

THE HIGH COURT

[2021] IEHC 645

[2019/335 SP]

**IN THE MATTER OF THE ESTATE OF OLIVER SHERRY
LATE OF 3 LAUREL, HAZELDENE, ANGLESEA ROAD, DUBLIN 4, DECEASED**

AND

IN THE MATTER OF THE SUCCESSION ACT, 1965

BETWEEN

KIERAN CROWLEY

PLAINTIFF

AND

DAIRE MURPHY

DEFENDANT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 12th day of October 2021.

Introduction

1. Mr. Oliver Sherry ('the deceased') of 3, Laurel, Hazeldene, Anglesea Road, Dublin 4, passed away on 12th December, 2015. He had made and executed his last will on 14th October, 2009. In that will, he appointed the defendant, an experienced solicitor who was then a partner in the firm Lyons Kenny of 57 Fitzwilliam Square, Dublin 2, as his executor and trustee under the will. It is of some relevance to note that the will stated that, if the defendant were "unwilling or unable" to act as executor and trustee, the firm of Lyons Kenny, or any firm with which Lyons Kenny was amalgamated or into which it was incorporated, was to act as his executor and trustee.
2. After payment of debts and expenses, and some small charitable bequests, the residue of the estate was to be left to the plaintiff, who is described in the will as the deceased's "assistant". While the plaintiff in his grounding affidavit describes himself as a "homemaker", the defendant in his affidavit of 20th January, 2020 at para. 5 describes the plaintiff as the "sole carer of the deceased for many years", a description with which the plaintiff does not take issue. The deceased's estate is a valuable one; the grant of probate which issued on 23rd February, 2018 recorded the gross value and the net value of the estate as €1,831,420 and €1,819,424 respectively.
3. The plaintiff became dissatisfied with the way in which the defendant was discharging his role as executor, and issued the present proceedings seeking various orders against the defendant as regards the administration of the deceased's estate, or in the alternative, an order removing the defendant as the legal personal representative of the estate. Ultimately, after a number of hearings before this Court, the parties on June 4th, 2021 indicated their acceptance that, subject to some minor administrative matters, the administration of the estate was complete and that the only issue to be decided was that of the costs of the proceedings.
4. While this judgment therefore deals solely with the issue of costs, it is necessary to set out in some detail the background to the proceedings, and the manner in which they developed.

The pleadings and the reliefs sought

5. The plaintiff initiated the present proceedings by way of special summons on 26th July, 2019. The special indorsement of claim referred to the principal asset of the estate as being a property ('the property') situate at 3 Laurel, Hazeldene, Anglesea Road, Dublin 4, which the plaintiff contended had a value of €625,000. It was stated that there had been "three failed sales of the property", and that various shareholdings had "not yet been transferred to the plaintiff despite the plaintiff's requests to do so". It was pleaded that the plaintiff was "desirous of administering the estate of the deceased properly and in accordance with law and to that end among the reliefs sought seeks the removal of the Defendant as the legal personal representative of the estate" [para. 10].
6. The substantive reliefs sought in the special indorsement of claim are as follows:
 - (1) An order vesting the property situate at 3 Laurel, Hazeldene, Anglesea Road, Ballsbridge, Dublin 4 in the plaintiff pursuant to s.52(4) of the Succession Act 1965;
 - (2) an order commanding the defendant to lodge in the probate office on oath, a true, full, and perfect inventory and account of the estate of Oliver Sherry deceased, and a true account of the administration thereof pursuant to s.64 of the Succession Act 1965;
 - (3) an order requiring the defendant to file a Corrective Inland Revenue Affidavit in the Probate Office;
 - (4) an order for all necessary accounts and inquiries;
 - (5) an order directing the defendant to complete the administration of the estate within three months;
 - (6) in the alternative, an order removing the defendant as the legal personal representative of the estate of Oliver Sherry deceased;
 - (7) if the defendant is removed as the legal personal representative, an order giving the plaintiff liberty to apply for a grant of administration with will annexed pursuant to s.27(4) of the Succession Act 1965..."

Events prior to the proceedings

7. It appears that the plaintiff became frustrated when, three years after Mr. Sherry's death, the estate had not been fully administered. He consulted a firm of solicitors, which raised queries with the defendant as to a number of matters pertaining to the estate, and requesting that all funds held by the defendant for the benefit of the plaintiff be transferred to that firm. An amount of €380,000 was transferred by the defendant on 7th February, 2019 to the plaintiff's solicitors, who continued to press for answers to their various queries regarding the administration of the estate. Due to what those solicitors regarded as a persistent failure to answer the queries, the plaintiff's solicitors wrote to the defendant on 1st March, 2019, copying the letter by way of complaint to the Law Society of Ireland ("the Law Society"). On being contacted by the Law Society, the defendant,

after an initial holding response, wrote by letter of 25th April, 2019, enclosing a number of documents by way of reply to the plaintiff's queries.

8. These documents included what was referred to as a "Matter Summary". This comprised a detailed statement setting out the manner in which the defendant had conducted the administration to date. It appeared that there had been issues regarding the will on the part of some members of the deceased's family. These included the intimation on behalf of a sister of the deceased of a possible challenge to the will on the grounds of undue influence on the part of the plaintiff, which required the defendant to obtain the opinion of counsel. Ultimately, agreement was reached that the family would be satisfied if certain family heirlooms, to which members of the family had laid claim as their property, were returned to them. The plaintiff agreed to this, and this course of action appears to have resolved the family's issues regarding the will.
9. The "Matter Summary" set out other tasks undertaken by the defendant on which it is not necessary to dwell in any detail. The property had to be secured and some repairs were carried out. The deceased's affairs were apparently in some disarray, and required various searches, inquiries and valuations to be conducted. Issues arose in relation to the plaintiff's employment status, and in particular the tax liabilities which might accrue to the estate, as it appeared that no deductions had been made by the deceased for tax, nor had the plaintiff paid any tax in respect of his employment. A firm of accountants was engaged to deal with the situation, and ultimately income tax liabilities and penalties relating to the plaintiff were discharged from partial distributions of the estate to him.
10. The summary refers to various standard tasks performed by the defendant in the administration of the estate. After the extent of the estate had been established, an application for a grant of probate was prepared and made. The grant issued on 23rd February, 2018. It was stated in the summary that the assets of the estate had been gathered in, and the property prepared for sale, although the first sale agreed had fallen through. Various distributions had been made to the plaintiff or on his behalf, which as of the date of the summary, amount to €865,025.58. This included a sum of €380,000 paid to the plaintiff's solicitors on 7th February, 2019.
11. The plaintiff did not regard the letter of 25th April, 2019 or the attached documentation as satisfactory. By letter of 31st May, 2019, the plaintiff's solicitor raised further queries in relation to the matters set out in the summary, and "in light of the delay in administering the estate to date", called upon the defendant to "hand carriage of the Estate to Kent Carty Solicitors [the plaintiff's solicitors] while you remain as executor in name, available to sign relevant documentation". The possibility of "a High Court application to remove you as executor" was intimated, as was the possibility that "this may have significant costs consequences for you personally". The request to "hand carriage of the estate to Kent Carty Solicitors" was reiterated in a letter from that firm of 3rd July, 2019. It does not appear that any response to this request was received, and the present proceedings issued later that month.

12. It is clear from the grounding affidavit that the main complaint of the plaintiff as regards realisation of assets was in relation to the property. It appears that, by January 2019, three sales of the property had been agreed, but none had proceeded. The plaintiff at para. 32 of his grounding affidavit attributes the difficulties to "certain difficulties... in relation to the title of the property... the Defendant has failed to cure the defect in the title and/or reconstruct the title...", and maintained that this was "frustrating any opportunity for the property to be sold and is causing the estate loss...". However, in his replying affidavit of 28th November, 2019, the defendant avers as follows: -

"13. -The Applicant entirely omits the complex efforts undertaken by me to ensure that the title was reconstructed and I was in a position to issue contracts to potential purchasers. While the impression is given that virtually nothing transpired during my tenure as executor such a completely distorted narrative ignores the fact that several sales of the property were actually attempted. I say that the real difficulty for potential purchasers transpired to be that certain fire protection defects had been identified by the management company relating to all apartments in the Hazeldene development. At the times of the attempted sales the fact that such defects were in existence was known but the extent of and, in particular, the costs of any necessary remedial work was still unknown. These works have now been completed and I have no doubt that this will enable the property to be sold when it returns to the market. Obviously I am not in control of the market nor the sales process and such a sale is entirely down to Lisneys Auctioneers who were appointed to sell the property".

The course of the proceedings

13. The plaintiff's grounding affidavit was sworn on 17th September, 2019, and concluded by alleging that the defendant should be removed from his role on the alleged grounds of delay, a failure to manage and protect the assets of the estate, a failure to provide the necessary accounts and inquiries, what the plaintiff alleged was a breach of trust and fiduciary duty on the part of the defendant in causing the beneficiaries loss, and a failure to respond to inquiries adequately or at all. It was suggested that, due to the defendant's alleged "...dilatatory attitude and the continued failure by him to administer the estate...this matter can now only be resolved with the assistance of this Honourable Court" [para. 41]. The plaintiff alleged that "serious misconduct" [on the part of the defendant] and "serious special circumstances" justified and necessitated the plaintiff's removal.

14. The defendant replied by an affidavit of 28th November, 2019, and robustly rejected the criticisms made of him. He characterised the application as "grossly premature", given that the grant of probate had issued less than two years previously, and denied that there had been either delay or prejudice to the plaintiff. In the course of this affidavit, the defendant canvassed in more detail the various issues set out in the "Matter Summary" furnished with his letter of 25th April, 2019 to the plaintiff's solicitors. The defendant lays some emphasis on the fact that the applicant's position was now that he requested the property to be transferred to him by a deed of assent. He asserts that the reason this had not been done previously was that the plaintiff had instructed that he wished to have the

property sold and the cash value realised. According to the defendant, the transfer of the property to the plaintiff would crystallise a capital acquisitions tax liability; the defendant says that this was pointed out to the plaintiff's solicitors by a partner in his firm. The solicitors for the plaintiff then confirmed that they required in any event the property to be transferred to their client: as the defendant puts it –

“...it appears that while the Applicant's solicitors are entirely happy for me to remain as Executor and complete the estate including giving instructions for the sale of various shares, their position is that only their law firm could handle the conveyance of the largest asset in the estate. This is a most unusual position given that their client had instructed us not to vest the property in his name due to the tax consequences of such an action, but now appears to suggest that the most suitable course of action would be to ensure that his newly appointed solicitors have carriage of sale of the asset”. [Para. 15].

15. In the view of the defendant, the purpose of the transfer of the property to the plaintiff – which by this stage has been effected by the defendant – is “to facilitate the Applicant solicitors having carriage of sale of the primary asset within the estate” [para. 25]. The plaintiff on the other hand clearly wished at this stage to take the realisation of the estate's main asset under his control due to what he considered to be the dilatory approach and failure to deal with queries by the defendant.
16. The parties continued over the course of the proceedings to exchange affidavits setting out their respective criticisms of each other's positions. Further affidavits in this regard were sworn by the plaintiff on 20th December, 2019 and 7th February, 2020, and by the defendant on 20th January, 2020 and 17th February, 2020. Each side served a notice to cross examine on foot of the other side's affidavits.

The hearings

17. Due in part to the delays caused by the Covid-19 Pandemic, the matter did not come on for trial until 4th November, 2020. The assent to the transfer of the property was sent by the defendant's solicitors to the plaintiff's solicitors on 16th January, 2020. By the end of March 2020, the plaintiff's solicitors stated the outstanding items in the estate to be a sale of some Bank of Ireland shares, a transfer of Cement Roadstone Holdings plc shares for which the share certificate had been lost, and a “schedule of all dividends received”.
18. When the matter came before this Court on 4th November, 2020, it was accepted that the administration of the estate was almost complete. The defendant proffered an undertaking to complete the administration of the estate within three months, with liberty to apply in the event of a difficulty. This was acceptable to the plaintiff; however, the plaintiff applied for an order for the costs of the proceedings to be made against the defendant personally, *i.e.* that the defendant would not have the right to an indemnity from the estate in respect of such costs. This application was strenuously contested by the defendant. Both sides proffered detailed written submissions in relation to the issue, which is the subject of the present judgment.

19. The matter came again before the court on 30th April, 2021. Two minor issues remained outstanding, and a number of purely administrative issues. Although the defendant was in breach of his undertaking to complete the administration within three months, the plaintiff did not press the issue, and the parties agreed to put the matter back to 4th June, 2021 in the hope that all outstanding items might be completed. On that date, the parties accepted that the administration was complete, subject to a precautionary liberty to apply for the plaintiff, and asked the court to proceed with its determination of the costs issue.

Legal principles as to costs in probate and administration actions

20. The plaintiff submits that, notwithstanding that these proceedings relate to the administration of an estate, "...and ordinarily would be characterised as an administration suit..." in which costs are usually awarded to the respective parties from the estate of the deceased, the established authorities relating to the issue of costs in probate and testamentary suits – in *In bonis Morelli: Vella v Morelli* [1968] IR 11 and *Elliot v. Stamp* [2008] 3 IR 387 – are not applicable to the present matter. Those authorities establish that, for an unsuccessful party in such an action to have his or her costs paid out of the estate, two matters must be established: that there were reasonable grounds for the litigation, and that the litigation was conducted *bona fide*.
21. The plaintiff's position is that the present matter is a hostile *lis inter partes*, rather than involving the usual disputes involved in an administration suit, such as in relation to a testamentary disposition or document. The case was focussed on the defendant's alleged "failure to administer the estate with due expedience and *inter alia* an application for his removal, a claim the defendant continues to deny" [plaintiff's written submissions, 28th October, 2020]. The plaintiff relies on the decision of Herbert J in *O'Connor v. Markey* [2007] 2 IR 194, and in particular upon the following passage at para. 7 of the court's judgment:
- "By contrast, the instant application bore all the hallmarks of contentious litigation between beneficiaries which did not in any way touch upon the capacity of the testator or the state in which he had left his testamentary papers. The present applicant arose in the course of the administration of the estate, was not a probate action, but neither was it an ordinary administration suit. To all intents and purposes it was a hostile *lis inter partes* between two beneficiaries under the will. It related to the conduct of the testator's business by the first defendant while the testator was still alive and to the issue of whether the first defendant was or was not obliged to pay the particular debts as they arose, so that they would not become a burden upon and payable out of the estate on the death of the testator. The special administrator was in reality only a nominal plaintiff to enable the opinion of the court to be obtained by way of a special summons for directions in the course of the administration. The many issues of fact and of law were litigated as a proceeding *inter partes* between the first defendant and the second defendant on their own evidence, and the evidence of witnesses called by each of them".
22. The foregoing paragraph is quoted with approval by Laffoy J in *Rennick v. Rennick* [2012] IEHC 559. The court held in that case that the dispute which was the subject of the

litigation was in reality a *lis inter partes* which warranted “the application of Order 99 of the Rules [of the Superior Courts], which, subject to the overriding discretion of the court, mandates that costs should follow the event” [page 11 of judgment].

23. The plaintiff also relies on the decision of Keane J in *Muckian v. Hoey* [2017] IEHC 47. This ruling as to costs followed a judgment in the substantive proceedings reported at [2016] IEHC 688, as a result of which the first named respondent was removed as legal personal representative of the estate. It was submitted by the first named respondent that she should be entitled to her costs out of the estate on the basis that no misconduct had been established against her. Keane J did not accept that there was “any absolute or inflexible rule” to this effect; he accepted the principle identified by Herbert J in *O’Connor v. Markey* and applied by Laffoy J in *Rennick* that a hostile *lis inter partes* “...may, depending on all of the circumstances, attract the unvarnished application of the usual rule that costs follow the event” [para. 13]. The court had regard to the findings in the judgment dealing with the substantive matter that there had been “...what is, by any measure, an extraordinary delay in the administration of the deceased’s estate by the first respondent that has not been adequately explained (para. 19), and that the first respondent has failed in her fundamental duties as administratrix properly to gather in the property of the estate and properly to account to the beneficiaries of the estate for its assets and liabilities... (para. 27)”. The court held at para. 14 of the judgment that these factors demonstrated “a want of proper capacity on the part of the first respondent to execute the duties of administratrix, amounting to a special circumstance warranting her removal from that position, which special circumstance is more evident still when [the factors] are considered in combination (para. 37)”.
24. The court concluded that, in the circumstances, “...to exercise the Court’s discretion to order that the first respondent’s costs of the unsuccessful defence of that application should be borne by the estate (and, thus ultimately by the beneficiaries), rather than by the first respondent, would fly in the face, not only of fundamental reason and common sense, but also of justice” [para. 18]. It seems clear from the judgment of the court that, pursuant to O.99 of the Rules of the Superior Courts, costs would have been awarded against the first named respondent as following the event, although the plaintiff, “...perhaps in the interests of conciliation...”, did not make such an application.
25. The plaintiff also referred to the decision of MacGrath J in *Shannon v. Shannon* [2019] IEHC 604, a construction suit in which an executor contended unsuccessfully for a certain interpretation of a will against the defendant, a beneficiary of that will. The court in the course of its judgment cited with approval the dicta of Kekewich J in *Buckton v. Buckton* [1907] 2 Ch 406, in which the court addressed a situation where an application is made by a beneficiary who makes a claim adverse to other beneficiaries, that “...once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs”. The court emphasised that the “rules in relation to costs, both in O.99 and as discussed and developed in *Elliott* and *O’Connor* are designed to achieve a just result”...

and came to the conclusion that “the fairest and most just result” was that there be no order as to costs.

26. While both sides in the present case proffered detailed written submissions to support their respective positions, I did not understand the defendant, in either the oral or written submissions on his behalf, to take serious issue in any substantive respect with the legal position as outlined on behalf of the plaintiff or the principles set out above. It was suggested in the written submissions of the defendant that the contention of the plaintiff “that the matter is a hostile *lis inter partes* is mistaken and this is a purely administrative action in the estate”. However, no authorities were cited to support this argument, which was not pressed in oral submissions. The submissions on behalf of the defendant were directed more to the facts of the matter than the legal principles; it was not seriously contested that, if the court were satisfied that the present action was what Herbert J termed a “hostile *lis inter partes*” rather than an administration suit as normally understood, the costs of the matter should be determined under the costs provisions applicable in ss. 168 and 169 of the Legal Services Regulation Act 2015 and the recast O.99 of the Rules of the Superior Courts, rather than pursuant to the principles in *Morelli* and *Elliot*. It was of course strongly argued on behalf of the defendant that he had not been deficient in any respect in his administration of the deceased’s estate, much less that his actions constituted “serious misconduct and/or special circumstances” as was suggested by Lynch J in *Dunne v. Heffernan* [1997] 3 IR 431 would be required for the court to order his removal as executor.

The “event” which costs should follow

27. In *Dunne v. Heffernan* [1997] 3 IR 431, the Supreme Court (Lynch J) remarked that an order removing an executrix or appointing some other person as administrator with the will annexed

“...is a very serious step to take. It is not justified because one of the beneficiaries appears to have felt frustrated and excluded from what he considers his legitimate concerns. It would require serious misconduct and/or serious special circumstances on the part of the executrix to justify such a drastic step.” [Pages 442 to 443]

28. In the substantive decision in *Muckian*, Keane J considered it necessary to make an order revoking the grant of administration of the deceased’s estate to the first named respondent, and replacing her with an alternative administrator. He did so on the basis of the following conclusions:

- “(a) A pronounced delay on the part of a personal representative in the administration of an estate could, alone or in combination with other factors, amount to a special circumstance warranting the removal and replacement of that person.
- (b) A failure by a personal representative to discharge the fundamental duty to collect and get in the estate and administer it according to law can, depending on the gravity or extent of that failure, whether alone or in combination with other factors,

amount to a special circumstance warranting the removal and replacement of that person.

- (c) An administrator (or administratrix) may be replaced more readily in such circumstances than an executor.
 - (d) The factors identified at (a) and (b) above are both applicable in the circumstances of the present case and each demonstrates a want of proper capacity on the part of the first respondent to execute the duties of administratrix, amounting to a special circumstance.”
29. In that case, the deceased died intestate on 13th October, 2003. The first named respondent was granted letters of administration on 22nd May, 2009, some five and a half years after his death. Two daughters initiated the proceedings against the first named respondent, the widow of the deceased. The grounding affidavit of the first named plaintiff was sworn on 17th July, 2015, and it was alleged that the first named respondent had been guilty of excessive delay in the administration of the estate, and had misunderstood her obligations as administratrix by, *inter alia*, transferring lands without gathering in the consideration for those lands to the estate, sending a letter on 14th December, 2004 to the Department of Agriculture claiming payments under a scheme operated by that department which misrepresented the extent of the deceased’s interest in his late father’s estate, and certain other serious administrative errors.
30. The plaintiff in the present case submitted that the defendant had been responsible for the following matters, which it was contended amounted cumulatively to “serious misconduct and special circumstances” which warranted the defendant’s removal:
- (1) **Delay:** The plaintiff submitted that, the deceased having died in 2015, the administration of the estate was “ongoing and incomplete at the time the proceedings issued in July 2019”... Reference was made to the “executor’s year” a reference to s.62 of the Succession Act 1965, which provides that:
 - “62(1) The personal representatives of a deceased person shall distribute his estate as soon after his death as is reasonably practicable having regard to the nature of the estate, the manner in which it is required to be distributed and all other relevant circumstances, but proceedings against the personal representatives in respect of their failure to distribute shall not, without leave of the court, be brought before the expiration of one year from the date of the death of the deceased.
 - (2) Nothing in this section shall prejudice or affect the rights of creditors of a deceased person to bring proceedings against his personal representatives before the expiration of one year before his death.”
 - (2) **Failure to manage and protect the assets of the estate:** in this regard, the plaintiff relies particularly on what he contends is the failure of the plaintiff to correct the title of the property, or to sell and/or arrange the appropriate

registration of shares which, it is alleged, caused the estate loss as a result of the devaluation of the shares.

(3) **Failure to provide the necessary accounts and inquiries:** the plaintiff concedes that 'some indication or type of accounts' were furnished, but that these could not be interpreted by the plaintiff, and that an explanation for certain of the figures was 'not forthcoming'.

(4) **Breach of trust and breach of fiduciary duty:** In this regard, the plaintiff's written submissions state as follows:

'the Defendant is a trustee of the estate (s.10 of the Succession Act 1965) and has a fiduciary duty as an executor, and particularly as a professional solicitor executor, not to cause the beneficiary loss. The administration costs incurred to date are of great concern, notwithstanding the losses that might accrue due to the Defendant's failure to manage and protect the assets of the estate.'

(5) **Failure to respond to inquiries:** the plaintiff complains of a general failure of the defendant to respond to queries for information, and what is alleged to be a dilatory attitude in responding to the Law Society when contacted.

31. It is fair to say that the defendant, over the course of his three affidavits and both oral and written submissions on his behalf, disputes utterly that his administration of the estate has been in any respect deficient, although as written submissions were not delivered in sequence, no direct response to the matters set out above in the plaintiff's submissions were furnished.

The circumstances of the appointment

32. The plaintiff's position is, then, that the court should award costs on the basis that they should follow the event, and that, despite the fact that the plaintiff did not ultimately proceed with the matter and seek substantive relief, the proceedings have been instrumental in forcing the defendant to complete the administration of the estate, and that therefore the costs of the proceedings should be awarded against the defendant. In his affidavit of 20th December, 2019, the plaintiff summarised his position as follows: -

"25. Even if all of the outstanding issues were to be addressed presently, these proceedings were necessary in order to motivate the Defendant and his firm Kenny Solicitors to address their minds to the issues raised and engage with my legal advisers in a meaningful way. Furthermore, if the outstanding issues were to be resolved before this matter is determined by this Honourable Court, the final issue of the costs of these proceedings would fall to be considered. I say that the costs of these proceedings should not be borne by the estate and should not be classed as administration costs, as to do so would unfairly and unjustly burden the residuary beneficiary, that is your deponent. The delay in administering the estate is fully attributable to the Defendant and your deponent as a residuary beneficiary should not be unfairly penalised if the costs in resolving this matter are to be awarded

from the estate of the Deceased. The Defendant was afforded ample time and an opportunity to resolve this matter without the necessity of issuing proceedings, yet he chose not to. The proceedings herein were wholly necessary in all of the circumstances, and in particular to get the administration of the estate of the Deceased almost to completion.”

33. The defendant on the other hand characterises the proceedings and the reliefs sought as “ill-advised and premature”, and on affidavit refutes each of the contentions of the plaintiff. The defendant’s position is that his costs of defending these proceedings should be “costs in the estate”; if the matter is indeed a “hostile *lis inter partes*” governed by the usual costs provisions and litigation, and the costs issue were resolved in favour of the defendant, it might be that the appropriate order would simply be an order for costs against the plaintiff, rather than an order that the costs of the action be regarded in the same way as administration expenses which the defendant, in the usual way, would be entitled to recover from the estate. The distinction makes little practical difference in the present case, as the plaintiff is the only beneficiary of the residue of the estate.
34. In considering whether costs should be awarded against the defendant, it is necessary to consider the terms of his appointment as executor. In addition to the appointment referred at at para. 1 of this judgment, the will – which is a straightforward and uncomplicated document – contains *inter alia*, the following provisions:
- “2. **My trustee** [i.e. executor] shall be entitled to charge professional fees for work done by him or it or its members in connection with my estate whether or not the work is of a professional nature on the same basis as if he or the said firm were not my executors and Trustees but employed to carry out work on their behalf...
6. **ANY** of my Trustees who are engaged in a profession shall be entitled to be paid fees for work done by him or his firm on the same basis as if he were not one of my Trustees but employed to act on behalf of my Trustees.
7. **I DECLARE** that no Trustee of this my will shall be liable for any loss not attributable to the Trustee’s own dishonesty or to the wilful commission of the Trustees of any act known to be a breach of trust.”
35. The defendant was the solicitor who represented the deceased for a number of years. He was the choice of the deceased to act as executor, and in the six years between the execution of the will and the death of the deceased, that choice remained unchanged. The deceased was aware that the defendant was a practising solicitor, and appears to have been of the view that such a person, rather than a relative or friend, would be suitable for the task of administering his estate, particularly given that he stipulated that, should the defendant be unable or unwilling to act, the partners of the defendant’s present or future firm should act in his stead.
36. In the circumstances, it is reasonable to infer that the plaintiff would have been of the view that the defendant is a solicitor whose knowledge, experience and acumen made

him suitable as an executor, notwithstanding that such an appointment would inevitably be more costly than if the work were done by a relative or friend. He would also have known that a busy solicitor with many clients would not be in a position to devote exclusive attention to administering his estate, and that the task of administration would be one which would be carried out over a prolonged period, the length of which would depend on the complexity of the issues which arose in the estate. As against that, it is also fair to presume that the deceased appointed the defendant on the basis that there would be no undue delay in administering the estate, and that appropriate expedition would be exercised to ensure that the deceased's wishes were carried out in a timely manner.

The approach of the plaintiff and his solicitors

37. The grant of probate was issued on 23rd February, 2018. In his grounding affidavit, the plaintiff avers that he "became frustrated with the delay in the administration of the estate of the Deceased. To that end, I met and engaged with Kent Carty Solicitors in or about December 2018" [para. 13]. The first letter from the plaintiff's solicitors intimating dissatisfaction was on 17th December, 2018, and the complaint to the Law Society was made on 1st March, 2019.
38. According to his own account, the defendant had, after the grant of probate, commenced gathering in funds from bank accounts and various life policies. The first substantial funds were received by him on 23rd March, 2018 and 3rd April, 2018. On 10th April, 2018, at the plaintiff's request he paid a sum of €50,000 to the plaintiff's partner, Ms. Tanya McConnon, who received a further €17,000 in the course of 2018. The defendant also arranged for the discharge in June 2018 of historic tax liabilities of the plaintiff, calculated by a firm of accountants engaged by the defendant, in the sum of €81,305, together with interest of approximately €6,590. A sum of €320,130 appears to have been paid out to the plaintiff on 19th November, 2018, and a further sum of €380,000 paid to the plaintiff's solicitors on 7th February, 2019. A distribution account compiled by the defendant on 14th October, 2019 shows that a total of €870,007.08 had by that stage been discharged by the defendant either to the plaintiff or in discharge of his liabilities.
39. The defendant's position as regards the reference of the matter by the plaintiff's solicitors to the Law Society is that this complaint was simply not pursued, the defendant having given considerable detail and documentation in relation to his conduct of the executorship with his letter of 25th April, 2019 to the plaintiff's solicitors. This characterisation is hotly disputed by the plaintiff, who contends that the Law Society indicated by letter of 9th July, 2019 – which letter is not exhibited to the plaintiff's affidavits – that its file must be closed if litigation was forthcoming, and that it could not continue to investigate a complaint where to do so would interfere with court proceedings.
40. While the plaintiff has averred as to his frustration with the pace of the administration, which caused him to consult his present solicitors, there is little or no evidence of any written or formal complaint by him until the involvement by him of solicitors on his behalf in December 2018. He clearly had contact with the defendant up to that point and issued instructions to him subsequent to the grant of probate in February 2018 in relation to a

number of matters, including preparation of the property for sale and marketing, and the establishment and discharge of his historical tax liabilities. He received very substantial disbursements from the defendant, and received a further sum of €380,000 in early February 2019.

41. The approach taken by the plaintiff's solicitors after their engagement in December 2018 was decidedly aggressive. The letters of 17th December, 2018 and 1st March, 2019 – the latter of which referred the matter to the "Law Society Complaints and Client Relations Committee" – in particular set out queries and complaints that the plaintiff had not yet received the full benefit of the estate. The letter of 25th April, 2019 from the defendant to the plaintiff's solicitors, which gave a considerable amount of documentation and information in relation to the realisation of the estate, did not assuage the concerns of the plaintiff's solicitors, who wrote a lengthy letter on 31st May, 2019 addressing matters arising out of the "Matter Summary", and calling on the defendant to "hand carriage of the Estate to Kent Carty Solicitors, while you remain as executor in name, available to sign relevant documentation...", and intimating, in the event that this proposal was not acceptable, the possibility of an application to remove the defendant as executor. When no response deemed satisfactory was received from the defendant, the plaintiff after a further letter from his solicitors on 3rd July, 2019 initiated the present proceedings on 26th July, 2019.

The approach of the court

42. The test for removal of an executor is as set out by the Supreme Court in *Dunne v. Heffernan*, *i.e.* that there must be serious misconduct and/or special serious special circumstances to justify such a "drastic step". The plaintiff accepts that this is the appropriate test by specifically averring at para. 41 of his grounding affidavit that the issues referred to by him in the affidavit satisfied this test and "justify and necessitate the Defendant's removal".
43. It seems to me that there are two issues which the court must resolve: firstly, whether the proceedings were justified, having regard to the reliefs which the plaintiffs sought; and secondly, whether the proceedings were instrumental in causing matters to be resolved to the satisfaction of the plaintiff, at least to the extent where it was deemed unnecessary to press ahead with the proceedings.
44. In relation to the first issue, the conduct of the defendant of which the plaintiff complains must be examined. However, the context must be borne in mind. The deceased had selected as executor a busy solicitor who would deal with the matter alone along with all the other matters demanding his professional attention. The defendant has set out in detail the matters which held up progress in administering the estate. Most notably, these included putting order on the somewhat disorganised affairs of the deceased, and in particular identifying and obtaining valuations of the various assets of the deceased; arranging for the tax liabilities arising out of the plaintiff's employment to be quantified and discharged, in circumstances where the plaintiff appears to have been unable to supply much in the way of relevant documentation; the preparation of the property for

sale; and dealing with the rather delicate situation whereby relatives of the deceased were intimating a possible challenge to the will.

45. It does appear that, once the grant of probate issued, the defendant was in a position to make disbursements from the estate to the plaintiff and in discharge of his tax liabilities, and did so. By February 2019, very substantial payments had been made to or on behalf of the plaintiff. Notwithstanding this, a complaint was made to the Law Society on 1st March, 2019, with the defendant responding with detailed information and documentation on 25th April, 2019.
46. Section 62 of the Succession Act 1965, quoted above, states that proceedings against the personal representatives may not be brought without leave of the court before the expiration of one year from the death of the deceased. It is very clear that this subsection does not impose an obligation on a personal representative to complete the realisation of the estate within a year. He must however distribute the estate as soon after the death of the deceased "as is reasonably practicable". Whether or not a personal representative has done that in a given case is a question of fact, determined by the context and the particular circumstances of the case.
47. In the present case, it is clear that the defendant consulted with the plaintiff as to the realisation of the estate, and has carried out duties as executor from the time of the deceased's death until the present day. The issue between the parties is whether he has been assiduous enough in the discharge of his duties. The defendant's evidence is that he has done everything that could have been expected of him. Although the plaintiff is not a solicitor, it is clear that he, and the solicitors who advise him, are of the view that the defendant has been dilatory in exercising his role as executor.
48. What is missing from this case, in circumstances where the court is called upon to decide whether or not costs should be awarded to a plaintiff whose case was that the removal by this Court of the defendant was justified, is any independent expert evidence which could establish that the amount of time taken by the defendant, or the manner in which he conducted the executorship, were such as to justify the reliefs sought in the special endorsement of claim. There may be circumstances in which such evidence is hardly necessary: the delays and lack of adherence to proper procedures in Muckian were such that the court had no difficulty in finding that the first named respondent, who was not a solicitor, should be removed.
49. However, the circumstances of the present case are very different. There does not appear to have been much or any complaint by the plaintiff up the point in February 2018 when the grant of probate issued, after which numerous disbursements were made to him; serious pressure was however exerted on the defendant after December 2018. The Law Society seems to have backed away from the matter after the defendant accounted for his executorship on 25th April, 2019. The proceedings issued at the end of July 2019, and the grounding affidavit of 17th September, 2019 continued to contend that "the cumulative effect of the issues raised in this affidavit amount to serious misconduct and serious special circumstances which would justify and necessitate the defendant's

removal" [para. 41]. This was a very serious allegation, and an imputation on the defendant's professional reputation which he was entitled to – and did – take very seriously.

50. In this regard, it was suggested by the plaintiff, almost in passing, that he had suffered loss as a result of the way in which the estate was administered. No evidence was presented to back up this allegation. While the three abortive sales of the property did involve successive decreases in price, this alone does not establish a loss, much less that it was a loss for which the defendant was culpable.

Conclusion

51. In the absence of any expert evidence, the court can only examine the facts and circumstances in the round to decide whether the proceedings, and the manner in which they were prosecuted, were the "event" which caused the defendant to perform his duties and complete his role as executor, thus precluding the need to press on with the matter.
52. Shortly after the proceedings had commenced, the plaintiff, on the advice of his new solicitors, instructed that the property be transferred to him by means of an Assent, thereby withdrawing his instruction that the property be sold. An agreement to this effect was concluded in November 2019. After an administrative hiccup which caused brief delay, the defendant complied with this wish. There remained some minor realisations of prize bonds and shares, which were in train in January 2020 when the defendant swore his second affidavit, and which have now been completed.
53. It is clear that the administration of the estate has not taken place as quickly as the plaintiff would have liked, and it may be that the defendant could on occasion have responded to queries more quickly, or acted more expeditiously. However, no doubt that could be said of almost any administration of an estate, the beneficiary of which is waiting impatiently for his distribution. In the present case, the defendant carried out the office to which he was appointed by the deceased's will. There is no independent evidence that he did so at a pace that was at odds with his duty under s.62 of the Succession Act 1965 to distribute the estate "as soon...as is reasonably practicable having regard to the nature of the estate, the manner in which it is required to be distributed and all other relevant circumstances...". Likewise, there is no evidence that he caused loss to the estate in the course of his duties, or that he is responsible for the failure of successive sales of the property. Even if a court were to presume culpability on his part in this regard, there is no evidence as to the quantum of any alleged loss.
54. The plaintiff made a complaint to the Law Society, and raised various queries. The defendant supplied various items of documentation and a narrative justifying his position. The plaintiff's response was to issue further queries, and ultimately to go ahead with proceedings due to a perceived failure on the part of the defendant to answer these latter queries. Given that there was an existing complaint to the Law Society – which would normally cause a practising solicitor to take very seriously the issue of whether or not he was proceeding appropriately and with due expedition – one wonders why the plaintiff did

not try to advance the matter by these means. Effectively, the complaint process was abandoned by the plaintiff in favour of proceedings.

55. In all the circumstances, it does not seem to me that the proceedings were the appropriate means of expediting an administration which, subject to an agreement regarding the transfer of the property which was concluded shortly after the proceedings were initiated, had been largely completed. I do not think, in all the circumstances, that the proceedings or the way in which they were prosecuted can be regarded as "the event" which costs must follow. Neither do I consider that there is sufficient evidence before me to justify disallowing portion of the defendant's costs. I am mindful that para. 7 of the will itself provides that the executor was not to be liable "for any loss not attributable to the [executor's] own dishonesty or to the wilful commission by the [executors] of any act known to be a breach of trust". There is no suggestion by the plaintiff that the defendant has been in any way dishonest. Neither do I think that the plaintiff has established any breach of trust on the part of the defendant.
56. I can see no reason why the defendant should not be entitled to his costs of the proceedings, whether in the proceedings themselves – which the plaintiff has effectively withdrawn – or as his necessary fees and costs to which he would normally be entitled in the course of the administration. The parties should liaise to agree appropriate orders; if this is not possible, each party should make brief written submissions – no more than 500 words – as to the appropriate orders within fourteen days after delivery of this judgment, after which I will make orders without further reference to the parties.