffer any explanation why these agreements had not been recited in the Tomlin order and had not otherwise been brought to the attention of the court and did not form part of the court Order, despite the fact these agreements fundamentally changed the ownership of the premises from the beneficiaries to Tracey Kerr.

[30] Ms Kelly Shaw, solicitor filed a number of affidavits in the related proceedings before the Master including affidavits sworn on 11 January 2016 and 5 July 2016. At paragraph 3 of her affidavit dated 11 January 2016 she averred that:

"... The Tomlin order agreed by all the parties being the beneficiaries of the estate provided *inter alia* that lands and premises at 71 Saintfield Road, Ballygowan be transferred into the name of Tracey Kerr."

Further at paragraph 6 she stated:

"All of the beneficiaries indicated that they consent to the transfer by signing the Tomlin order and indemnities at court on 11 March 2010."

[31] The indemnities Ms Shaw referred to were in fact the agreements entered into by the beneficiaries. Ms Shaw exhibited all the agreements including the agreement entered into by the defendant. It stated:

"I Agnes Jane Jamison hereby confirm that I have been advised of my right to obtain independent legal advice and I have declined to do so.

I confirm that I consent to transfer any interest or entitlement I obtain or interest in the property at 71 Saintfield Road to my niece to Tracey Singleton.

Signed
Dated 11 March 2010."

[32] Ms Shaw's affidavit also exhibited a letter from the defendant's solicitors dated 14 December 2015 which stated that the defendant did not consent to transferring her interest in the premises to Tracey Kerr. A further exhibit consisted of a six page hand written letter from the defendant dated 22 December 2015 in which she denied ever signing away her interest to Tracey Kerr and further stated that she wanted her share of the estate.

[33] At paragraphs 4 and 5 of Ms Shaw's affidavit sworn on 5 July 2016 she stated as follows:

"4. He (Ronald Kerr) now wishes to transfer to the first named defendant Tracey Kerr Singleton property at or about 71 Saintfield Road, Ballygowan pursuant to the terms of a Tomlin order which was agreed by all the parties on 11 March 2010.

5. As appears from this all of the beneficiaries indicated their consent to the transfer and I confirm all of the defendants apart from Jean Agnes Jamison are now agreeable that this is done."

[34] When giving oral evidence Ms Shaw confirmed that she was the solicitor on record for Ms Tracey Kerr and she had instructed Michael Lavery QC and Ronan Lavery QC to act as senior and junior counsel respectively. She attended court on 11 March 2010 and made an attendance note in relation to the events which had taken place at court.

[35] Her recollection of events was that the 2007 proceedings were ultimately settled on the basis that Tracey Kerr was to pay £82,500 (to include costs) to Myrtle Mayne and Samuel Kerr and on this basis they and all the remaining beneficiaries would transfer their respective interests in the premises to her so that she became the sole owner of the premises. This agreement was achieved by way of a Tomlin order under which the personal representatives were paid £82,500 and an agreement to assent the premises to the non-party beneficiaries. Separate agreements were also entered into by the non-party beneficiaries, including the defendant, in which they each agreed to transfer their respective interests in the premises to Tracey Kerr.

[36] In respect of the circumstances giving rise to the defendant agreeing to transfer her interest in the premises and ultimately signing the agreement and Tomlin order, Ms Shaw accepted that there were frailties in her memory and stated, "I don't have a good detailed memory of this case". Indeed, this became clear when she was unable to answer questions about the procedural steps taken in the case. She advised that she could not answer these questions without looking at the files, which unfortunately she had not brought to court.

[37] Doing the best she could Ms Shaw said she could recall senior counsel speaking to all the beneficiaries including the defendant and recalled that he explained the terms of settlement and advised each of them to seek independent legal advice before entering into the agreements. She recollected that all the beneficiaries including the defendant declined to seek independent legal advice. Senior counsel then dictated the terms of the agreement to her which she then transcribed into documents entitled "record of attendance". Ms Shaw said she was clear in her memory that senior counsel then read the agreements separately to each of the beneficiaries including the defendant before the agreements were respectively signed by them. After the agreements were signed Ms Shaw recalled that she then read the Tomlin order to the defendant and Peggy (Margaret Elizabeth Kerr) together, and they then each signed the Tomlin order and she witnessed their signatures.

[38] Ms Shaw stressed that the defendant attended court as a witness and prior to the court hearing on 11 March 2010 she had not engaged in any discussions with her about transferring her interest in the premises to her client.

[39] Ms Shaw denied that there was any agreement to give the defendant a lump sum payment in consideration of transferring her interest in the premises to Ms Kerr. She did however recall that the defendant had "chipped into discussions" outside court about what amount of money should be paid to settle the case.

[40] Ms Shaw stated that she was unaware that the defendant had any eyesight problems. She accepted that she was not disputing the medical evidence although she stated the medical evidence did not state whether the defendant was suffering eyesight problems in 2010.

[41] Whilst I am satisfied that Ms Shaw was doing her best to give her evidence honestly to the court in relation to what happened at court on 11 March 2010 her memory of events on that date, as she accepted, had frailties.

[42] The court had the benefit of Ms Shaw's attendance note which was made reasonably contemporaneously to the events on 11 March 2010 and I consider that this gives a more accurate account of what occurred at court on the date in question. The attendance note states:

"He (Michael Lavery Senior) told them to get independent legal advice ... Discuss with beneficiaries in detail that they are gifting their share to Tracey ... They understood and agreed ... signed form of indemnity in this regard."

[43] Given the repeated use of the plural in the attendance note I am satisfied that the terms of the proposed agreement were discussed when all the beneficiaries were

together as a group. The attendance note does not state that before each beneficiary signed the agreement it was read out and explained to him or her, individually.

[44] Whilst Ms Shaw gave evidence that the agreement was separately read out to the defendant, I consider that this recollection should be given little weight for the following reasons. Firstly, she accepted she had limited memory of many significant events in the litigation. Secondly, it is not recorded in her attendance note that this happened. If it had happened I would have expected this to be recorded in her detailed attendance note. Thirdly, despite Ms Shaw's confidence that she recalled the agreement being read out individually to the defendant she was unable to give any reason why she specifically remembered this part of the proceedings when she could not remember other important aspects of the court proceedings. Accordingly, for these reasons and for reasons which appear later, I am not satisfied that the agreement was read out and explained to the defendant personally before she signed it.

The evidence of the defendant

[45] The defendant did not appear and was not represented. She had however filed an affidavit in the earlier proceedings before the Master, which proceedings were in exactly similar terms to the proceedings before this court. In her affidavit sworn on 27 October 2016 she made a number of averments. In particular she averred that the original action taken by the plaintiff to have the purported Wills admitted to probate was defended on the basis that these purported Wills had been forged and she further averred that at the hearing of that action the Wills were deemed to be forgeries. She further averred that prior to the High Court hearing on 11 March 2010, the plaintiff had promised to pay her £30,000 if she signed a transfer of her interest in the premises to his daughter Tracey Kerr. At that time the defendant refused to sign such a transfer.

[46] When she attended court on 11 March 2010 she averred that she recalled sitting in the corridor outside court and was aware of ongoing discussions between the parties. At one stage she suggested that everyone should get £40,000 so that the case could be resolved. She recalls that after this intervention Tracey Kerr's barrister said that "they were going to take £40,000 each". Shortly thereafter Tracey Kerr told her to "just sign for your money". Later a barrister held out a piece of paper for her to sign. She recalls signing a document which was blank but accepts she would not have been able to read the document in any event as she has difficulty reading due to age related macular degeneration. She only recalls signing a blank piece of paper which she believed would entitle her to receive £40,000 in exchange for her share of the premises and asserts that she would have had no desire or motivation to gift her interest in the premises to Tracey Kerr as she has had three children of her own. She further denied being offered independent legal advice. She specifically denies signing the 'agreement' and further states that had the document been properly explained to her she would not have signed it. She asks the court not to grant the redress sought by the plaintiff.

[47] The defendant's GP, Dr Gibson in his report dated 16 September 2016 stated that the defendant had, "chronic kidney disease and is on regular dialysis since mid-2015. She also has significant visual impairment and attends the low vision clinic and so it is difficult for her to read any normal size print. She has magnifiers but these are limited. This would make it difficult for her to read documents effectively and she can only write with the aid of someone and it takes a long time. Prior to her dialysis when she was feeling even more unwell her vision was significantly worse. Since her dialysis this has improved marginally".

[48] Although the defendant did not attend court and was not subject to cross-examination I nonetheless give some weight to her affidavit evidence because it was corroborated by other evidence. Firstly, the reason she did not attend court was due to her advanced years and ill health and there was medical evidence before the court indicating she was not fit to attend. Secondly, the allegation of alleged forgery is supported by the fact the court made an order on consent not to admit the purported Wills to probate and made an order condemning the plaintiff in costs. Thirdly, her evidence about contributing to the discussions at court is corroborated by the evidence of Ms Shaw who accepted that the defendant "chipped in to the discussions" as they were ongoing. Fourthly, the defendant's reference that she was to receive a payment of £40,000 rings true as her two siblings, who were the personal representatives, each received £40,000 in consideration of transferring their respective interests in the premises to Tracey Kerr. Fifthly, the defendant's own evidence about her eyesight is corroborated by the medical report provided by her GP.

Consideration

[50] The central question to be determined is whether the defendant entered into a binding agreement on 11 March 2010 and if so whether the court should grant the equitable relief sought.

Legal principles: - Formation of a binding contract

[51] In *Horrocks v Foray* [1976] 1 All ER 737 Megaw LJ set out the elements necessary for the creation of a binding agreement at page 742, as follows:

"In order to establish a contract, whether it was an express contract or a contract implied by law, there has to be shown a meeting of the minds of the parties, with a definition of the contractual terms reasonably clearly made out, with an intention to affect their legal relationship: that is that the agreement that is made is one which is properly to be regarded as being enforceable by the court if one or the other fails to comply with it; and it still remains a part of the law of

this country, though many people think that it is time that it was changed to some other criterion, that there must be consideration moving in order to establish a contract.”

[52] As Megaw LJ noted, notwithstanding some academic debate, consideration remains an essential ingredient of a binding contract. Indeed the principal test still used to distinguish between a gratuitous promise, which cannot be specifically enforced and a legally binding promise is to ask whether the promise was supported by consideration.

[53] The general rule is that consideration is usually provided by the promisee “paying for” the promise by doing or promising to do or forbearing or promising to forbear from doing something in return for it. There are a number of exceptions to this general rule, for example when the promise is contained in a deed or the principles of waiver or promissory or proprietary estoppel apply.

Discussion

[54] In determining whether the defendant entered into a binding agreement it is necessary to ensure that all the ingredients of a binding contract are present. In respect of the agreement entered into by the defendant the only element of a binding contract upon which there is some dispute is whether consideration was provided. As the promise was not contained in a deed, and none of the other exceptions to the need to have consideration applies, it is necessary for the plaintiff to establish that Tracey Kerr provided consideration for the promises made by the defendant.

[55] Mr Lavery submitted that, although there was nothing on the face of the agreement signed by the defendant which indicated consideration had been given the court should nonetheless find that consideration was given by way of natural love and affection.

[56] In *Mansukhani v Sharkey* [1992] 2 EGLR 105 Fox LJ noted:

“Consideration by way of love and affection is a familiar recital in deeds of gifts and voluntary settlements. It is difficult to imagine it normally having any place in a sale document”.

Hence “consideration” consisting of natural love and affection does not amount to valid legal consideration for a promise which is not contained in a deed.

[57] The promise in this case was not contained in a deed. Although Mr Lavery argued that there was consideration by way of natural love and affection he did not point to any evidence of such consideration save that the defendant was Tracey Kerr’s aunt. The defendant made it clear in her affidavit however that she would not

make a voluntary transfer of her interest in the premises especially as she had two daughters of her own. On the basis of the evidence I am satisfied that there was no consideration given by way of natural love and affection. In addition, even if, contrary to my view, there was consideration given by way of natural love and affection, this would not constitute legal consideration for the promise in any event.

[58] Although not argued by Mr Lavery, there may be an argument that Ms Kerr gave consideration by settling her counter claim in which she claimed title to the premises on the basis of proprietary estoppel. In settling her counter claim, it could be submitted that she was effectively agreeing to forbear in bringing any further proceedings against the defendant.

[59] On the evidence however I am satisfied that no such consideration was in fact given. This is because the terms of settlement, as recorded in the court order, did not contain any reference to Ms Kerr agreeing to forbear in bringing future proceedings against the defendant. On the contrary, the court order made it clear that the settlement involved the premises being assented to the defendant and the other non-party beneficiaries. It contained no reference to the agreement entered into by the defendant. Hence the settlement terms, as set out in the Tomlin order and recorded in the court order did not contain any term which could be viewed as consideration for the agreement entered into by the defendant.

[60] Consequently I find that there is no evidence before the court that Tracey Kerr paid for the promise by doing or forbearing or agreeing to do or forbear from doing anything in return for the promise made by the defendant and in these circumstances I find that the promise made by the defendant is unenforceable because it is not supported by consideration.

[61] If I am wrong in finding that there was no consideration I am satisfied that the agreement is not binding on the basis that the doctrine of non est factum applies.

[62] Chitty on Contracts Volume 1 paragraph 3.049 states as follows:

“The general rule is that... a party of full age and understanding is normally bound by his signature to a document, whether he reads or understands it or not. If however, a party has been misled into executing a deed or signing a document essentially different from that which he intended to execute or sign, he can plead non est factum in an action against him. ... The courts have placed strict limits on this doctrine and key elements for a successful plea of non est factum have been summarised thus:

- (a) The belief of the signer that the person is signing a document of one character or effect whereas its character and effect were quite different;
- (b) The need for some sort of disability which gives rise to that state of mind.”

[63] Having regard to the uncontroverted medical evidence and defendant’s own evidence I accept that she had longstanding eyesight problems caused by macular degeneration. I find that, although she states she did not sign the agreement, because she had bad eyesight and because she accepts she did sign a document, that she did in fact sign the agreement. I further find that, at the time the defendant signed the agreement her ability to read the document was adversely affected by her medical condition. Although the medical report post-dates the signing of the agreement it is clear that her eyesight problems were of a long standing nature and the doctor indicates that her eyesight had improved at the time of his report as she had dialysis. Consequently, I find that when she signed the agreement she believed she was signing a blank document.

[64] I am further satisfied that when the defendant signed the document she believed that she would receive £40,000 in the event her interest in the premises was transferred to Ms Kerr. This was the evidence she gave in her affidavit. I accept her evidence in this regard in particular because it was corroborated by Ms Shaw who accepted that the defendant chipped into discussions. It also chimes with the facts. I consider it significant that her two siblings who were the personal representatives and who held exactly the same interest in the premises as the defendant, each received £40,000 when costs are deducted from the lump sum that was made payable to them.

[65] I am also satisfied the agreement was not read out and adequately explained to the defendant before she signed it. Mr Ronan Lavery QC accepted he could not assert the agreement was read out and explained to the defendant as he could not recall her signing in his presence. Similarly, Ms Shaw, although she stated Mr Lavery Senior read the document to the defendant admitted some frailties in her memory and accepted that she did not have a detailed memory of the case and could only remember “bits and pieces”. This is not surprising given the lapse of time since the events in question. In these circumstances I find that her attendance note provides a more accurate account of what happened at court on the 11 March 2010. It is clear from the language used in her attendance note that Mr Lavery Senior spoke to all the beneficiaries as a group and after this discussion the agreements were drafted up and then signed by each beneficiary. There is nothing in the attendance note to indicate that the agreements were read out and or explained to the beneficiaries individually before they signed them. Further, the defendant had a clear recollection that the agreement was not read out to her. I consider that she is likely to have a better recollection of what happened in court that day considering attendance at court by her would have been an unusual experience. In addition I

consider that given the number of beneficiaries and the need for counsel to attend to joint discussions and consultation with his own client it would have been extremely unlikely that he would have read the agreement out separately to each beneficiary. I am satisfied that the defendant failed to understand the terms of the agreement even though I accept that the “gist” of the agreement was explained to her when she was with the other beneficiaries by Mr Lavery Senior QC. I accordingly accept her evidence that she believed she would be entitled to receive £40,000 in the event she signed away her interest in the premises to Tracey Kerr.

[66] Further, even if the agreement was read out to the defendant I find that it was either not adequately explained to her or she misunderstood its effect. I have formed this view because it is clear from the applications made to the Master and the supporting affidavits that the plaintiff and his solicitor Ms Shaw each believed that the Tomlin order required the defendant to transfer her interest in the premises to Tracey Kerr. This appears from the extracts of the applications and the supporting affidavits I have set out above. The Tomlin order however did not require the defendant to transfer her interest in the premises to Ms Kerr. Rather it provided that the premises were to be vested in the defendant and the other non-party beneficiaries. Given the mistaken belief of Ms Shaw as to the effect of the Tomlin order I am satisfied that she did not fully understand the terms and effect of the Tomlin order and therefore I am satisfied that she could not have adequately advised the defendant as to the effect of the agreement and the Tomlin order and I am further satisfied that if the solicitor misunderstood its import even after it was explained by Senior Counsel, it is likely that the defendant also misunderstood the effect of the agreement she signed.

[66] Accordingly, I find that when the defendant signed the agreement she signed a document which was essentially different from that which the defendant intended to sign and accordingly the doctrine of non est factum applies.

[67] If I am wrong about my conclusion that the doctrine of non est factum applies I find that any agreement entered into by the defendant to transfer her interest in the premises to Tracey Kerr was varied by the terms of the Tomlin order which was signed subsequent to the agreement. In accordance with the terms of the Tomlin order the premises were to be transferred to the defendant and the other non-party beneficiaries. Accordingly, I find the agreement was superseded by the later Tomlin order and subsequent court order.

Conclusion

[68] In light of my conclusion that there was no consideration and/or that the doctrine of non est factum applies and/or that the alleged agreement was varied by the subsequent Tomlin order I find that the alleged agreement is not legally enforceable.

[69] In these circumstances it is not necessary for the court to consider the question of what relief, if any, the court should grant. I therefore do not propose to deal with the question of equitable relief save to note the following. The plaintiff sought equitable relief in circumstances where the defendant alleged he did not have 'clean hands' as his application to the Court to have the purported wills admitted to Proof in Solemn Form was dismissed and he was condemned in costs. She averred that this order was made because the court deemed the purported wills to be forgeries. Although the plaintiff filed a number of affidavits in various applications to this court he has never denied this assertion. In addition he was present in court during this hearing and failed to give evidence. Accordingly, the court was deprived of the opportunity to observe his demeanour and to hear his response to the allegations made by the defendant. In all these circumstances the court may well have drawn an adverse inference arising from the plaintiff's failure to give evidence. This would have had a bearing on the exercise of the court's discretion in deciding whether to grant equitable relief.

[70] In addition the court wishes to highlight a number of other matters which arose during the course of this litigation and which gave it cause for concern. On 11 March 2010 the Court was informed that the case was settled on the terms set out in a Tomlin order and these terms were then incorporated into a court order on consent ("court order"). The court was not informed of the existence of the other agreements which had been entered into on 11 March 2010, prior to the making of the court order. As a consequence the court order which records that the premises were to be transferred to the beneficiaries was fundamentally at odds with the terms of the agreements which provided, in stark contradiction to the terms of the Tomlin order that in fact the premises were to be transferred to Tracey Kerr for no valuable consideration. As a result the court was left under a misapprehension as to the true terms of settlement. Notwithstanding the fact the agreements fundamentally changed the terms of settlement, no reason was given why these agreements were not brought to the attention of the court and Ronan Lavery QC was unable to provide the court with any explanation of this. There are a number of reasons why this happened. There could be some innocent explanation. Alternatively it may be that the agreements were not brought to the court's attention for some fraudulent reason such as tax avoidance. I am not making any finding in this case that either counsel or solicitor involved deliberately misled the court. Nonetheless, it is important that counsel and solicitors in accordance with their duties of candour and their duty not to mislead the court should act with the utmost care to ensure that the court is not misled and should fully inform the court of the "actual" terms of settlement reached between the parties, especially where those terms are incorporated into a court order.

[71] It is also important that the court says something about the nature of this type of litigation. In Probate actions it is the personal representatives who act on behalf of the estate. In accordance with section 15 of the Trustee Act (NI) 1958 and section 40 (9) of the Administration of Estates Act (NI) 1955 the personal representatives are given a power to compromise actions. In most cases, before compromising an action

the personal representatives seek the consent of the beneficiaries. In the absence of consent the personal representatives can then either compromise the case in accordance with their statutory powers, (a power which is generally only exercised in very clear cut cases) or alternatively they can seek to have the beneficiaries joined as parties to the proceedings. The purpose of this scheme is to ensure that beneficiaries' interests are properly protected. Consequently, if compromise agreements are entered into without observing this procedure, there is a real risk that such compromise agreements may not be enforceable, as has been highlighted in this case.

[72] In the present case, as far as the court which made the Tomlin order was concerned, this procedure had been followed, as the court was presented with a Tomlin order signed by the beneficiaries thereby signifying their consent to the terms of the compromise. This court is therefore surprised to now discover that, contrary to the proper procedure, it was in fact the legal representatives of Tracey Kerr who directly approached the beneficiaries, without going through the personal representatives, and then asked them to enter into compromise agreements under which they voluntarily gave up their respective interests in the premises to their client. Whilst I accept the evidence of Mr Lavery QC and Ms Shaw that the non-party beneficiaries were advised of their right to seek independent legal advice, I consider that this alone did not provide the non-party beneficiaries with sufficient protection. In addition the fact the court was not informed about the agreements and the beneficiaries were not brought into court meant the court was also denied the opportunity to inform the beneficiaries of their rights to be represented by the personal representatives and to further advise them of their right to seek independent legal advice and or to seek to be joined as parties to the proceedings. Counsel and solicitors who act in probate actions must be scrupulous in ensuring that they do not directly approach non-party beneficiaries to enter into compromise agreements and that at all times they act to ensure that any compromise of an action involving non-party beneficiaries is transacted by the personal representatives of the estate.

[73] I therefore dismiss the application and I will hear counsel in respect of costs.

Footnote

This judgment was originally delivered extempore. At that time I indicated that I reserved the right to amend and or add to my reasons in the event the matter was appealed. This judgment is an amended version of the transcription of the extempore judgment.