



**THE HIGH COURT  
PROBATE**

**Record No.: 2021/5113 P**

**IN THE MATTER OF THE ESTATE OF MARY EASTWOOD, DECEASED, LATE  
OF “LYTTLETON” COOLOCK LANE IN THE CITY OF DUBLIN,  
AND IN THE MATTER OF THE SUCCESSION ACT, 1965,  
AND IN THE MATTER OF AN APPLICATION BY ROBERT EASTWOOD OF  
“LYTTLETON” COOLOCK LANE IN THE CITY OF DUBLIN**

**BETWEEN:**

**ROBERT EASTWOOD and JENNIFER EASTWOOD**

**Plaintiffs**

**-and-**

**ANNETTE RICHARDS (NÉE EASTWOOD), DOLORES EASTWOOD and JIMMY  
EASTWOOD**

**Defendants/Counterclaim Plaintiffs**

**-and-**

**ROBERT EASTWOOD, JENNIFER EASTWOOD and BRIAN BOHAN**

**Counterclaim defendants**

**JUDGMENT of Mr. Justice Rory Mulcahy delivered on the 12<sup>th</sup> day of June 2023**

1. This judgment concerns two motions. The first motion was issued by the Defendants in the context of their counterclaim on 20 March 2022. The motion is directed towards the third counterclaim Defendant, Mr Brian Bohan, who is the Administrator *Ad Colligenda Bona* of the estate of Mary Eastwood. The Defendants seek Orders requiring Mr Bohan to provide an account of his appointment as administrator and, in particular, in relation to his collection of rents. The Defendants no longer pursue those Orders and the sole remaining dispute between the parties on that motion relates to costs.

2. The second motion was issued by the Plaintiffs on 5 January 2023 and seeks to strike out the Defendants' counterclaim or, in the alternative, seeks a separate trial of that counterclaim.

### **Background**

3. These proceedings have their genesis in an application made before this Court seeking to prove the will of Mary Eastwood in terms of a copy. The two Plaintiffs and three Defendants are the children of Mary and James Eastwood.
4. On 30 November 2020, on the application of the first Defendant, Mr Bohan was granted liberty to apply for and extract a Grant of Letters of Administration *Ad Colligenda Bona* in the estate of Mary Eastwood, limited for the purpose of collecting rents in respect of the properties of the deceased. Mr Bohan was appointed as administrator for this purpose on 1 February 2021.
5. On the same day, on the application of the first Defendant, Mr Bohan was granted liberty to apply for and extract a Grant of Letters of Administration in the estate of Mary Eastwood, limited for the purpose of defending proceedings which the first Defendant intended instituting against the estate of Mary Eastwood. Mr Bohan was appointed administrator for this purpose on 8 December 2020.
6. On the same day, also on the application of the first Defendant, Mr Bohan was granted liberty to apply for and extract a Grant of Letters of Administration in the estate of James Eastwood, the husband of Mary Eastwood, who had pre-deceased her, and died intestate.
7. Separately, an application was made in the so-called non-contentious Monday probate list, grounded on the affidavit of the first Plaintiff, with the support of the second Plaintiff, to have Mary Eastwood's will proved by a copy of that will dated 29 November 2016. The Defendants each filed replying affidavits to that application which came on for hearing before Allen J. on 15 March 2021.

8. The circumstances leading to that application are set out in the written judgment of Allen J. dated 4 June 2021 ([2021] IEHC 387). Allen J. concluded that it was not an application which could be decided by reference to those matters which were not seriously in dispute and that it would be necessary to hear oral evidence.
9. As a consequence, the Plaintiffs issued plenary proceedings in which, in effect, the only relief sought was to prove Mary Eastwood's will by a copy of that will.
10. The Defendants delivered a defence to this claim, denying that the copy will was Mary Eastwood's will. In addition, the Defendants counterclaimed in relation to rents received from properties comprising the estates of both Mary Eastwood and James Eastwood, claiming that the Plaintiffs had received rents from these properties which they had not accounted for to the administrator of those estates. For this purpose, the Defendants sought to join Mr Bohan as a co-defendant to the counterclaim.
11. In the context of this counterclaim, the Defendants issued the motion the subject of this judgment.

### **Defendants' Motion**

12. The Defendants' motion sought Orders requiring Mr Bohan to provide an account in respect of his appointment as Administrator *Ad Colligenda Bona*. The motion was issued against a background of correspondence issuing on behalf of the Defendants calling on the Administrator to ensure that all rents from the properties belonging to the estate of James Eastwood and the estate of Mary Eastwood were collected by him.
13. The properties in question comprise 6 properties forming part of the estate of James Eastwood. The first Plaintiff resides in one of those properties, the third Defendant in another, the other four are tenanted. In addition, there is one property forming part of the estate of Mary Eastwood, which is also tenanted. Prior to the appointment of the administrator, the second Plaintiff collected rent from four of the five tenanted properties and the second Defendant collected rent from the other.

14. Over a period of time, the solicitors for the Defendant wrote to Mr Bohan regarding the steps he was taking in his role as administrator and, in particular, the steps he was taking to take over the collection of the rents which were being collected by the second Plaintiff and to have her account for the rents she had already collected.
15. Ultimately, the Defendants were not satisfied with the steps which Mr Bohan had taken or the amount of progress made by him in his role as Administrator *Ad Colligenda Bona*. In particular, they became concerned when Mr Bohan threatened to give up his role as administrator. Accordingly, they issued the within motion.
16. However, having issued the motion, the Defendants elected not to proceed with their application. The Defendants explain that they are now satisfied with the progress being made, which they argue is a consequence of their having brought the motion. In the circumstances, the only issue outstanding is that of costs.
17. The Defendants say that the costs should be made costs in the estate of Mary Eastwood or, in the alternative, reserved.
18. The Plaintiffs and the Administrator both argue that the motion is improperly constituted. They explain that these proceedings relate only to proving the will of Mary Eastwood in the context of the administration of her estate. They say that only the administrator could pursue a cause of action against them concerning the collection of rents in Mary Eastwood's estate, *i.e.* the Defendants do not have *locus standi* to make the claim. They claim, furthermore, that any claim against the administrator is a claim which could only be commenced by way of special summons.
19. The Defendants say that their claim should not be defeated by any want of form, relying in this regard on Order 19, Rule 26 of the Rules of the Superior Courts.

#### **Decision on Defendant's Motion**

20. Order 99, Rule 3(1) of the Rules of the Superior Courts provides:

*The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.*

21. This rule now has a statutory basis in sections 168 and 169 of the Legal Services Regulation Act 2015. It is clear, therefore, that costs should be determined at this stage unless this cannot justly be done (see **Thompson v Tennant [2020] IEHC 693**).
22. In my view, it is possible to justly determine the costs of this application at this stage. There seems little prospect that the issues which were raised by this motion will be revisited in any substantive hearing, even leaving aside the question of whether the motion is properly constituted. In the circumstances, it would be inappropriate to reserve the costs.
23. Nor does it seem to me to be necessary to resolve the Plaintiff and the administrator's complaint about the form of the application. The Defendants have not pursued the application. In the circumstances they cannot be said to have won the event and accordingly, it does not follow that they should be automatically entitled to their costs which, it seems to me, would be the effect of making the Order sought, that costs would be costs in the estate.
24. I am mindful that the Defendants say that the administrator is now doing what they were looking for him to do. I am also mindful that in circumstances where the motion was listed for hearing together with the Plaintiffs' motion, some of the costs incurred by reason of the Defendants' motion would have been incurred in any event.
25. In the circumstances, it seems to me that the Order which best does justice to all the parties is to make no Order for the costs of the Defendants' motion.

#### **Plaintiffs' motion**

26. Although the Plaintiff's motion sought that the Defendants' counterclaim be disallowed, at the hearing of the motion, the Plaintiffs' counsel pursued only the relief

seeking to stay the hearing of the counterclaim pending the determination of the Plaintiffs' claim relating to proving the will.

27. The Plaintiffs placed considerable emphasis on the genesis of these proceedings in the application determined by Allen J. and his conclusion that the will could not be proved in terms of a copy on the basis of affidavit evidence only:

*“49. All the appearances are that the last will of Mary Eastwood dated 29th November, 2016 has been lost or destroyed but it seems to me that there is a contest of fact as to how and when it was either lost or destroyed. In the first place, although it was on his behalf that the affidavit of Mr. Lawlor was filed, the applicant’s case is that it is not reliable. I have come to the conclusion that there is an issue to be tried as to whether what Mr. Lawlor has suggested happened to the will in fact happened: not, as the applicant contends, because it was or would have been at variance with good practice, but because the evidence is vague. Secondly, I have come to the conclusion that there is a contest of fact as to how and by whom the post arriving at “Lyttleton” was dealt with in January, 2018. If that factual issue is resolved in favour of the applicant and against the notice parties, the original will might not be traced into the possession of the deceased so that the presumption of revocation would not arise. However, if that factual issue were to be resolved the other way, the presumption of revocation would arise. I accept that there is considerable force in the submission that the uncontested fact that the deceased never sought or said that she was seeking her original will must on any view of the case be of very considerable significance, but the first step is to find the facts.*

*50. For these reasons I have concluded that this is not an application which can be decided by reference to those aspects of the evidence that are not seriously in dispute and that it will be necessary to hear oral evidence.”*

28. In the circumstances, the Plaintiffs say that their claim relates to a single net issue and that the Defendants' counterclaim, even if capable of being pursued, is unrelated to the Plaintiffs' claim and therefore could be and should be dealt with separately. The Plaintiffs say that as a matter of practicality resolving the question of whether the will can be proved in terms of a copy is a necessary first step and that, at worst, the counterclaim can be pursued thereafter. They also argue, more optimistically, that the resolution of the issue in relation to the will may result in a narrowing of the issues in the counterclaim.

29. The Defendants oppose the motion noting that the same witnesses will be required to give evidence in relation to the proving of the will and in relation to the counterclaim regarding the collection of and accounting for rents. They contend, therefore, that a more efficient use of Court time would be for the proceedings to progress in the ordinary way, with the claim and counterclaim being heard together.

#### **Decision on Plaintiffs' motion**

30. The Plaintiffs' application is, in effect, for a modular trial. In **Donatex Limited v Dublin Docklands Development Authority [2011] IEHC 538**, Clarke J. (as he then was) reviewed the relevant authorities (see **Cork Plastics (Manufacturing) v. Ineos Compound (UK) Limited [2008] IEHC 93**; **Atlantic Shellfish Limited and Anor v Cork County Council [2010] IEHC 294**; and **McCann v. Desmond [2010] IEHC 164**) on the principles applicable to deciding whether a modular trial is appropriate. He concluded that the test could be condensed to the consideration of two questions:

*“2.8 It may, in truth, be convenient to say that there are, therefore, two broad considerations which the court has to consider:-*

*A. whether there is a logical division of the case into modules as a result of which it is realistic to hope that so dividing the case will truly save time and costs; and*

*B whether there might be any true prejudice to any of the parties (as opposed to mere tactical disadvantage) as a result of the proposed division.”*

31. It is very clear that there is a logical division of the case between the claim and counterclaim. In truth, there is unlikely to be any overlap in the evidence or the legal issues between the two. It is, moreover, realistic to hope that the resolution of the first issue – whether the will can be proved in terms of a copy – will have a bearing on the approach of the parties to the issues in the counterclaim, with at least the potential, therefore, for a saving in time and costs.

32. In this regard, I am mindful that the Plaintiffs and Defendants are siblings disputing the distribution of their parents' estates. It may be that the differences between them are intractable, but it is to be hoped that the resolution of one issue may assist in the resolution of the remaining issues. The parties will, no doubt, consider mediation, which this Court would strongly encourage.

33. Even if there proves to be no narrowing of the issues, it seems to me that the only duplication of effort if the counterclaim is stayed pending the determination of the Plaintiffs' claim will be that of the parties themselves, some of whom may, as a consequence, have to give evidence more than once. This does not seem to me to be the type of "true prejudice" contemplated by Clarke J. in **Donatex** and it is, in my view, a price worth paying to enable early progress on the question of proving the will and the potential for time and costs savings.
34. In the circumstances, I propose making an Order staying the further prosecution of the counterclaim pending the determination of the Plaintiffs' claim in the High Court.
35. I propose making an Order that the costs of the Plaintiffs' motion be costs in the estate of Mary Eastwood. If either side wishes to contend for a different form of costs order than that proposed, they should file brief written submissions in the Central Office of the High Court within ten days of today's date. A copy of the written submissions should be sent to the other side and to the registrar. The other side will then have a further ten days within which to file written submissions in reply.
36. I will list the matter for mention on 11 July 2023 for the purpose of making final Orders on the Plaintiffs' motion.