

NOONAN

237

THE HIGH COURT

433

1986 No.2135p

BETWEEN/

JOHH NOONAN A WARD OF COURT
SUIING BY THE COMMITTEE OF HIS ESTATE
MATTHEW MURPHY

PLAINTIFF

AND

MAURICE O'CONNELL

DEFENDANT

Judgment of Mr. Justice Lynch delivered the 10^H day of April
1987.

This is an Action brought by the Plaintiff to set aside a transfer dated the 9th of July 1979 whereby the Plaintiff transferred to the Defendant one undivided half share in the lands the subject matter of Folio 40640 of the Register of Freeholders County Cork comprising 108 acres approximately of the lands of Rossacon in the Barony of Duhallow and County of Cork.

The Plaintiff was made a Ward of Court by Order dated the 14th of October 1985 and he sues by the Committee of his estate Matthew Murphy appointed and authorised to bring these proceedings by Order in the wardship matter made the 20th of November 1985. Matthew Murphy is a nephew of the Plaintiff being a son of the Plaintiff's sister Catherine Murphy nee Noonan who died in 1974.

The Defendant is the transferee of the said undivided half share in the said lands and pursuant to the said transfer the Plaintiff and the Defendant became registered jointly as

full owners of the said lands on the 5th day of August 1980. Prior to that date the Plaintiff had been registered as sole full owner of the said lands.

The Defendant is another nephew of the Plaintiff being a son of another sister of the Plaintiff namely, Helen O'Connell nee Noonan who died in March 1983.

The Plaintiff was born on the 27th October 1906. He is a bachelor and he has lived all his life on the said lands of Rossacon until the 20th December 1978. The Plaintiff had three sisters, namely, the said Catherine, the said Helen and Elizabeth Noonan who is still living and unmarried. Elizabeth Noonan's mother died when she was only one and a half years old and she was reared by an aunt and uncle so that the said lands were never her home. The said Catherine and the said Helen left the said lands on marriage in the 1940's since when the Plaintiff lived alone on the said lands and catered for himself.

The Plaintiff engaged in mixed farming. He would have anything between 30 and 50 cattle of which some would be cows and some young cattle and others store cattle. In December 1978 the Plaintiff's cattle which then comprised 14 cows, 12 bullocks and four heifers were sold. The Plaintiff also did some tillage usually about 25 to 35 acres of barley but employed contractors for the ploughing, sowing and harvesting.

The Plaintiff's farming was on a modest scale and for a farm of 108 acres even though approximately half the farm was of poor land fit for grazing only the profits were also modest. They were however adequate to support the Plaintiff who lived very frugally and who was of an independent nature not seeking help without paying for it in cash or kind prior to 1978.

The Committee of the Plaintiff's estate, Matthew Murphy,

-3 -

is a married man with two sons and he lives at Clarina, County Limerick. Matthew Murphy farms some 115 acres at Clarina which is about 45 miles away from the Plaintiff's residence at Rossacon which is about two miles from Kanturk, County Cork. Matthew Murphy was on good terms with the Plaintiff but rarely visited him owing to the distance. He could be of no assistance to the Plaintiff in the running of the Plaintiff's farm.

The Defendant is a bachelor who lives at Lisleigh, Ballyclough, Mallow, County Cork about 14 miles from the Plaintiff's residence. The Defendant farms about 84 acres of land at Lisleigh which is the remainder of a farm of about 184 acres which was left equally between the Defendant, his brother and his sister, the balance of which was sold to provide for the share of the Defendant's brother and sister. The Defendant has lived all his life at Lisleigh which is a few miles from Mallow and about 14 miles from the Plaintiff's lands at Rossacon. The Defendant is a businessman.

The Plaintiff found it increasingly difficult to cope with his farming operations as he entered his seventies. His sister Helen O'Connell, the mother of the Defendant, was at that time still alive and living in Lisleigh with her son the Defendant. The Plaintiff suggested that the Defendant should assist in the running of the Plaintiff's lands. This suggestion was made sometime in the summer of 1978 and the initiative regarding any such suggestion came not from the Defendant in the first instance but from the Plaintiff.

The Plaintiff suffered at least one weakness at his local creamery in the year 1978 but had recovered by the time

he was brought home. On the 20th of December 1978 the Defendant and some neighbours were helping the Plaintiff to get his cattle tested for T.B. by a veterinary surgeon with a view to selling all the cattle as the Plaintiff by then felt unable to manage the cattle especially in winter time. On the occasion of this cattle testing the Plaintiff became very weak and was unable to give any assistance to the extent that the Defendant persuaded the Plaintiff, who was very reluctant, to visit a doctor in Kanturk. As a result of this visit the Plaintiff was admitted to Kanturk Hospital on that day where he was detained overnight and transferred to St. Stephen's Hospital, Glanmire, where he was detained until the 21st of February 1979. He was then transferred to St. Martin's Hospital, Cork, where he was detained until the 15th of March 1979 and was then transferred to Nazareth House, Mallow, where he has lived ever since.

The Plaintiff did not want his lands to be sold or let. He wanted his lands retained and worked as a farm. His sisters, Helen O'Connell and Elizabeth Noonan were in favour of having the lands let and applying the rent to the support of the Plaintiff in Nazareth House but the burden of selling off the cattle and arranging any such lettings or managing the lands was assumed by all the relatives of the Plaintiff to fall on the Defendant.

The Plaintiff at one stage suggested that he might transfer outright his lands to the Defendant who very properly dissuaded the Plaintiff from doing so. Ultimately the Plaintiff suggested that there should be a partnership between himself and the Defendant whereby the Defendant would manage

and work the lands or have them worked and would become owner of a half share in them. The Plaintiff suggested that Mr. O'Meara of Mallow should be engaged as Solicitor to carry out the legal formalities to effect such partnership.

In April 1979 Mr. O'Meara was informed by the Defendant of this request by the Plaintiff and requested Doctor O'Grady to examine the Plaintiff to see whether he was fit to do business. Doctor O'Grady carried out such examination and reported that the Plaintiff "owing to physical and mental infirmity is incapable of making a Will and is incapable of managing his own affairs". On the occasion of that examination on the 6th of April 1979 the Plaintiff was only recovering from the semi-collapse which he suffered on the 20th of December 1978 and from malnutrition due to the frugality of his way of life. The Plaintiff greatly improved between April and July 1979 and on the 9th of July the transfer the subject matter of these proceedings was executed. The transfer was drawn by Mr. O'Meara, Solicitor of Mallow who had got the medical report of the 6th of April 1979 and I infer that Mr. O'Meara satisfied himself that the Plaintiff was so much improved with the good care that he had received in Nazareth House that the disabilities mentioned in the medical report of April 1979 no longer applied. Obviously Mr. O'Meara formed the view that the Plaintiff was fit to transact business and accordingly had the transfer executed which was witnessed by Mr. O'Meara.

The Plaintiff now claims through the Committee of his estate to set aside the transfer of the 9th of July 1979 on the grounds:

(1) That the Plaintiff was incapable of entering into a valid transaction of that nature owing to mental incapacity:

(2) That the transfer was procured by undue influence on the part of the Defendant, his servants or agents:

(3) And that the transfer was improvident.

The Plaintiff also claims various declarations and injunctions and accounts and inquiries.

The Defendant denies that the Plaintiff was incapable of entering into the transaction or that the Defendant was aware of any such incapacity: he denies that there was any undue influence on his part and he further pleads that he gave good consideration for the transfer extrinsic to the consideration mentioned in the transfer: he further pleads that the transfer was affirmed in 1981 by the Plaintiff giving a mortgage by deposit to Trinity Bank and a guarantee to Trinity Bank of liabilities of the Defendant and he relies on laches and on the fact as the Defendant alleges that he has altered his position in reliance on the transfer.

As regards the question of mental capacity of the Plaintiff there is strong evidence both ways in that the evidence of Doctor O'Grady and Miss Elizabeth Noonan points to an unrelieved and worsening senile dementia. Unfortunately Mr. O'Meara who prepared the transfer and advised the Plaintiff died as a relatively young man some months before the trial. No written instructions from or attendance on the Plaintiff by the late Mr. O'Meara was tendered in evidence as a record made by Mr. O'Meara in the course of his duty, from which I infer that

no note of such instructions or attendance was in fact made. A letter written years later by Mr. O'Meara to the Defendant's Solicitors in these proceedings was tendered in evidence, but was objected to on behalf of the Plaintiff and was excluded by me. I have, however, had the evidence of the Defendant and of Mr. Nicholas Comyn of Cork, Solicitor for Trinity Bank who saw the Plaintiff in March 1981 and obtained from the Plaintiff a deposit of the land certificate and a guarantee of the Defendant's liabilities to that bank. Mr. Comyn's evidence was very positively to the effect that the Plaintiff was a bright, alert person well capable of doing such business as he did for Mr. Comyn.

I have come to the conclusion that provided the Plaintiff had completely independent legal advice from a person who was fully aware of all his circumstances he would have had sufficient mental capacity at the time of executing the transfer of the 9th of July 1979 to carry out such a transaction but that he did require such completely independent and fully informed legal advice. His mental capacity was sufficiently impaired to render him incapable of entering into a binding transaction of the nature of the transfer of the 9th of July 1979 without such completely independent legal advice.

As regards the allegation of undue influence on the part of the Defendant I have come to the conclusion that there was no express undue influence of any sort by the Defendant. As I have already said the initiative for some form of settlement of his lands on the Defendant came from the Plaintiff himself and not from the Defendant. The Defendant was the only relative living reasonably near to the Plaintiff and therefore the only relative who might be of help to the Plaintiff in running and

managing his farm. He was also the only relative who visited the Plaintiff on a regular basis.

The relationship between the Plaintiff and the Defendant was however one of inequality and this was quite frankly and honestly acknowledged by the Defendant himself. In his evidence the Defendant stated that from June 1978 the Plaintiff was going downhill fast and that he, the Defendant, was the Plaintiff's only salvation and that the Plaintiff was totally dependent on him.

The unequal relationship between the Plaintiff and the Defendant therefore called for extra care to protect the Plaintiff by fully informed and totally independent legal advice. In fact it is clear that the Plaintiff did not have such independent legal advice. The late Mr. O'Meara received his initial instructions from the Defendant and acted thereafter for the Defendant as well as for the Plaintiff in the transaction. He attended on the Plaintiff on the evening of the 9th of July 1979 with the transfer already typed out. It is clear therefore that Mr. O'Meara could not be regarded as an independent legal adviser and that the Plaintiff therefore did not have that fully informed and completely independent legal advice which he required if he was to enter validly into a transaction of the nature of the transfer.

I have also come to the conclusion that the transfer was and is improvident. It contains no provision whatsoever that the Defendant should do anything for the Plaintiff. On its face it is a purely voluntary transfer and of course the reference to fifty pence consideration is a complete anachronism and does not constitute any consideration. At the time when the transfer was executed the Plaintiff was in need of increased income to provide for him in Nazareth House and

yet he parted with a half share in his lands getting nothing whatever in return so far as the deed is concerned.

The Defendant says that in fact it was agreed that he the Defendant was to maintain the Plaintiff and to pay the charges of Nazareth House whether the lands made sufficient profit to do so or not. The Defendant also says that it was agreed that he would run the farm on a joint basis on behalf of the Plaintiff as well as himself. The Defendant says that he is quite willing to consent to rectification of the deed to include the forgoing provisions and any necessary provisions to make it a provident deed. I am of the view that if this deed were to become a provident deed it would have to include a power of revocation in favour of the Plaintiff in which event the deed would already have been revoked by the correspondence in this case and by the mere commencement of these proceedings. Rectification would therefore be a pointless exercise and in any event the Plaintiff is not bound to accept rectification if he does not want such.

The Defendant relies on the equitable mortgage by deposit of the land certificate and on the guarantee of March 1981 as an affirmation in his favour of the transfer of the 9th of July 1979. The transaction of March 1981 is a separate transaction altogether. The deposit of the land certificate by the Plaintiff was in respect only of the half share of which the Plaintiff was then registered full owner. The guarantee is a completely separate and distinct transaction not necessarily related to the lands at all. These two transactions of March 1981 indicate a continuance of the Plaintiff's beneficial intentions towards the Defendant (and also at that time of influence by the Defendant on the Plaintiff) but they do not constitute an affirmation of the transfer of the 9th of July

1979 nor do they estop the Plaintiff from seeking a cancellation of that transfer.

Finally the Defendant relies on laches and delay and on an allegation that he the Defendant has altered his position as a result of the transfer. There can be no question of the Plaintiff being barred by laches or delay. He has been an inmate of the Nazareth House ever since the transfer and undoubtedly his mental capacity has deteriorated to the extent that he is now totally helpless and recognises nobody and was by 1985 and remains unable to manage his own affairs. Neither is there any substance in the plea by the Defendant that he has altered his position in reliance on the transfer. He has not altered his position to his detriment: in fact he has used his part ownership of the lands to raise money for other business enterprises.

I have come to the conclusion therefore that the transfer of the 9th of July 1979 must be set aside and cancelled and that the Plaintiff must be registered as sole full owner of the lands and I accordingly so Order. This Judgment and Order does not affect any rights (if any) which Trinity Bank may have in to or over the lands and the registration of the Plaintiff as full owner is to be subject to any such rights (if any) acquired by Trinity Bank by the deposit of the land certificate by the Plaintiff and the Defendant with them. This Judgment does not in any way affect the validity or invalidity (as the case may be) of the transactions between the Plaintiff and Trinity Bank of March 1981 or of the deposit of the land certificate by the Defendant with Trinity Bank in respect of the undivided half share in the lands of which the Defendant was then registered owner. The Defendant is however primarily liable for all sums due to

Trinity Bank on foot of such transactions and I accordingly Order that the Defendant forthwith take all steps necessary to secure the release of the said lands from the mortgage in favour of Trinity Bank and the cancellation of the guarantee by the Plaintiff of the sums owing by the Defendant to Trinity Bank.

I now come to accounts and inquiries and I intend giving the parties an opportunity of making further submissions and calling further evidence on this aspect of the case if they so wish in the light of the findings which I am about to make.

First I propose dealing with the rents and profits of the lands. I am satisfied that in attempting to work the lands rather than letting them all out every year the Defendant was carrying out the Plaintiff's wishes and he should not therefore be charged on the theoretical letting basis as given by Mr. Byrnes in his evidence. I think the fair and reliable basis of conducting this account is to accept the figures given by Mr. Martin in his summary of the accounts from 1979/80 to 1986/87 inclusive.

These accounts show a loss in 1979/80 of £1,417, in 1980/81 of £716, in 1981/82 of £1,595 and in 1983/84 of £1,301 making a total loss over the period of £5,029. The accounts show profits in 1982/83 of £3,130, in 1984/85 of £3,800, in 1985/86 of £1,100 and in 1986/87 of £1,900 making a total of £9,930. This leaves a balance received by the Defendant of £4,901.

It seems to me that the forgoing accounts make provision for the moneys expended by the Defendant on land reclamation in that the accounts for 1980/81 show contracting at £3,295 and

for 1981/82 at £3,000. On the other hand the accounts do not, in my opinion, include anything for the value of trees felled and which can be sold and may already have been sold and it seems to me that these would have a value of £1,500 making the amount due by the Defendant to the Plaintiff £6,401. I have not allowed anything in respect of such work as the Defendant himself did in managing the lands but the Defendant very frankly admitted that the amount of work spent by him in looking after the lands was not very great. It is more than adequately remunerated by making no allowance for interest on the forgoing sum or other sums hereinafter found to be due by the Defendant.

Next comes an account of the bank moneys received by the Defendant with which he has to be charged and the payments thereout made by the Defendant with which he has to be credited. These accounts, it seems to me, properly commence from the 20th of December 1978 because from that date the Defendant in fact took charge of the Plaintiff's affairs.

The following moneys were received by the Defendant. First there is the Allied Irish Bank accounts in Kanturk. The deposit account was in credit £10,316.07 whilst the current account was in debit £819.46 leaving a net credit of £9,496.61. Those moneys earned interest of £1,620.53. The proceeds of the sale of the Plaintiff's cattle realised £6,333.55. The bank went into overdraft and there is a Judgment against the Plaintiff by his Committee for £2,438.72. There is a sum due to Ballyclough Co-operative Creamery Limited of £1,700.45. These sums total together £21,589.86 for which the Plaintiff has to account.

-13-

The Plaintiff has made the following disbursements which may be deducted from the foregoing receipts.

Nazareth House	£6,401.47 and £3,053.34
St. Stephen's Hospital, Glanmire	£ 853.63
St. Martin's Hospital, Cork	£ 139.35
Interest charged on overdraft	£ 900.44
Standing Orders for Bank Tax Fees	£ 169.05
Bank Fees	£ 3.00
Lodgement to Current Account	£ 500.00

These sums make a total of £12,020.28 and when deducted from the sum of £21,589.86 leave a balance due by the Defendant to the Plaintiff of £9,569.58. This does not include anything in respect of the furniture the property of the Plaintiff now in the possession of the Defendant. The Defendant expressed willingness to make available that furniture whenever it was required but in case that any difficulty arises about the furniture it seems to me that the better course is to value it at £1,000 and add that to the amount due, namely £9,569.58 and £6,401 making an overall total of £16,970.58.

I shall give liberty to either party to apply in regard to the forgoing accounts. Such application must be made by seven day notice to be served not later than Friday the 8th of May 1987 and the notice should give full details of the nature of the application and any items to be challenged or adduced so that the other party may be in a position fully to deal with the matter when it comes back into the list. If no such application is made by either party then the Order will be made

up as soon as possible after the 8th of May 1987 directing the Defendant to pay into the wardship matter in the High Court the sum of £16,970.58.

I also make an Order directing the Defendant to vacate the lands within two weeks of this date.

Signed _____


KEVIN LYNCH

THE HIGH COURT

1986 No.2135p

BETWEEN/

JOHH NOONAN A WARD OF COURT
SUING BY THE COMMITTEE OF HIS ESTATE
MATTHEW MURPHY

PLAINTIFF

AND

MAURICE O'CONNELL

DEFENDANT

Appearances

For the Plaintiff:

Patrick Keane S.C. and
John White B.L.
Instructed by Mr. Patrick G. McMahon,
Solicitor, Newcastle West, Co. Limerick.

For the Defendant:

Brian Dempsey S.C. and
Willis Walshe B.L.
Instructed by Messrs.Martin Sheehan & Co.
Solicitors, 16 South Mall, Cork.

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