

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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2008 No. 3169

IN THE ESTATE OF MAUREEN DIAMOND DECEASED  
CLAIRE CAMPBELL, MICHAEL GILLEN AS PERSONAL  
REPRESENTATIVES OF MAUREEN DIAMOND DECEASED

Plaintiffs;

-and-

EDWARD DIAMOND AS PERSONAL REPRESENTATIVE OF  
THOMAS JOHN DIAMOND DECEASED

Defendant.

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**TREACY J**

[1] The plaintiffs are the executors of the estate of Maureen Diamond Deceased ("the Testatrix"). The defendant is the personal representative of the Testatrix's brother Thomas John Diamond deceased ("Thomas").

[2] A difficulty has arisen in relation to the distribution of the Testatrix's estate and by originating summons dated 8 January 2008 the plaintiffs, pursuant to Order 85 Rule (2) RSC, sought directions in respect thereof.

[3] At the time of her death the Testatrix owned substantial assets including commercial premises situate at 85-87 Newry Street, Banbridge ("the property").

[4] The Testatrix and Thomas inherited the property from their late mother Alice Diamond who died on 9 January 1973 whose will bequeathed the estate to the Testatrix and Thomas “in equal shares”.

[5] It is now common case that these are clearly words of severance and that the property was held by them as tenants in common.

[6] Despite extensive searches the deeds of the property cannot be found. However a copy Deed of Memorial of the Assent dated 5 October 1981 was obtained from which it would appear that the Deed of Assent vested the property in the Testatrix and Thomas as joint tenants.

[7] The Testatrix died on 19 December 2004 and pre-deceased Thomas who died on 1 September 2006.

[8] By the terms of Clause 4 of the Testatrix’s last will dated 16 June 2000 she purported to devise her interest in the property to two nephews and two nieces. This will was prepared and drafted by Michael Gillen who stated in a supplementary affidavit that his practice would not have been to make a will in those terms unless the Testatrix had told him that she held the property as a tenant in common.

[9] If the Testatrix and Thomas held the property as joint tenants her interest passed automatically to Thomas by virtue of survivorship and will now pass to the beneficiaries of Thomas’ estate – the 20 nephews and nieces referred to at para 6 of the defendants affidavit dated 9 April 2008. If on the other hand the property was held under a tenancy in common the Testatrix’s share will pass by Clause 4 of her will to the two nephews and two nieces named therein.

[10] In her skeleton argument counsel for the plaintiff submitted that it is well established that the law strains to find against a joint tenancy save in very limited circumstances. It was further submitted that in the light of the absence of any direct evidence that the Testatrix and Thomas sought to create a joint tenancy out of their tenancy in common, the absence of the Deed of Assent and the fact that the Testatrix clearly considered that she was still a tenant in common when she made her 2000 will it was submitted that the court should declare the Testatrix and Thomas held the property as tenants in common at the time of her death.

[11] At the hearing of the summons the plaintiff’s counsel candidly acknowledged that the contents of the Memorial of Assent dated 5 October 1981 presented a difficulty, to put it mildly, with that submission. If the Memorial was genuine and correct its terms made it perfectly clear that they were to hold the property as “joint tenants” as stated therein. It was also common case that no evidence had been introduced to justify rectification of

the Assent nor did any issue arise as to its construction because its terms were so clear.

[12] I accept that it was not at all an unusual course of action for these two siblings to change their tenancy in common to a joint tenancy. Much more importantly however there is direct evidence in the form of the Memorial to support the joint tenancy: see Wylie's Irish Conveyancing (3<sup>rd</sup> Edn., 2005) at paras 14.52 and 14.53 and Wylie's Irish Land Law (3<sup>rd</sup> Edn., 1997) at paras 22.02 (at footnote 14-16) and 22.05 et seq.

[13] I agree with the submission that what the Testatrix may have thought in 2000 (19 years after the Assent) is of little or no assistance. It is established law that the making of a will does not sever a joint tenancy see for example paras 7.04 (footnote 9) and 7.28 (at footnote 88) of Wylie's Irish Land Law (3<sup>rd</sup> Edn., 1997).

[14] Accordingly the court determines that at the time of the death of the Testatrix she held the property situated at 85-87 Newry Street, Banbridge, County Down with Thomas under a joint tenancy.

[15] I will hear the parties as to costs and any further or other relief.