

1981 No. 62 SP

FALVEY

AND

FALVEY



Judgment of Mr. Justice Barron delivered the 28th day of July 1983.

This application arises in the following circumstances. *re: Barron's Case*

The testator died on 25th of August, 1971. He had been widowed and had re-married. He was survived by his second wife, by the three children of his first marriage Finbarr, Kevin the Plaintiff and Tadgh then aged 36, 30, and 23 years of age respectively and by the two children of his second marriage Gerrard and Brid then aged 14 and 12 respectively. He was a pharmacist by profession and was the owner of a successful chemist shop which carried on business in the city of — . This business had a full-time staff of four in addition to the testator which comprised the testator's wife and the Plaintiff's wife both of whom were qualified assistants and had worked in the pharmacy prior to their marriage, the Plaintiff who had no particular qualification and an assistant. The Plaintiff had worked in the shop since he left school. He had unfortunately failed his Leaving Certificate and

was unable to continue to higher education. However in the hope that he might yet do so he returned to school for a further year but unfortunately failed his Leaving Certificate on that occasion also.

In 1968 the testator became ill and underwent an operation. Cancer of the lung was diagnosed, he was out of the shop for some months as was his wife and during this period the Plaintiff and his wife were responsible for its day to day running though they were never at any time involved with the books. The day to day books were kept by the Defendant and the more important ones by the testator himself. Following his return to the shop the testator had a remission in his illness for approximately 18 months. He returned to hospital in 1980 and from then until his death was clearly dying and worked on and off in the shop. Again during this period his wife looked after him and also spent less time in the shop. In fact she appears to have come in only at lunchtime to help out those who were working full-time.

The testator was aware that he was dying, he discussed his will with his family and it was known and agreed that he would leave his business as to $\frac{2}{3}$ to his wife and as to $\frac{1}{3}$ to his son

Kevin. He made a will to this effect, which has not been produced in evidence as it is no longer in existence. In May, 1971 the testator changed his will. There is a conflict of evidence as to the circumstances surrounding this change. I prefer the evidence of the Plaintiff and his wife in so far as it conflicts with that of the Defendant. Their demeanour in the witness box was open and frank and in one important respect the evidence of the Plaintiff's wife was confirmed by the documents. The cash payments book in its record of wages paid confirms exactly the date upon which she says her husband left the shop. On the other hand the Defendant was less than candid. I do not accept that she did not know how much money her husband had in the wallet which she kept for him nor that she cannot remember the source of the funds placed in the three deposit accounts with the Bank of Ireland on three successive dates at the end of April 1971. She operated one of these accounts, not the Blackpool account, after her husband's death and she should have remembered this. Further her evidence that she received £140 per month by cheque is not borne out by the cheque payments book nor by the bank account sheets.

The circumstances which caused this change were relatively simple. One evening in the shop the Plaintiff had a row with his brother Tadgh who was working there on a temporary basis. Tadgh went home and complained to his father and step-mother that the Plaintiff had struck him in front of a customer. The Plaintiff denies this and I accept that there was merely an argument which did not take place in front of a customer. In any event the Plaintiff rang his step-mother to ask her to stop Tadgh seeing his father and distressing him, this she either would not or could not prevent. The Plaintiff went home to his parents house where he was involved in a row. As these things will the original cause was forgotten and the Defendant complained to her husband that she objected to the way which her daughter-in-law treated her in the shop. The latter was brought to the house, tempers were lost and the Plaintiff's wife was reduced to tears. The animosity shown by the Defendant was totally unexpected both by the Plaintiff and his wife. The Plaintiff indicated to his father that so long as his step-mother took that attitude he would not work in the shop. His father said that if he left he would cut him out of his will. At the beginning

of June the Plaintiff went on a month's training course as a medical representative and at the end of the month started on his new employment on a six month's trial basis. His wife remained working in the shop apparently at the request of the testator. It is clear from the evidence that a fairly trivial incident sparked off a serious family row. The testator must have changed his will almost immediately since his new will is dated the 18th of May, 1971 and the incident occurred in May. He died without changing this will. By its terms each of the children of his first marriage were left £1,000 and apart from other small or pecuniary legacies the entire estate was left to his wife.

The first question which I have to consider is whether the testator failed in his moral duty to his son Kevin to make proper provision for him by his will. I must do so in the context of the moral claims on his estate. Neither Finbarr nor Tadgh have made any claim that the testator failed in his moral duty towards them. Accordingly since the evidence does not disclose any other moral claim I have to consider the present application in the context of the moral obligation which the testator owed to the Defendant and his two younger children also. In the

present case the testator had considered his moral obligations carefully and decided that his major asset should be divided between his wife and two minor children on the one hand and his son Kevin on the other. His moral obligations to the former were clear. His moral obligation to his son Kevin was equally clear. He had been led to believe that his future lay in the shop. Both he and his wife had been paid on a joint basis at less than an economic wage and on the basis of an allowance rather than a salary. The justification expressed for so treating them was that ultimately they were working for themselves. In my view nothing occurred which lessened the testator's moral obligation towards Kevin. He behaved properly in the circumstances and his father had no reason to do what he did. It has been submitted on behalf of the Defendant that the obligation to provide for his son existed only so long as he worked in the shop. I don't accept this. The provision of a share in the business assumed family harmony. A lack of family harmony did not lessen the moral obligation though it would have been a reason for making alternative provision. The testator was no doubt upset by the family row which broke out, however, his reaction to it was not

headed and stubborn and I would like to think that he would have altered his will but for his illness. For whatever reason he did not. While I must express an objective view of the testator's moral obligation, independent of the subjective view of the testator and the family, I see no reason why this objective view should differ from the testator's own view expressed when he gave proper consideration to the nature of the provision to be made for Kevin at a time when he knew he was dying, and that any provision he made would soon take effect.

It was clear for whatever reason the Defendant did not want to work in the shop with her step-son and his wife. Since she was to have been the owner of the larger share in the business, the provision which a prudent parent would have made for Kevin would have been such as to have enabled him to set up on his own rather than to be chained to a family business. The size of such provision would have equated to the share which he would otherwise have had. In my view the testator had a moral obligation towards Kevin to leave him the equivalent of $\frac{1}{4}$ of his business and he failed in this duty.

Evidence has been adduced to establish the value of the

testator's estate at the date of his death. His assets comprised his house and its contents including his personal belongings and motor car, certain items of cash being prize bonds valued at £1,000 Government Stock value £376.50 and the cash from the three deposit accounts amounting to almost £4,000. In addition he had the assets used in relation to his business which comprised the premises his stock in trade his goodwill his cash in the bank and his book debts. As against this he had liabilities amounting to £4,731.50 for which trade creditors were £3,054. Details of the assets are contained in the Schedule of Assets. Evidence supporting the valuations given therein was adduced by the Defendant. In support of these valuations the business accounts over a period were produced in evidence, these include the entire assets of the deceased. However, it is perfectly easy to isolate the items relating only to the business. The evidence adduced on behalf of the Plaintiff and in particular that of his accountant was directed to showing the business accounts did not show the full picture and that some items were understated.

The premises and the goodwill have been valued separately. It seems to me that it would have been more appropriate to value

the business as a going concern. However, I must accept the evidence as it was given. Nevertheless there is duplication in the valuations carried out on this basis. If the premises are valued on the basis that there is a notional profit rent as there has been, then such rent must be charged against the profits of the business otherwise that benefit is valued twice. In the events which have happened there is such a short reversion now that the benefit of the profit rent is no longer of any value in respect of the premises. However it has been availed of over the years and accordingly I intend to treat the valuation of the goodwill on the basis upon which it has been given, that is, that the benefit of the notional profit rent has accrued to the business. This means that I will not accept the valuation of the premises itself on the basis of this notional profit rent. The evidence is that because of its short reversion the business now has merely a nominal value and I will accept that it had an equivalent nominal value in 1971.

I accept that the accounts do not state the full picture. I accept the reasoning of the Plaintiffs' accountant both as to profit margins and stock turnover. I accept that the reasonable

inference to be drawn from the wallet of cash and the monies deposited at the end of April 1971 is to the same effect. As regards the goodwill I prefer the basis of valuation given on behalf of the Plaintiff. A 20% return on super profits seems more reasonable than a return of 33 $\frac{1}{3}$ %. The assets of the business comprised its premises, its goodwill, its stock in trade and its book debts less its trade creditors. In so far as the latter exceeded the former, the assets should also be regarded as comprising sufficient cash in the bank to offset the difference. The balance of cash in the bank and cash elsewhere may properly be regarded as past profits belonging to the deceased and not to his business, the only reason that they appear to have belonged to the business is that his accounts dealt with the entire of his financial affairs. It is also clear that the remainder of his assets, that is his home, contents, motor car etc. had no reference to his business.

The value of the relevant assets at the date of death which I accept are as follows - so far as the premises are concerned they had a nominal value only, this has been valued in today's money as between £10,000 and £15,000. Accepting the evidence of

Mr. Boland that there has been a five fold inflation since 1971 this puts the value of the premises then on a nominal key money basis at between £2,000 and £3,000 and I would accept the mean figure of £2,500. The stock in trade has been re-valued on the basis of being turned over four times a year. It seems to me that this might be pitching the figure a little too high and allowing $4\frac{1}{2}$ times turnover a year produces a figure for stock of £4,510. The goodwill has been calculated on the basis of a 30% return. Of the figures shown this was not achieved in any of the years and I think it should be reduced slightly. If I re-calculate the figure on the basis of $28\frac{1}{2}\%$, that means taking off $1\frac{1}{2}\%$ from the total gross sales figures, it brings the figure for goodwill down to a figure of £4,640. Adding these three figures together produces a valuation of £11,650. A third of that would amount to £3,883 which I will round off at £4,000. The Plaintiff received £1,000 so in my view at the date of death of the testator proper additional provision ought to have been made for him in the amount of £3,000.

However there has been a disgraceful delay in this case and I cannot ignore the effects of this delay on the value of money.

Half of the delay was caused by the Probate action but there is ready explanation for the delay since the will was proved in solemn form which was the 21st July 1976. Nevertheless there is no suggestion that the Plaintiff has actively been responsible for any part of this and certainly as between him and the estate there is no ground for penalising him in any way because this delay has occurred. Apart from inflation I cannot disregard the change in circumstances of those to whom the testator owed a moral duty. The Plaintiff is now established as a $\frac{1}{4}$ owner of a pharmacy of which his wife is also a $\frac{1}{4}$ owner. To this extent he now has perhaps what his father intended for him but many years later. Although the business was started 8 years ago he did not feel sufficiently secure financially to give up his job until after the business had been established for 3 years. This suggests that it is now reasonably successful. However, I accept that there are heavy bank borrowings and that like other businesses in new shopping centres, the business has to pay a heavy rent for its premises. The testator's children by his second marriage are no longer children of 14 and 12 respectively. His son is now a qualified pharmacist working in the business and

his daughter is a laboratory technician having qualified as such in a regional college. At present she is unemployed. I do not regard the Plaintiff's present financial position such that having regard to those others to whom the testator owed a moral duty to provide for by his will I should make any alteration in the balance which I should have regarded as fair and just when the deceased died. In the circumstances I propose to declare that a proper provision now would be the equivalent in money terms of £3,000 then which on the evidence is a sum of £15,000 and I shall so order.

Henry Barron
28/4/83