

THE HIGH COURT

[2023] IEHC 485

2022 No. 121SP

IN THE MATTER OF THE ESTATE OF JOHN O' SULLIVAN (DECEASED)

AND

IN THE MATTER OF THE SUCCESSION ACT, 1965

BRIAN O'SULLIVAN

PLAINTIFF

AND

SEAN O'SULLIVAN, ANNE MARIE MEEHAN (Nee O'SULLIVAN) and BRENDAN

O'SULLIVAN

DEFENDANTS

JUDGMENT of Ms. Justice Eileen Roberts delivered on 31 July 2023

Introduction

1. This application relates entirely to legal costs and in particular whether the costs of the present proceedings should be awarded out of the estate of John O'Sullivan (the "**Deceased**"), as contended for by the plaintiff. The defendants argue that the plaintiff should have to pay those costs personally or that no order should be made as to costs, leaving all parties to pay their own costs.

The parties and the background to this dispute

2. The plaintiff is a son of the Deceased and the executor of the Deceased's estate. The Deceased died intestate (a widower) on 13 February 2016. The Deceased was survived by his five children, being the plaintiff, the defendants and Susan O'Sullivan.
3. The defendants are siblings of the plaintiff and comprise the remaining surviving children of the Deceased. The defendants are beneficiaries of the Deceased's estate.
4. The notice party (who was joined to these proceedings by order dated 19 July 2022) is the surviving widower and legal personal representative of Susan O'Sullivan (who died on 6 September 2016), a daughter of the Deceased.
5. By his last will dated 13 May 2004, the Deceased bequeathed all his property to his children to be divided equally among them as tenants in common in equal shares.
6. The plaintiff extracted a grant of probate in the Deceased's estate on 16 March 2017. The principal asset of the Deceased's estate is a residential property in Glasnevin, Dublin which was the former family home of the Deceased and his children (the "**Property**").
7. A protracted dispute arose between the plaintiff and the defendants regarding the administration of the Deceased's estate resulting in legal proceedings being issued in May 2017 by the defendants against the plaintiff in his role as executor. Those proceedings were issued under record number 2000/205 SP (the "**First Proceedings**"). In the First Proceedings the defendants sought to achieve their entitlement under the Deceased's will for their respective interests in the Property to be vested in them. On 15 December 2017 the parties entered into agreed terms of settlement of the First Proceedings (the "**Settlement Terms**").

8. The Settlement Terms provided in material part as follows: –
- (1) The executor would execute an assent vesting the respective interests of the Deceased (and his pre-deceased wife) in the Property into the names of each of the children as tenants in common in equal shares. This was with the intended effect that collectively the parties would become the co-owners of the Property.
 - (2) The parties agreed that the Property would be placed on the open market for sale no later than 26 January 2018, with auctioneers appointed as selling agent on behalf of the co-owners. The net sale proceeds after payment of auctioneers and legal fees were to be divided on an equal basis between all the co-owners. The executor would pay out those net proceeds of sale within 21 days of receiving the sale proceeds of the Property.
 - (3) The co-owners agreed to follow the auctioneer's advices. A majority of the co-owners could bind the others to a sale.
 - (4) The solicitors for the respective parties were to have joint carriage of sale of the Property.
9. The parties to the First Proceedings and the notice party (as the legal personal representative of Susan O' Sullivan) were registered as tenants in common in equal shares of the Property on foot of a deed of Assent dated 6 June 2018. Although this was a matter which had been agreed between the parties, it was an unusual step to be taken given that the administration of the estate had not concluded. It appears to this court that this registration/vesting did not fully recognise how the debts due by the estate were to be satisfied in circumstances where the main asset of the estate had been vested. In the normal course, beneficiaries would have no property vested in them until it was certain that all liabilities due by the estate had been discharged or there were sufficient other available assets from which to discharge those liabilities.

10. Following further disputes and disagreements and an exchange of affidavits, the matter came back before the High Court on a number of occasions between 15 December 2017 and 4 February 2019, ultimately resulting in further terms of settlement which were made an Order of the High Court on 5 February 2019 (the “**Order**”).
11. The Order provided, on consent, for the strike out of the First Proceedings on the following material terms:
 - (1) The Property would remain on the market until 31 March 2019 at which point a sale would proceed with the best offer available on that date.
 - (2) The executor would amend the capital acquisitions tax returns for the beneficiaries to reflect advancements to each of them in agreed amounts.
 - (3) The costs of the First Proceedings (including reserved costs) were to be paid out of the estate of the Deceased and to be taxed in default of agreement.
12. As there was no offer for the Property on 31 March 2019, the Property could not be sold at that time. It remained on the market, however, and in May 2019 an offer of €460,000 was made by a third party to purchase it.
13. The plaintiff says that notwithstanding the terms of the Order and this third party offer the defendants refused to allow him at that time to conclude a sale and conveyance of the Property and to distribute the estate in the manner directed by the Deceased in his will. The notice party has not engaged in any objection to proposed sales to date and has remained neutral.
14. In his affidavit sworn 6 July 2022, the plaintiff states at para 11 that the essence of the objections taken by the defendants was their assertion that because the Property is vested in each of their names and together they are co-owners of three fifths of the Property, they have a right to simply buy out the remaining two fifths portion of the

executor and the notice party at a price of €184,000, being two fifths of the €460,000 offered by a potential purchaser of the Property in 2019.

15. The plaintiff says that such assertion is simply incorrect and that this result would be in clear breach of the Order. He says that if all the purchase money is not brought into the estate this would render the estate insolvent in light of the obligations on the estate in respect of the legal costs of the First Proceedings as contained in the Order.
16. The correspondence exhibited at “BO’S4” shows that the Defendants confirmed on 29 April 2019 that “[A]s we have not received a value for the expenditure on legal fees and costs to date regarding the estate of our late father, we have decided to withdraw the above property from active sale until the issue is resolved”. The plaintiff was not in agreement and indicated that he was prepared to accept an offer of €460,000 for the Property. The defendants were not however happy to sell the Property at €460,000 and instead offered that they would purchase the remaining two fifths interest (as set out above) for €184,000. While the executor had no issue with the defendants becoming the purchasers of the Property, he said that the Property in its entirety must be what was sold and purchased as this was a sale by the estate and not by individual family members.
17. Correspondence then took place between the respective solicitors regarding allegations that the defendants’ proposal was a breach of the Order. It was stated by the defendants’ solicitor that the executor “cannot show any prejudice for not proceeding with the sale of the property to our clients” (letter dated 9 May 2019). It appears to this court however that this statement failed to appreciate that there were debts due by the estate out of the sales proceeds and so it would have been necessary for those to be discharged before the parties could establish what net proceeds there were to divide equally between them. The correspondence from the defendants or their solicitors

makes no reference as to how those debts would be dealt with in the context of their proposal. Indeed, the correspondence is almost entirely on the plaintiff's solicitor's side between 17 September 2020 and May 2021. At that stage the defendants' solicitors in their letter dated 24 May 2021 stated that, as the executor had vested the property in the beneficiaries in June 2018, "[A]ccordingly, it no longer forms part of the estate". They further confirmed that the executor had no power of sale and could not act in a unilateral manner to sell the Property.

- 18.** The plaintiff proceeded to market the Property for sale and by letter dated 26 May 2021 the defendants' solicitors confirmed that their clients were agreeable to the sale of the Property proceeding although they requested that the proceeds of sale be split between the parties. The plaintiff's solicitors replied that the sale proceeds must be paid into the estate before being finally distributed. They asked for details of the defendants' costs and indicated that the plaintiff's costs of the First Proceedings were €106,000 including Vat and outlay as assessed by legal costs accountants. They said further costs had been incurred by the executor since the conclusion of the First Proceedings.
- 19.** On 22 July 2021, the defendants' solicitors said their clients were not agreeable to a sale of the Property until they received a full breakdown of the legal costs incurred by the executor and an executor's account. The plaintiff's solicitors replied confirming that the cash assets of the estate at the date of death were less than €30,000 and that this sum was wholly insufficient to discharge the debts and liabilities of the estate. They sought an undertaking that the Property could be sold and that the proceeds of sale would be applied to meet outstanding debts and liabilities of the estate with the remainder to be distributed to the beneficiaries equally. They stated that if no satisfactory response was received within seven days the executor would have to bring matters back before the court.

20. Despite further correspondence, matters did not progress and by letter dated 26 May 2022 the plaintiff's solicitors stated that the executor had exhausted all avenues and had no choice but to institute High Court proceedings to enforce compliance with the terms of the Order. It was indicated that if those proceedings were necessary, the executor would be seeking an order to hold the defendants personally liable for the executor's legal costs arising from the defendant's refusal to comply with the Order. A period of 14 days was given for a response. None appears to have been received.
21. The plaintiff issued the present proceedings by way of special summons on 6 July 2022 seeking an order authorising him to sign a contract for sale of the Property for a sum of not less than €485,000 in the name of all co-owners of the Property so as to bind them and to execute the conveyance of same on standard Law Society terms in the name of all co-owners. The plaintiff seeks an order that the net proceeds of sale of the Property be applied in the administration of the estate of the Deceased taking account of and complying with the Settlement Terms and the Order.

The Affidavit of Sean O'Sullivan

22. In his affidavit responding to these proceedings sworn on 14 February 2023, Sean O'Sullivan on behalf of the defendants, attributes the delay referred to in the plaintiff's affidavit to a breakdown in relations between the defendants and their former solicitor. He states that the present proceedings are wholly unnecessary given that the plaintiff should have accepted the defendants' proposal. He says that even if the plaintiff had to come back to court he did not need to issue these proceedings and that it was open to the plaintiff to use the "*liberty to apply*" provision of the Settlement Terms. He says these proceedings expose the estate and the beneficiaries to further unnecessary costs

and expense. He says the plaintiff has no authority to sell the Property because it is now vested in the defendants.

23. Regarding the obligation to discharge the costs of the First Proceedings, Mr O’Sullivan at paragraph 6 of his affidavit states that *“At this early opportunity, the Defendants state they have no desire to avoid the payment of legal fees arising from the 2017 proceedings, and they accept that legal fees are due”*.
24. Mr O’Sullivan goes on to state that the defendants take issue with the level of fees - although the adjudication process is available to deal with that disagreement. He states at para 6 that *“[F]or the avoidance of doubt, it is the Defendants’ position that the said legal fees will only be paid from the net proceeds of sale of the Property”*.
25. A proposal for the resolution of matters is set out para 7 of his affidavit. This new proposal essentially reverts to the earlier agreed position that the Property would be sold on the open market. The only controversial element of that proposal relates to the costs of these proceedings, which the defendants submit should not be borne by the estate.

Analysis and decision of this court

26. It is my view that the Order, which reflected that the costs of the First Proceedings be discharged by the estate, would become meaningless if the Property was to be excluded from the estate, thereby leaving little or no assets to satisfy those costs due by the estate. Furthermore, the plaintiff is due an additional payment by one of the defendants as part of the Settlement Terms and she agreed to discharge same to him out of the proceeds of sale.
27. Allowing the interpretation contended for by the defendants in their proposal would have rendered the estate insolvent and meant that each of the defendants would have

received substantially more than their legal entitlement from the estate. While a sensible solution has now been agreed by the defendants (as set out at paragraph 7 of Mr O’Sullivan’s affidavit), this has taken some time and has only recently been proposed. I do not agree that the refusal by the plaintiff to accept the defendants’ proposal to buy out two fifths of the Property was “*wholly unreasonable*” as alleged by the defendants (paragraph 8 Mr O’Sullivan’s affidavit). In all the circumstances I believe that the plaintiff as executor had no choice but to issue further proceedings to compel the sale of the Property on the open market, thereby allowing all of the sales proceeds to come into the estate and be available for the discharge of liabilities. There was considerable correspondence from the plaintiff’s solicitors pointing out that the burden of legal costs had significantly reduced the net entitlement which each beneficiary would ultimately receive and that those costs should not be allowed to accumulate further. However, despite this sensible warning, the defendants continued to insist on their proposal being implemented.

- 28.** I do not accept the contention by the defendants that it was always intended in the defendants’ proposal that they would each separately pay a contribution towards the costs of the estate out of their own retained resources. No such concession or suggestion is evident from the correspondence issued by the defendants or their solicitor at any time while they were insisting on their proposal.
- 29.** While there may be some argument regarding whether these proceedings were the most appropriate or cost-effective means of advancing matters, I believe that the issuing of a special summons was an appropriate step for the plaintiff to take in all the circumstances. While it is possible that an application might have been made under the “liberty to apply” proviso in the Settlement Terms, this could have presented some issue in circumstances where the Order does not reflect this provision and where the

First Proceedings have been struck out. In any event, it would have been necessary for the parties to set out their position on affidavit and there would have been legal costs incurred no matter which route was taken by the plaintiff. Of course, no additional legal costs would have been necessary at all had the defendants allowed the Property to be sold on the open market in accordance with the Settlement Terms.

- 30.** In those circumstances I make an order that the costs of the present proceedings should be costs in the administration of the Deceased's estate. Those costs should be adjudicated in default of agreement between the parties.