Neutral Citation no. [2007] NIQB 67 | *Ref:* **DEEC5897**

Judgment: approved by the Court for handing down | *Delivered:* **13/09/07**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

JAMES JOSEPH HENRY

Plaintiff;

and

PHILOMENA HENRY ON HER OWN BEHALF AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HUGH JOSEPH HENRY DECEASED

First Defendant;

and

HUGH PATRICK HENRY

Second Defendant.

DEENY J

[1] This is an application by the plaintiff for discovery which raises the issue, apparently novel, as to whether the executed will of a living person is protected by legal professional privilege. The plaintiff seeks discovery of any will made by the first defendant in the months succeeding November 1994 as relevant to the issues in the action. The first defendant is his mother and the personal representative of the estate of the plaintiff's late father Hugh Joseph Henry. She is also the mother of the second defendant.

[2] The matter arises in this way. The plaintiff, his father and brother were all farmers in and around Macosquin, Coleraine, County Londonderry, who were in partnership as such until 21 April 1992. The father had a road accident in 1994 and determined thereafter, the plaintiff says, to apportion his land between his sons. This involved discussions not only amongst the family but with accountants and solicitors. The plaintiff claims that the deceased represented to him and agreed with him that the plaintiff would receive the home farm being house and lands contained at Folio no 4432

County Londonderry. In reliance upon such promises, assurances or agreement the plaintiff provided farm services to the deceased and the first-named defendant from 1994 until the deceased's death on 10 June 2005, as particularised at paragraph 7 of the plaintiff's Statement of Claim.

[3] The first defendant was apparently registered as joint tenant of the said lands on 20 December 1995, but this was on foot of a transfer document signed on 19 January 1995 from the deceased to the first defendant relating to the lands in question, for natural love and affection. It is the plaintiff's belief, as the son of the first defendant and still in touch with her and who was then closer to her, that she made a will in or around January 1995. He believes that that would show a bequest to him of these lands which would corroborate his claim, at paragraph 8 of his Statement of Claim, that she agreed that the home farm would pass to the plaintiff rather than to their other son the second defendant, who would receive other lands. This matter was debated as a preliminary point at the hearing of the application. I received helpful oral and written submissions from Mr Gareth Purvis on behalf of the plaintiff and Mr Ronan Lavery on behalf of the first defendant. On instructions, Mr Lavery was unable to deny that a will existed, without, of course, disclosing any of the contents of the same. The plaintiff cannot bring his claim under Order 76 of the Rules of the Supreme Court and must rely on Order 24 rule 9 by satisfying the court so that it is of the opinion that discovery is necessary either for disposing fairly of the cause or matter or for saving costs. Reference in such a will to the lands in Folio 4432 would be relevant and potentially very important to the issues which the court is asked to decide. I am satisfied that such is the case and that a will made in or about January 2005 would indeed be relevant.

[4] At one point counsel for the plaintiff had sought to argue that any accompanying testamentary scripts were also discoverable but he wisely abandoned that contention in the course of argument. It is quite clear that any documents related to the drafting of the will which Mrs Henry made in early 2005 would be covered by legal professional privilege. The net issue in this application is whether her will itself is or is not covered by that same privilege.

[5] Hugh Joseph Henry died on 10 June 2005. It then emerged that his last will of 5 May 2005 left Folio No 4432 to his son Hugh, the second defendant, with a right of residence to the mother. There are alternative claims by the plaintiff in his Statement of Claim, including pointing out that the first defendant as joint tenant is in fact the owner of the lands rather than the second defendant, but it is not necessary to go into these for the purposes of this application.

[6] Mr Purvis acknowledged to the court that he could have sought the information he requires by interrogating under Order 26 but that the same

point would arise there. I am inclined to think that he is right in that and also that the same point would arise on trial if the first defendant gave evidence i.e. would she be able to claim legal professional privilege for the will which she had made in early 1995.

[7] Mr Purvis relied in support of his argument on Section 67(2) of the Judicature (NI) Act 1978, which reads:

> "(2) A writ of subpoena ad testificandum or duces tecum may issue under this section for the purpose of enforcing any order made by the High Court requiring any person to give evidence respecting any paper or writing being or purporting to be testamentary or to lodge in the Probate and Matrimonial Office any such paper or writing which may be shown to be in his possession or under his control."

Rather therefore than there being an exception for testamentary documents an express power was conferred on the court. He accepted that the document was in any event confidential but confidentiality of a document does not give immunity from discovery: Science Research Council v Nassé [1980] AC 1029 (HL). Of course the fact of confidentiality would be very material in, for example, the public interest immunity field. It would also mean here that if Mr Purvis succeeded in his application I would propose to receive the document myself and disclose only to the plaintiff any matters which were necessary for disposing fairly of this action or for saving costs i.e. strictly relevant to the issues at large in the action and excluding other materials which were not relevant.

[8] It must be borne in mind, however, that the House of Lords has emphatically stated that the issue of legal professional privilege is not one in which the court discloses or does not disclose in the course of a balancing exercise. It is an absolute privilege. I quote the speech of Lord Taylor of Gosforth in R v Derby Magistrates Court, ex parte B [1996] 1 AC 487 at 507D.

> "The principle which runs through all these cases and the many other cases which were cited is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on

> which the administration of justice as a whole rests."

[9] The privilege is not confined to cases where legal proceedings were already in contemplation; Greenhough v Gaskell (1833) 1 M. & K. 98. As Lord Brougham said at page 103 in that case:

> "If the privilege did not exist at all, everyone would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case."

At page 508H in Derby Lord Taylor said:

> "But it is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established."

Lord Nicholls of Birkenhead, at page 110 succinctly sets out the dichotomy that exists in this situation.

> "Legal professional privilege is concerned with the interaction between two aspects of the public interest in the administration of justice. The public interest in the efficient working of the legal system requires that people should be able to obtain professional legal advice on their rights and liabilities and obligations. This is desirable for the orderly conduct of everyday affairs. Similarly, people should be able to seek legal advice and assistance in connection with the proper conduct of court proceedings. To this end communications between clients and lawyers must be uninhibited. But, in practice, candour cannot be expected if disclosure of the contents of communications between client and lawyer may be compelled, to a client's prejudice and contrary to his wishes. That is one aspect of the public interest. It takes the

> form of according to the client a right, or privilege as it is unhelpfully called, to withhold disclosure of the contents of client-lawyer communications. In the ordinary course the client has an interest in asserting this right, in so far as disclosure would or might prejudice him.
>
> The other aspect of the public interest is that all relevant material should be available to courts when deciding cases. Courts should not have to reach decisions in ignorance of the contents of documents or other material which, if disclosed, might well affect the outcome."

In the situation before me Mrs Henry does not wish to disclose her will. If, as is implicit in the plaintiff's case, she then wanted the lands to go to one son and at some later date decided they should go to the other son the disclosure of her earlier wishes may be prejudicial to her present position. On the other hand from the point of view of the court her expressed intention at that time may be important evidence of what the parties had agreed shortly before.

[10] In Balabel v India [1988] 1 Ch 317 the Court of Appeal in England had to consider how broadly privilege should extend. They held that the purpose of legal professional privilege was to enable legal advice to be sought and given in confidence; that a document was covered by privilege if it had been made confidentially for the purposes of legal advice, construing such purposes broadly and that legal advice included advice as to what should prudently and sensibly be done in the relevant legal context; that in order to be disclosable a document had to be material and relevant; that in view of the increased range of assistance given by solicitors to their clients not all solicitor and client communications were privileged, but that in a conveyancing transaction communications passing in the handling of that transaction were privileged even though they did not incorporate a specific piece of advice, provided that their aim was the obtain of appropriate legal advice. It seems implicit from the judgment of Taylor LJ that the ultimate conveyance which arose from the legal advice was not itself privileged. Such a conveyance, or indeed a contract, would cease to be confidential because it would be disclosed to the other party to the conveyance or contract, although it may remain confidential between them. Confidentiality and privilege are distinct but if a party chooses to give up the confidentiality of a document by publishing it in some way it has waived its privilege. It might be argued that a will once executed has a limited confidentiality ie until the testator dies. Even if the will itself is subsequently revoked an executor or other person making an affidavit of testamentary scripts is obliged to disclose the contents of the earlier will. As has been said wills are public documents. They can, in

certain circumstances, be held in public registries even when the testator is alive.

[11] It ought to be remembered that a solicitor is not essential for the making of a will. A will can be duly executed without the involvement of a solicitor, whether using a pro forma draft or otherwise. In those circumstances it may be entirely confidential to the testator if he chooses to cover the text of the will when the witnesses witness to his signature. But he may choose to show it to others. What is certain is that if it physically survives other persons will be entitled to see it. In that regard it significantly differs from documents furnished to a lawyer seeking legal advice or the giving of that advice by the lawyer for the privilege survives death. Obviously no question of legal advice privilege can arise from a self made will if no legal advice has been sought.

[12] In R (Morgan Grenville and Company Limited) v Special Commissioner of Income Tax [2003] 1 AC 563 at pages 606 and 616 Lord Hoffman and Lord Hobhouse described the protection of communications on the basis of legal professional privilege as a fundamental human right. The most recent consideration of this issue by the House of Lords has been in Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6) [2005] 1 AC 610. As Lord Scott of Foscote said at the beginning of his judgment the decision for appeal was an apparently simple one i.e. do the communications between the Bank of England, their solicitors and counsel relating to the content and preparation of the statement to be submitted on behalf of the bank to the Bingham Inquiry qualify for legal professional privilege? The House of Lords concluded that it did and that the obtaining of "legal advice" extended to advice as to what should prudently and sensibly be done in a "relevant legal context" which would include the presentation of a case to an inquiry by someone whose conduct might be criticised by it. As Lord Scott however went on to say the consideration of the appeal involved broad and detailed consideration of the whole field of legal professional privilege. At page 646 he identified four important features of legal advice privilege. Firstly, legal advice privilege arises out of a relationship of confidence between lawyer and client. "Unless the communication or document for which privilege is sought is a confidential one, there can be no question of legal advice privilege arising. The confidential character of the communication or document is not by itself enough to enable privilege to be claimed but it is an essential requirement." Secondly, if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the client or overridden by statute but it is otherwise absolute. His Lordship noted, and this is relevant to a case subsequently relied on, that the Supreme Court of Canada in Jones v Smith [1999] 1 SCR 455 held that while of great importance legal professional privilege is not absolute but Lord Scott points out that no

other common law jurisdiction has apparently developed the law of privilege in this way. Thirdly, legal advice privilege gives the person entitled to it the right to decline to disclose or to allow to be disclosed the confidential communication or document in question. Fourthly, while legal advice privilege has undoubted relationship with litigation privilege it is not confined to litigation. In discussing why the privilege extends beyond litigation he quotes, inter alia, Lord Millet in B v Auckland District Law Society [2003] 2 AC 736, at 757, paragraph 47, as justifying the privilege on the ground that "a lawyer must be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent." That statement has to be qualified in the probate context. A lawyer if asked by his client would have to say that once the will is executed it is indeed likely that its contents will become known either because it will dispose of the estate or because certain persons may be obliged pursuant to Order 76 Rule 5 of the Rules of the Supreme Court to disclose it as a testamentary script after the death of the testator. Of course, a testator may view that with a degree of robustness for obvious reasons but view less robustly the possibility that the contents of the will be disclosed while he or she is still alive.

[13] At page 650 Lord Scott differed from the Court of Appeal which had restricted the scope of legal advice privilege to material constituting or recording communications between clients and lawyers seeking or giving advice about the client's legal rights and obligations. Following Taylor LJ in Balabel he concluded that the privilege extended to seeking or giving legal advice for the purpose of presenting the client's case to the inquiry. For the purposes of the matter before me it is important to note that the verbs are seeking or giving or getting and giving as it has sometimes been put. The draft will given by the solicitor, if one is involved, is undoubtedly a form of giving legal advice to the client. But once that draft will has been executed the client is no longer seeking and the lawyer is no longer giving such advice. It is the product of that process which now exists. It does not appear to have been contended in the Three Rivers case that the statement upon which the solicitors, counsel and the bank had been labouring to the inquiry was in itself privileged. This was clearly not the case as it had ceased to be confidential. To a degree the will when executed ceases to be confidential in that a testator, or indeed the solicitor himself, may be obliged to disclose it to the court in the future.

[14] There is a relevant passage in the judgment of Lord Rodger of Earlsferry at paragraph 55.

> "The case for confidentiality is, if anything, even more obvious when it comes to the preparation of a will. Rightly or wrongly, the provisions are often shaped by past relationships, indiscretions, experiences,

> impressions and mistakes, as well as by jealousies, slights, animosities and affections, which the testator would not wish to have revealed but which he must nevertheless explain if the solicitor is to carry out his wishes. Divulging the provisions during the testator's lifetime or disclosing the reasons for them after the testator's death could often cause incalculable harm and misery. The public interest lies in minimising the risk of that happening."

In so far as that passage is concerned I respectfully agree with the view that the instructions to the solicitor should be covered absolutely by privilege in their lifetime. It might also be said that the risk of divulging the provisions ie of the will during the testator's lifetime are still minimised even if the applicant succeeds here. These are unusual facts before the court. Counsel have been unable to find an incidence of this point arising before. The will itself will not be fully disclosed in the testator's lifetime – only that part, if such exists, which is relevant to the issues in this action. Baroness Hale, at page 659, stated that there was a public interest, inter alia, that people "make wills which will withstand the challenge of the disappointed".

[15] Lord Carswell was in agreement with his colleagues. While he does not address the issue before me I note his observation, at paragraph 111, that communications between solicitor and client are privileged "provided that they are directly related to the performance by his solicitor of his professional duty as legal adviser of his client." Once a will has been executed a solicitor instructed for that purpose has discharged his duty of advice to the client. The relationship for that purpose, perhaps for all purposes, may end there.

[16] The plaintiff relies on a short decision of Sir Gorell Barnes P., In the Estate of Hester Harvey,[1907] P 239, but Mr Lavery points out that the testator there is not stated to be alive at the time of hearing. He, in turn, relies on Geffen v Goodman Estate (1991) 81 DLR (4th) 211, a decision of the Supreme Court of Canada, as taking the view that an instrument analogous to a will was privileged in the testator's lifetime. But, if so, it was clearly an obitur dictum and, moreover, is only to be found by implication in the judgment.

[17] Of much greater weight for this court must be the statutory provisions to be found in the Administration of Estates (NI) Order 1979, as amended. Article 27 provides that "safe and convenient depositories for the custody of wills of living persons shall be provided and managed in accordance with the directions of the Lord Chancellor." Article 15 has the heading "Production of instruments purporting to be testamentary". It reads as follows.

> "15. The High Court may, whether or not any legal proceeding is pending with respect to the administration of the estate of a deceased person, require (by order or otherwise) any person to lodge in the Probate and Matrimonial Office any paper or writing, being or purporting to be testamentary, which may be shown to be in his possession or under his control."

This clearly gives this court the power to order that Mrs Henry's will be lodged in court. While it is open to the interpretation that the power is merely to ensure the safe preservation of any testamentary writing it may be said that it makes explicit the fact that such a writing is not a purely private document. It requires only a modest step to say that it can be examined by the court when the interests of justice so demands, no privilege attaining to it.

[18] It cannot be disputed that Mrs Henry's instructions to her then solicitor were privileged. Any draft will which he then presented to her, expressing her instructions in proper legal form would be equally privileged. The plaintiff's contention must be that the privilege ends after she has signed and two other persons have witnessed the document. In support of that contention it must be acknowledged that the legal nature of the document does change once executed. It becomes a testamentary document. It is revocable but if the deponent were to expire immediately after the execution of the will, for whatever reason, the will determines by law the disposition of the testator's estate (subject to certain statutory exceptions). The issue for the court is whether that alteration and the legal status of the document ends the privilege of the client testator.

[19] I conclude that a will, once executed, is no longer covered by the privilege applying to the getting and giving of legal advice. By executing the will the testator has acted upon the advice. The execution of the draft will has, beyond doubt, altered the legal character of the document. It ceases to be privileged and becomes subject to the normal rules of discovery and confidentiality. Subject to any further submissions of counsel, I propose to order the disclosure of the document to the court. If on examination a part of it is relevant to the material issues before the court, that part only shall be disclosed to the plaintiff but no more.