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Judgment: approved by the Court for handing down | *Delivered:* **02/03/07**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF THE ESTATE OF SARAH SCOTT DECEASED

BETWEEN:

COLIN JOHN SCOTT

Plaintiff;

-and-

BRIAN SCOTT

Defendant.

MORGAN J

[1] The plaintiff and the defendant are the sons of Sarah Scott deceased. She died on 13 September 2004. By a will made on 12 January 2001 she appointed the plaintiff as her sole executor. She left her house at 43 The Burn Road Comber, garden, yard, football field and lower field to the plaintiff. She left her front field containing the sheds and the bog field to the defendant. The residue of her estate was left to her sons in equal shares.

[2] The defendant entered a caveat on 18 October 2004 and the plaintiff now seeks to have the said will proved in solemn form. The defendant has counterclaimed that the plaintiff is estopped from denying the defendant's beneficial interest in half of the deceased's estate on the basis that the deceased encouraged the defendant to work on her lands and make improvements to the land and buildings thereon in the understanding and belief that he would inherit half of the estate of the deceased. There was no dispute about the identification of the relevant lands.

[3] The first witness was Mr John Campbell an experienced solicitor who had made wills throughout his practice. He explained that the husband of the testator died on 13 October 2000. The land was held jointly with his wife who was a client of the practice as was the plaintiff. He explained that he received a set of written instructions although he could not say if those had been

received at the time that he made the will or whether they had been left with him before that. He remembered meeting the deceased in his office in Comber. He always followed the same procedure for the execution and making of a will. He satisfied himself about the identification of the land and access to the fields. He had the draft will printed out and given to the deceased. He asked her to check it and confirm that it was correct. He remembered her reading it. She had a loud voice because she was deaf. The meeting lasted approximately 15 minutes. Mr Campbell's secretary dated the will. The deceased signed it and then he and his secretary witnessed it. The plaintiff was in the room with the testator, Mr Campbell and the secretary. Mr Campbell was having difficulty communicating with the deceased. At Mr Campbell's request the plaintiff spoke to his mother. He could hear the answers that the testator gave. The questions were directed to the description of the fields as Mr Campbell wanted to be clear about the dispositions.

[4] In cross-examination he agreed that the letter written by him on 24 March 2005 to the defendant's solicitors gave the impression that the handwritten instructions had been received prior to the testator's visit. He had no recollection of meeting the testator when he dealt with her husband's intestacy. He said that he was satisfied that the will reflected her true intentions because of the written instructions given to him, his questions to her about the contents and the fact that she checked the will carefully. She seemed an alert and intelligent lady. He did not consider it necessary to have someone independent to communicate with her. He agreed that it was not his general practice to keep beneficiaries in the room when the will was being executed.

[5] Mr Campbell's secretary had been with him for 16 years and had assisted in the execution and witnessing of many wills. She identified her hand writing both as a witness and dating the will. She had no recollection of the precise circumstances of this will. She said that she was not usually in the room when instructions were taken.

[6] The plaintiff said that because Mr Campbell had acted in his father's estate his mother decided to use him for her will. He took her down to the solicitor. She was completely deaf but could lip read. He said that he suggested to the solicitor that he should not be present but his mother indicated that she wanted him to stay. He had made the appointment to see Mr Campbell but his mother had not discussed how she wanted to make her will. He recognised his mother's signature on the will and her writing on the written instructions. He could not remember how the written instructions came into existence. He had no recollection of seeing it before Mr Campbell showed it to him sometime after his mother's death. He explained that he would ask questions suggested by Mr Campbell which his mother could understand by reading his lips. She then replied to Mr Campbell. He remembered that there was a map of the fields and thought that he himself

had probably sketched it during the visit. He said his mother read the document over. He could not remember who paid the solicitor's bill of 23 April 2001. He found his mother's copy of the will in her bedside table shortly after she died.

[7] In cross-examination the plaintiff said that he first saw his mother's written instructions after she died. He did not recollect his mother having any piece of paper at the time of making the will. She indicated the fields to the solicitor. He made a sketch of the fields at the request of the solicitor to assist her. He said that he did not know what his mother wanted to do before he took her to the solicitor's office. It was his mother who wanted to make the will. He thought that he had taken his mother down to the solicitor once in respect of his father's affairs. He said that he offered to leave the room because he assumed that his mother would leave something to him. He said that he asked his mother to tell his brother about the terms of the will but felt that it was a matter for her. He felt that his brother should have known. He said that he had not mentioned to his brother that his mother had made an appointment for the will during the week or so prior to her attending the solicitors office. He had no recollection of handing over any document or envelope which might have contained the written instructions on behalf of his mother. He assumes that his mother had arrived with them on the day that she made the will.

[8] There is no issue in this case as to testamentary capacity or the proper execution of the formalities. The defendant relies upon the principle considered by the Court of Appeal in Fuller v Strum [2001] EWCA Civ 1879 that where suspicion about the circumstances of the knowledge and approval of the testator arose it had to be the more clearly shown that the deceased knew and approved the contents of the will so that the suspicion was dispelled. Suspicion could be aroused in varying degrees, depending on the circumstances, and what was needed to dispel the suspicion would vary accordingly. The standard of proof was always the normal civil standard. In this case the defendant contended that the suspicion was aroused by the fact that the deceased was profoundly deaf and that the beneficiary was in the room at the time of the execution of the will.

[9] The evidence of Mr Campbell in particular leaves me satisfied to a high degree that the testator knew and approved the contents of the will. I am also entirely satisfied that the reason for the plaintiff remaining in the room was to assist Mr Campbell in ensuring that he accurately recorded the testator's intentions in the will. In those circumstances I direct that there should be an order decreeing probate of the will of 12 January 2001 in solemn form of law.

[10] On the counterclaim the first witness called by the defendant was David Kerr. He knew the defendant's father all his life. He said the family were very well respected. He said that he remembered a discussion about the

defendant putting up a shed on the land. The father told him that Brian was going to put the shed up on someone else's land but that the father have dissuaded him from that in case his son and the other man fell out. He said that the father told him that his son Brian was given permission to put the shed up on the family's land and he then said that the gardener was to get one side of the road and the farmer to get the other. This was apparently a reference to the plaintiff as a gardener and the defendant as the farmer. He said that this was about 1997 or 1998 and the work started in or about that time putting the shed up. He said that the plaintiff was an excellent gardener who had carried out brilliant work to the garden around the house.

[11] In cross-examination he agreed that he had had no conversation with the deceased. He had not discussed a will of any kind. He agreed that this was a general conversation. He agreed that the plaintiff did a lot with his family and was always with his mother if she was not well. He said that the deceased and the plaintiff were often together in the garden. The defendant was running the business. The plaintiff spent more time with his parents because the defendant was running a business. The defendant was often away at 5 a.m. to his farming and contracting duties. He said that the deceased was an astute businesswoman right to the end. He said that she was aware of the plaintiff's needs and the defendant's needs. She was an honest woman, reputable and a woman of her word.

[12] The defendant said that he saw the will a few days after his mother was buried. He said he was surprised because he always believed that he would get the ground and his brother would get the house and garden. He had always been interested in farming and was taught by his father how to plough with the tractor. His parents kept animals until the early 1980s and he helped with the feeding and cleaning while working as a dispatch clerk. His brother did not take much of an interest in the farm. Later on in the 1980s he would cut the grass and sowed fertiliser. He started his own business in 1986 having been in New Zealand for 7 or 8 months prior to that. Most years he took 2 cuts of silage off the land which probably took two or three days to allow for cutting and baling. He did not obtain any financial benefit from this. He needed a shed for his cattle have business in 1986 and between 1990 and 1994 he built a lean to on the land on which the main shed now stands. He discharged the costs of that personally. It was used for storage of the tractor and machinery. He expanded into agricultural subcontracting. In 1997 he started to build the main shed that is now on the land in the field which had been left to him. His father helped in digging the foundations. He had discussed the shed with his father and said that he was thinking of a farm shop at some stage in the future. His father agreed. His father decided that he should build the shed beside his existing workshops and he could always extend to the side later on. His father became ill in 1998. The shed was finished in either 2001 or 2002. He did quite a bit of the work himself. He paid contractors for other parts of the work. The contractors cost around

£25,000 in total. He planned to expand his business at some stage and if he wanted to do so the only flatland was that lying into the football field. Without some part of the football field he could not extend the shed in any practical and effective way. The shed was built on land owned by his mother and father and he was always led to believe that the land would be his. He worked at home for his parents as required without payment. Both his parents were involved in farming. With his mother he looked after pigs. His brother looked after the garden around the house and had no interest in farming. He told his parents of his business ideas. They gave him encouragement. Even when living away from home he always had breakfast with his mother and talked to her during that time. If he had known that the shed field was to be split from the football field he would not have gone ahead with the work at that location. He would not have built his initial shed in 1986, the lean to in the early 1990s or on the big shed. At times he worked very long hours.

[13] In cross-examination he said that he always assumed that the estate would be split as he said. He assumed that there would be some amicable agreement about monetary value. He thought he would get the four fields. His mother had only received some of the £35,000 cash after her sister died around 2002. He said there had been no difficulty between his brother and himself. He believed his parents were obliged to leave part of the estate to him. He did the work and took off the silage. He was the younger of the two brothers and left school with five O levels. He was self-employed whereas his brother was an employee. He had never suggested to his mother that she should go to a solicitor to put his father's affairs in order but trusted his mother to do the right thing. He did not know until two weeks before she died that she had made a will. His brother had told him about the will but had not told him what was in it. He had his own accountant since 1986 but had never included the shed as a fixed asset. He didn't believe that the issue of the shed ever came up with his accountant. He accepted that a few of the invoices identified by him were expenditure that may have been paid by his mother. Some of the invoices may have related to work done on the garden. When it was suggested that he got the land free to put up the shed and had a rent-free business he said that the work he did around the farm had more than compensated for the lack of rent. It was put to him than a valuer priced the rental value of the shed at £4500 per annum. He said that his profits were his own. The shop end of the business had only started in May 2002. Prior to that the premises had been used as workshops and storage. He accepted that his brother had used the shed from time to time. He accepted that he had normally earned substantially more than his brother in recent years and that he had inherited two fields at Killinchy from his aunt. He agreed that has brother had been a keen footballer. The BB had been allowed to play football on the field and floodlights had been provided in respect of it. Prior to being laid out as a football field it had been part of the shed field. He said that the bog field did not compensate him for the loss of the football field because it

had a steep incline. He agreed that there had been a planning application by his brother for a dwelling house on the ground on which the shed now stands quite a number of years ago. That application was made in 1988 and a further application was made in August 1995. Both were refused. He said that he had a portakabin office on the site from 1988 and he identified the boundary between the shed field and the football field as a hedge line and the gable of the shed.

[14] In defence of the counterclaim the plaintiff called a valuer, Mr Martin. He dealt with the valuation of the fields and valued the rental value of the shed at £4500 per annum. He said that the aunt's fields which comprised 3 ½ acres had special value because they neighboured other land. He said there was a 50-50 chance that expansion of the business of the shed would be allowed. He did not know the planning history of the shed. In cross-examination he agreed that there was a reasonable opportunity for expansion and that one could put an offset shed beside the existing shed. He agreed that would be a simple and neat way to carry out the expansion and said that there was room for a hard concrete area.

[15] The defendant further explained the topography of the land and identified those lands which were sloping. He said that the flat land around the shed adjoined the flat land at the football field. He said that the shed was 90' x 38' and that the rental was, therefore, higher than suggested by Mr Martin. If he put up an offset shed he would need approximately two thirds of an acre.

[16] The plaintiff said that he served his time in engineering. When his brother started business he did work on a crusher. He restored vintage ploughs for his father. He fixed tractors and other machinery for neighbours. He helped to put in the original shed. The football field was created when he was at school. He did car maintenance in the shed to put vehicles through MOT. He would need a shed for himself. He would like to erect a shed in the corner of the football field. He did repair work to a trap and his father won prizes for the pony and trap at local vintage rallies. He always tended the garden and the house and he had used the football pitch since he was at school. He had applied for planning permission in 1988 and 1995. His brother had done better financially than him. His mother knew that his aunt had left property to his brother. His mother had received money from that will. No one had told him that his brother was going to get that land. He explained that he had carried out extensive works to the garden. He had looked after his mother and his father. His brother regularly called at breakfast time.

[17] In cross-examination he agreed that he had bought his house under the right to buy scheme some 23 at 24 years ago. He intended to move to his mother's house and would sell his existing house. He said there was no

ground for a shed around the house. He agreed that he had only put a couple of cars through the MOT. He had not done so much work of that kind in the last couple of years. He was looking after the pony. His mother had never discussed property. He said that he was more sport minded that his brother. He did not have any problem when his brother erected the shed and started the business. He had told his mother to tell his brother about the contents of the will. He accepted that his brother had been good to his mother and father.

[18] There was no material difference between the parties on the appropriate legal principles. In order for the defendant to establish a proprietary estoppel it is necessary to establish an assurance, which may arise as a result of expectation or belief coupled with encouragement, reliance on the assurance and detriment. There must also be no bar to the equity. The fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine and the court must look at the matter in the round (Gillett v Holt [2001] Ch 210).

[19] Applying these principles in this case I conclude that no assurance of the type described above arose before 1997. The lodging of the two planning applications in 1988 and 1995 suggested that at the very least a different plan was being contemplated at that time. I consider, however, that after 1997 the defendant embarked on considerable expenditure and made a decision to focus his business where he did relying on the encouragement of his parents who were the joint owners of the property as a result of which he had an expectation and belief that the property associated with his business would be his. It seems clear to me that the defendant is a confident and capable businessman who has always sought to develop his business interests. I, therefore, conclude that the assurance affected not only the existing premises but also gave rise to an expectation and belief that there would be reasonable scope for development of the business. In my view the appropriate disposal in this case is to provide the defendant with title to such part of the ground which has not been left to him as would be required to construct an offset shed of identical size on that side of the existing shed lying into the football field. I will provide the parties with an opportunity to agree a form of order which reflects this decision taking into account any easements which may be required in order to effect such building work. I consider that such an outcome properly recognises the expectation created by the assurance while at the same time leaving largely undisturbed the disposition of the testator.