Neutral Citation: [2013] IEHC 407

THE HIGH COURT

[2011 No. 7826P]

IN THE MATTER OF THE ESTATE OF F. DECEASED

BETWEEN

S. 1

PLAINTIFF

AND

P.R. 1 AND P.R. 2

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 23rd day of August, 2013.

A – PROCEDURAL AND FACTUAL BACKGROUND

Preliminary issues/Related proceedings

1. By order of the High Court (McGovern J.) made on 16th July, 2012 in these proceedings (the Plenary Proceedings) it was directed that certain preliminary issues be tried, namely:

> (a) whether the plaintiff is statute-barred from the reliefs at paras. (1), (2) and (3) of the prayer in the statement of claim by virtue of the provisions of s. 9 of the Civil Liability Act 1961 (the Act of 1961), these proceedings having been issued more than two years after the date of the death of F. Deceased (the Testator) on 6th July, 2008; and
>
> (b) whether the Court has jurisdiction to grant the relief sought by the plaintiff pursuant to s. 117 of the Succession Act 1965 (the Act of 1965) at paras. (5) and (6) of the prayer in the statement of claim, these proceedings "having issued more than six months after the first taking out of representation to the estate of the [Testator] which occurred on 15th October, 2010 and whether the said grant of representation was a valid one for the purposes of the running of time".

The order provided that the preliminary issues be listed for hearing together with an issue to be tried in High Court proceedings bearing Record No. 2011/663 SP (the Related Proceedings).

2. The Related Proceedings under Record No. 2011/663 SP are entitled:

> "In the matter of the estate of F. Deceased . . . and in the matter of s. 117 of the Succession Act 1965
>
> **BETWEEN:**
>
> **S. 2**
>
> **PLAINTIFF**
>
> **AND**
>
> **P.R. 1 and P.R. 2**
>
> **DEFENDANTS"**

It is not clear on the documentation before the Court whether a separate order directing the trial of a preliminary issue was perfected in the Related Proceedings. However, the preliminary issue which the Court has to determine in relation to the Related Proceedings is the issue outlined at (b) in paragraph 1 above.

3. The plaintiff in the Plenary Proceedings, S.1, and the plaintiff in the Related Proceedings, S. 2, are brothers, being sons of the Testator.

Time line

4. The time line which has given rise to the Plenary Proceedings and to the Related Proceedings is as follows:

- 4th March, 1996:

  The Testator made his last will and testament on 4th March, 1996 wherein he appointed his wife, M., or if she should predecease him, his son, S. 1, and the defendants, P.R. 1 and P.R. 2, to be executors and trustees thereof. The Testator's wife, M., did predecease him. It is common case that under the terms of the will the six children of the Testator, including S. 1 and S. 2, are the beneficial owners of his estate in equal shares.

- 6th July, 2008:

  The Testator died on 6th July, 2008.

- 5th July, 2010:

  The order of the High Court referred to in the grant of Letters of Administration next referred to was made under s. 27(4) of the Act of 1965 on 5th July, 2010. There is no copy of that order before the Court.

- 15th October, 2010:

  Letters of Administration of the estate of the Testator were granted by the Probate Office to A.A.L. on 15th October, 2010 and were expressed to be granted to A.A.L., who was described as a solicitor, as follows:

  > ". . . the person appointed by the Court pursuant to Section 27(4) of the Succession Act 1965 to be Administrator of the Estate of said deceased limited for the purpose of defending proceedings which
  >
  > . . . Bank intend instituting against the estate of the deceased."

  In other words, that grant of administration was what is normally referred to as an *ad litem* grant made pursuant to an order of the Court obtained by a creditor bank. Typically for *ad litem* grant, the gross and net values of the estate of the Testator were shown on the face of the grant as amounting to €10.

- 28th March, 2011:

  A grant of probate of the Testator's last will was made from the District Probate Registry at Limerick to S. 1 and the defendants on 28th March, 2011. The grant was in the usual form of a grant of probate and followed Form No. 6 of Appendix Q to the Rules of the Superior Courts 1986 (the Rules). It was recorded on the face of the grant of probate that an Inland Revenue affidavit had been delivered showing the gross value of the estate of the Testator at in excess of €25.8m and the net value at in excess of €23.8m.

- 11th July, 2011:

  By order of the Assistant Probate Officer dated 11th July, 2011, the grant of probate made on 28th March, 2011 was revoked, as the evidence discloses, because S. 1 signalled his intention to issue the Plenary Proceedings.

- 30th August, 2011:

  The Plenary Proceedings were initiated by a plenary summons which issued on 30th August, 2011. From the outset P.R. 1 and P.R. 2 were named as defendants and an appearance was entered on their behalf on 2nd September, 2011.

- 23rd September, 2011:

  The special summons in the Related Proceedings was issued on behalf of S. 2 on 23rd September, 2011. P.R. 1 and P.R. 2 were named as defendants from the outset and the history of the grant of probate was outlined in the endorsement of claim, wherein it was stated that the defendants were sued "in their capacity as remaining legal personal representatives" of the Testator. An appearance was entered on behalf of the defendants on 20th October, 2011.

- 21st November, 2011:

  Letters of administration of the estate of the Testator with the will annexed *de bonis non* were granted to the defendants by the District Probate Registry at Limerick on 21st November, 2011.

Procedural aspects of these proceedings

5. As has been recorded, the plenary summons in the Plenary Proceedings issued on 30th August, 2011. The statement of claim was delivered on 2nd September, 2011. The reliefs sought at paras. (1), (2) and (3) in the prayer in the statement of claim were as follows:

> "(1) A Declaration that [S. 1] is entitled to beneficial ownership of the shareholding in F. Co. Limited held by the Testator at the date of his death.
>
> (2) A Declaration that insofar as the Defendants hold the said shareholding they do so in trust for the Plaintiff absolutely.
>
> (3) A Declaration that the Estate of the Testator, is obliged to honour the Guarantee provided by the Testator, in respect of the borrowings for the purchase of lands at Blackacre, from F. Co. Limited."

In very broad outline, the basis on which S. 1's entitlement to the reliefs at (1) and (2) is pleaded in the statement of claim is that in July 2000 S. 1, when he was changing employment, was asked by his father, the Testator, to come and work with him in his business instead of taking up an offer of employment which S. 1 was considering. The Testator promised S. 1 that, if he came to work with the Testator, the Testator would give him his entire shareholding in F. Co. Limited. The plaintiff accepted that proposal and the two parties shook hands on the "deal". The said promise, which it is pleaded was repeated on many occasions, was made by the Testator with the intention and in the knowledge that S. 1 would act in reliance on it and would act to his detriment in reliance on it. S. 1 turned down the offer of employment he had and commenced working with the Testator in "the [F.] Group of Companies". While S. 1's contract of employment was with one company in the Group, F. Contractors Ltd., he provided services to all the companies in the Group and, at the request of the Testator, accountancy and tax advice to various connected persons and companies. His salary was substantially lower than he would have earned if he had taken up the alternative employment on offer in July 2000. S. 1 alleged that, in breach of the assurances given by the Testator to him, the Testator did not during his lifetime make provision for the transfer of the ownership of F. Co. Limited to him, nor did he make such provision by making a new will or altering the existing will by codicil. Accordingly, S. 1 asserted that, insofar as the defendants, as personal representatives of the Testator, hold the shareholding in F. Co. Limited, they do so in trust for him absolutely.

6. The basis on which S. 1 pleads entitlement to the relief set out at (3) in the prayer for relief in the plenary summons is that in December 2006 he purchased about two acres of land at Blackacre from F. Co. Limited for the sum of €1.2m. He was assured by the Testator that following the sale by another company, described "as nominee for" the Testator, of 4.6 acres of land adjoining Blackacre, S. 1's borrowings from a bank (S. 1's Bank) to finance the purchase were to be discharged. The Testator died before the completion of the sale of the adjoining lands. The plaintiff is presently indebted to S. 1's Bank in the sum of approximately €1.7m in respect of his borrowings for the purchase of the two acres at Blackacre. It is pleaded that the estate of the Testator is obliged to honour the guarantee given by the Testator.

7. The reliefs sought by the plaintiff at paras. (5) and (6) in the prayer in the statement of claim referred to in the order of 16th July, 2012 are the following reliefs:

> "(5) Alternatively, a Declaration pursuant to Section 117 of the Succession Act, 1965 that the [Testator] has failed in his moral duty to make proper provision for the Plaintiff in accordance with his means.
>
> (6) An order pursuant to Section 117 of the Succession Act, 1965 making such provision for the Plaintiff out of the estate of the [Testator] as this Honourable Court thinks just."

In the statement of claim, S. 1 merely asserted that the Testator had failed in his moral duty to make proper provision for him in accordance with the Testator's means.

8. In their defence delivered on 25th April, 2012, the defendants pleaded, by way of preliminary objections, that –

> (a) the reliefs sought by S. 1 at paras. (1), (2) and (3) of the prayer in the statement of claim are statute-barred by virtue of the provisions of s. 9 of the Act of 1961; and
>
> (b) the Court does not have jurisdiction to grant the reliefs sought pursuant to s. 117 of the Act of 1965 at paras. (5) and (6) of the prayer in the statement of claim, these proceedings having issued more than six months after the first taking out of representation to the estate of the Testator, which is asserted to be the grant of administration *ad litem* granted on 15th October, 2010, pursuant to the order of the High Court dated 5th July, 2010.

More or less contemporaneously with delivery of the defence the defendants issued the motion which led to the order dated 16th July, 2012.

Procedural aspects of the Related Proceedings
9. As has already been recorded, the special summons in the Related Proceedings was issued on behalf of S. 2 on 23rd September, 2011. It was grounded on an affidavit sworn by S. 2 on 7th March, 2012. The replying affidavit on behalf of the defendants was sworn by P.R. 2 on 13th April, 2012. The defendants' motion seeking the trial of a preliminary issue as to the application of s. 117(6) of the Act of 1965 issued on 14th May, 2012.

Structure of remainder of the judgment
10. The issue in relation to the application of s. 117(6) of the Act of 1965 to the claims by S. 1 and S. 2 under s. 117 will be dealt with in section B of this judgment. The issue in relation to the application to s. 9 of the Act of 1961 to the other claims of S. 1 in the Plenary Proceedings will be dealt with in section C of this judgment.

B – SECTION 117(6) OF THE ACT OF 1965 ISSUE

Relevant provisions of the Act of 1965
11. It is convenient to deal with this preliminary issue first, as it affects both the plaintiff in the Plenary Proceedings, S. 1, and the plaintiff in the Related Proceedings, S. 2. Although s. 117 has been in operation for more than forty six years, the preliminary issue apparently raises a point which has not been previously decided by the High Court.

12. Section 117 of the Act of 1965 is to be found in Part IX of the Act of 1965, which is headed "Legal Right of Testator's Spouse and Provision for Children". Sub-section (1) of s. 109, which is the first provision in Part IX, provides that where a person dies wholly or partly testate leaving a spouse or children or both spouse and children, the provisions of Part IX shall have effect. Sub-section (2) of s. 109 provides that in Part IX references to the estate of the Testator are to all estate to which he is beneficially entitled for an estate or interest not ceasing on his death and remaining after payment of all expenses, debts and liabilities, other than estate duty (not of relevance in this case as the Testator died after the coming into operation of the Capital Acquisitions Tax Act 1976), payable thereout.

13. The provision for children is made in s. 117. Sub-section (1) of s. 117 provides:

> "Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just."

Before the Court can make a determination under s. 117, the Testator's will, that is to say, his last will and testament, including any codicil or codicils thereto, has to be identifiable, as has his estate, as defined for the purposes of Part IX. As originally enacted, subs. (6) of s. 117 provided as follows:

> "An order under this section shall not be made except on an application made within twelve months from the first taking out of representation of the deceased's estate."

Sub-section (6) was amended by s. 46 of the Family Law (Divorce) Act 1996 by the substitution of "6 months" for "twelve months".

14. The legal controversy between the defendants, as personal representatives of the Testator, on the one hand, and S. 1 and S. 2, as applicants under s. 117, on the other hand, is when did "the first taking out of representation of the [Testator's] estate" occur: did it occur when the grant of administration *ad litem* issued to A.A.L. on 15th October, 2010 pursuant to the order of the Court made on 5th July, 2010 under s. 27(4) of the Act of 1965, as submitted on behalf of the defendants; or did it occur when on 28th March, 2011 the grant of probate issued to S. 1 and the defendants, as S. 1 and S. 2 contend. The resolution of the controversy turns on the proper construction of subs. (6). The interpretation provision in the Act of 1965, s. 3(1), contains the following definitions:

(a) "representation" means probate or administration;

(b) "probate" means probate of a will;

(c) "administration", in relation to the estate of a deceased person, means letter of administration, whether with or without a will annexed, and whether granted for special or limited purposes; and

(d) "grant" means grant of representation.

15. Part IV of the Act of 1965 deals with "Grants of Representation". The provision on foot of which A.A.L. was appointed administrator *ad litem*, s. 27(4) provides:

> "Where by reason of any special circumstances it appears to the High Court
>
> . . . to be necessary or expedient to do so, the Court may order that administration be granted to such person as it thinks fit."

Construction of s. 117(6): the law

16. It would appear that the effect of s. 117(6) was first considered by the High Court in *MPD & Ors. v. MD* [1981] ILRM 179. The problem in that case was that the probate of the will of the testator was granted to the defendant on 25th September, 1978, whereas the summons seeking a declaration under s. 117 of the Act of 1965 was not issued until 16th October, 1979. At the time, s. 117(6) was in its original form. An issue which the High Court had to consider in that case was whether s. 127 of the Act of 1965 applied to an application under s. 117. Section 127, provides that s. 49 of the Statute of Limitations 1957, which amends s. 49 and extends the periods of limitation fixed by that Act where the person to whom a right of action accrued was under a disability, shall have effect in relation to an action in respect of certain specified claims to the estate of a deceased person. The issue which the Court had to decide was whether s. 127 covered an application under s. 117. It was held that it did not. Carroll J., having given an example of a situation in which an application under s. 117 might not have been considered appropriate initially, but might be considered necessary later, went on to state (at p. 183):

> "If there is no extension of time under s. 127 for the infant children, they are deprived of their remedy under s. 117. I am sure that there are many other examples which would show that there are compelling reasons why a time limit of twelve months set out in s. 117(6) should be mitigated by the application of s. 49 of the Statute of Limitations as amended by s. 127 of the Succession Act 1965, or in some other way.
>
> Equally there are reasons why the administration of estates should not be delayed beyond reasonable time. This was adverted to by the Supreme Court in *Moynihan v. Greensmith* [1977] I.R. 55 at 72."

17. As I have stated, in *MPD & Ors. v. MD*, Carroll J. found that s. 127 does not apply to an application under s. 117. She then went on to consider whether the wording of s. 117(6) precluded her from making the order sought under s. 117, even if she was satisfied that such an order should be made. She stated (at p. 184):

> "Normally, unless a defendant specifically relies on the defence of effluxion of time as barring a claim, the claim will be decided on the merits. However, this appears to me to be a case where both the right and the remedy are barred. I am reluctantly forced to the conclusion that s. 117(6) lays down a strict time limit which goes to the jurisdiction of the court and which cannot be ignored . . .."

I respectfully agree with that conclusion.

18. Of course, in this case, S. 1 and S. 2 being of full age, the issue of the application or otherwise of s. 127 to an application under s. 117 is not material. However, the judgment of Carroll J. and subsequent consideration of s. 117(6) illustrates the legislative policy underlying that strict provision.

19. In a report of the Law Reform Commission published in 1989 (LRC 30 – 1989), the Law Reform made the following recommendation in the report which was subsequently submitted to the then Attorney General in June 1989:

> "We recommend that s. 117(6) of the Succession Act be amended so as to give a discretion to the court to extend the one year time limit within which applications may be made."

That recommendation was never implemented. Indeed, what happened in 1976, as recorded earlier, was that s. 117(6) was amended and the time limit was reduced from twelve months to six months.

20. On the issue of construction of s. 117(6) with which the Court is concerned here, the meaning of "first taking out of representation", the law on a corresponding statutory provision in the United Kingdom gives some guidance. The relevant statute is the Inheritance (Provision for Family and Dependants) Act 1975 (the Act of 1975), which empowers the Court to make orders for the making out of the estate of a deceased person of provision for, *inter alia*, spouses and children. What is interesting for present purposes is that s. 4 imposes a time-limit on applications to court and it provides that such an application –

> ". . . shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out."

Section 23 specifically addresses the determination of the date on which representation is first taken out and provides that:

> "In considering for the purposes of this Act when representation with respect to the estate of a deceased was first taken out, a grant limited to settled land or to trust property shall be left out of account, and a grant limited to real estate or to personal estate shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time."

21. The Court was referred to the commentary in *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (20th Ed.) at para. 58 – 13 on those provisions, where, having outlined the effect of s. 4 and s. 23, the editors state:

> "The purpose of this condition is to avoid delay in the administration and distribution of estates where there might be doubts as to whether an application is likely to be made. It thus affords simple protection to the principle of the executor's year.

In this jurisdiction, the "executor's year" is reflected in s. 62 of the Act of 1965, which imposes an obligation on the personal representatives of a deceased person to distribute his estate as soon after his death as is reasonably practicable, but provides that proceedings against the personal representatives in respect of their failure to distribute shall not, without leave of the Court, be brought before the expiration of one year from the date of the death of the deceased.

22. It is reasonable to infer that, in this jurisdiction, the primary consideration which informs legislative policy in relation to the strict unextendable time limit for initiating an application under s. 117 is the avoidance of delay in the administration and distribution of estates.

23. Two matters are adverted to in the footnotes on para. 58 – 13 in *Williams et al.*, which I consider give useful guidance. The first is apropos of s. 23 of the 1975 Act, where the editors submit that, by analogy, other limited grants, for example, those *ad colligenda bona* or *pendente lite*, do not count either, citing *Re Johnson* referred to below. The second is the statement by the editors that the time limit in s. 4 is not merely procedural. It is substantive, citing *Re Salmon (Deceased)* [1981] Ch. 167, which was a decision of Sir Robert Megarry V-C refusing an extension of time under s. 4, which he described as "a substantive statutory time limit, not one that is merely procedural".

24. The decision of Latey J. in *Re Johnson (Paul Anthony) (Deceased)* [1987] CLY 3882 cited in *Williams et al*. is persuasive. In that case, a limited grant had been made in 1983 to the deceased's estate to two solicitors, limited to pursuing negligence claims in relation to the road accident in which he had died. Probate of the deceased's will was granted in 1987. The question arose whether time ran under s. 4 of the Act of 1975 from the date of the limited grant or of the full grant of probate. Latey J. held that the limited grant was not "the first taking out of representation required for time to begin to run under s. 4 as it merely enabled a particular thing to be done in relation to the estate and did not enable the distribution to take place". As has been noted, *Williams et al*. cite that authority at para. 58 – 13, footnote 65. Later, they summarise the law in a passage following the passage which I have quoted earlier, as follows:

> "The period of six months runs from the date when an effective or valid grant is first taken out so that if a will is first proved in common and then later in solemn form a fresh period of six months will not arise and run from the date of the solemn form grant. On the other hand if a later will is proved and displaces the earlier probate the period runs from the later (effective) grant."

25. That leads to the core question on the preliminary issue in relation to the application of s. 117(6), namely, what is the meaning of the expression "first taking out of representation of the deceased's estate" in s. 117(6). Does it mean the date when an effective grant was first taken out, as suggested in *Williams et al.*, and, if so, can a grant to an administrator *ad litem* be regarded as an effective grant?

26. The proper approach to be adopted in construing a statute is outlined in the following passage from the judgment of Denham J. in *DB v. Minister for Health* [2003] 3 I.R. 12 (at p. 21):

> "In construing statutes, words should be given their natural and ordinary meaning. The approach taken by the courts to the construction of statutes was described by Blayney J. in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101. He emphasised that the cardinal rule for the construction of statutes was that they be construed according to the intention expressed in the Acts themselves. If the words of the statute are precise and unambiguous then no more is necessary than to give them their ordinary sense. When the words are clear and unambiguous they declare best the intention of the legislature. If the meaning of the statute is not plain, then a court may move on to apply other rules of construction; it is not the role of the court to speculate as to the intention of the legislature. In that case I held also that statutes should be construed according to the intention expressed in the legislation and that the words used in the statute declare best the intent of the Act."

27. In her judgment in *DB v Minister for Health*, McGuinness J., having quoted from judgments in the Supreme Court in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, and the judgment of Keane J. in *Mulcahy v. Minister for the Marine* (Unreported, High Court, Keane J., 4th November, 1994) summarised the effect of the authorities as follows:

> "It may, I think, be safe to sum up the judicial *dicta* in this way. In the interpretation of statutes the starting point should be the literal approach - the plain ordinary meaning of the words used. The purposive approach may also be of considerable assistance, frequently, but not invariably, where the literal approach leads to ambiguity, lack of clarity, self-contradiction, or even absurdity. In the interpretation of a section it is also necessary to consider the Act as a whole."

28. Of course, the decision of the Supreme Court in *DB v. Minister for Health* pre-dated the coming into operation of the Interpretation Act 2005 (the Act of 2005) and, in particular, s. 5 of that Act. Nonetheless, the prevailing view is "that the literal rule remains the primary rule of interpretation" (*per* Hogan J. in *Children's University Hospital Temple Street v. CD* [2011] 1 I.R. 665 at p. 671).

29. Section 5 of the Act of 2005 provides as follows:

> "In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of –
>
> (i) . . . the Oireachtas, or
>
> (ii) . . .,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas . . ., where that intention

can be ascertained from the Act as a whole."

Application of rules of construction to s. 117(6)
30. When one looks at s. 117(6) on its own but incorporating the definitions contained in s. 3 of the Act of 1965, "first taking out of representation" reads as follows: first taking out probate of a will or letters of administration, whether with or without a will annexed, and whether granted for special or limited purposes. Such a reading would mean that, once a grant for a limited purpose, such as a grant to substantiate proceedings of the type granted to A.A.L. was extracted, time would start to run for the purposes of s. 117(6). However, when one looks at the Act of 1965 as a whole, as one is required to do at common law and under s. 5 of the Act of 2005, to ascertain the intention of the Oireachtas, it becomes obvious that the Oireachtas could not have intended that a grant limited for a purpose, such as a grant of administration *ad litem*, would start time running against a prospective applicant under s. 117.

31. As has been pointed out earlier, before the Court can determine whether to make an order under subs. (1) of s. 117 –

(a) the terms of the last will, including any codicils, of the Testator must have been proved either by a grant of probate or a grant of Letters of Administration with the will annexed, and

(b) the estate of the Testator must be identifiable.

Otherwise, the Court could not form a view as to

(i) what provision had been made by the Testator either by his will or otherwise, his will meaning his last will validly executed in accordance with law, hence the necessity for requirement (a), or

(ii) whether the Testator had made proper provision for the child applicant in accordance with his means, hence the necessity for requirement (b).

The limited grant which issued to A.A.L. on 15th October, 2010 did not fulfil either of those requirements. First, the Testator's will of 4th March, 1996 was not annexed to it and that will had not been proved in common form as the valid last will of the Testator until the grant of probate issued on 28th March, 2011. Secondly, the extent of the estate of the Testator was not established. While, obviously, an Inland Revenue affidavit was filed, it is clear on the face of the limited grant that the Inland Revenue affidavit, in accordance with normal practice in such cases, only showed nominal assets.

32. Further and significantly, under the limited grant of 15th October, 2010, the authority of A.A.L. was limited for the purpose of defending the proceedings which the creditor bank intended to bring against the estate of Testator. If an application under s. 117 was initiated against A.A.L., as defendant as representing the estate of the Testator, it could not be prosecuted because A.A.L. had no authority from the Court or otherwise to defend such an application.

33. Accordingly, it seems to me that, when one considers subs. (6) of s. 117 in the context of the Act of 1965 as a whole, the intention of the Oireachtas cannot have been that a grant of administration *ad litem* would trigger the commencement of the limitation period provided for in s. 117(6). On the contrary, it must have been the intention of the Oireachtas that only a grant of probate or a grant of administration with the will annexed granted on terms such as would enable –

(a) a prospective applicant under s. 117 to prosecute his application against the personal representatives,

(b) the personal representatives to defend, or, if they thought fit, compromise the application, and

(c) the Court to adjudicate on the application,

in order words, a grant capable of enabling a s. 117 application to be effectively prosecuted, could be regarded as constituting "representation" for the purposes of subs. (6) of s. 117, so as to trigger the commencement of the limitation period against a prospective applicant under s. 117.

34. That interpretation is not in any way at variance with the legislative policy which is discernible in the strict unextendable time limit imposed by s. 117(6). The administration of the estate of a testator and its proper distribution, having regard to potential claims under s. 117, necessitates the type of grant of representation suggested as being necessary to trigger the commencement of the limitation period in s. 117(6), in other words, an effective grant. Therefore, there can be no additional delay factor consequential on such interpretation.

35. I have no doubt that it is open to the Court to interpret "first taking out of representation" in subs. (6) of s. 117 in the manner which I have indicated and to conclude that such interpretation must have been the intention of the Oireachtas on either of two bases. The first is the proper application of s. 3(1) of the Act of 1965. The definitions in that sub-section are expressed at the commencement of the sub-section to apply "except where the context otherwise requires". I consider that it has been demonstrated that the application of subs. (6) of s. 117, in the overall context of the provisions of the Act of 1965 and, in particular, the totality of s. 117, requires that "representation" in that sub-section be given the meaning which I consider the Oireachtas must have intended. Alternatively, insofar as it is necessary to rely on it, s. 5 of the Act of 2005 permits the Court to give the expression "representation" in that sub-section a construction that reflects the plain intention of the Oireachtas ascertained from the Act of 1965 as a whole, because a literal interpretation by applying the definitions in s. 3(1) of the Act of 1965 simpliciter would be both absurd and fail to reflect the plain intention of the Oireachtas.

Answer to preliminary issue on s. 117(6) of the Act of 1965
36. I consider that both in relation to S. 1 and S. 2, the answer to the issue as to the application of s. 117(6) should be formulated somewhat differently to the question.

37. Therefore, I find that –

(a) S. 1, by having made the application for relief under s. 117 of the Act of 1965 by plenary summons which issued within six months of the issue of the grant of probate of the will of the Testator on 28th March, 2011, made that application within the time limited in s. 117(6) of the Act of 1965 and the Court does have jurisdiction to hear it;

(b) S. 2 by having made the application for relief under s. 117 of the Act of 1965 by special summons which issued within

six months of the issue of the grant of probate of the will of the Testator on 28th March, 2011, made that application within the time limited in s. 117(6) of the Act of 1965 and the Court does have jurisdiction to hear it.

C – SECTION 9 OF THE ACT OF 1961 ISSUE

Relevant provisions of the Act of 1961

38. It will be recalled that this issue arises only in respect of the Plenary Proceedings in which S. 1 is plaintiff.

39. The time line set out earlier is a chronological representation of a statement of facts put before the Court, which I understand was agreed between the parties. In relation to the s. 9 issue and, in particular, the facts on which S. 1 grounds his claim for the reliefs sought at paras. (1), (2) and (3) of the prayer in the statement of claim, no agreed statement of facts has been put before the Court. Although the moving parties on the preliminary issue, the defendants, did not so indicate, it must be assumed that they are accepting, for the purposes of the trial of the preliminary issue, the facts alleged by S. 1 in his statement of claim, having regard to the decision of the High Court (Lynch J.) in *McCabe v. Ireland* [1999] 4 I.R. 151. The analysis which follows is based on that assumption.

40. Section 8(1) of the Act of 1961 provides as follows:

> "On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) subsisting against him shall survive against his estate."

Excepted causes of action are defined in s. 6 of the Act of 1961. None of the causes of action asserted by S. 1 comes within the excepted causes of action.

41. Section 9 of the Act of 1961 provides:

> "(1) In this section 'the relevant period' means the period of limitation prescribed by the Statute of Limitations or any other limitation enactment.
>
> (2) No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either –
>
> (a) proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or
>
> (b) proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires."

The basis on which the defendants contend that any cause of action as the plaintiff, S. 1, may have against the estate of the Testator in respect of the reliefs at paras. (1), (2) and (3) is statute-barred is that –

> (i) it is a "cause of action . . . which has survived against the estate" of the Testator within the meaning of subs. (2) of s. 9; and,
>
> (ii) the Plenary Proceedings clearly not having been commenced prior to or being pending at the date of the death of the Testator, in compliance with paragraph (b) of subs. (2), the proceedings should have been commenced within two years after the death of the Testator.

Whether the defendants are correct in their contention is a matter of construction of s. 9.

42. Apart from the authorities usually relied on as to the approach the Court should adopt to the construction of statutes, for example, *Howard v. Commissioner of Public Works* [1994] 1 I.R. 101 and *D.B. v. Minister for Health* referred to earlier, in effect the parties to this issue have relied on four authorities, which I propose considering in chronological order.

43. The earliest is the judgment of the High Court (Barron J.) in *Bank of Ireland v. O'Keeffe* [1987] I.R. 47. The facts in that case were that in November 1980, Michael O'Keeffe and two others had entered into a continuing guarantee with Bank of Ireland whereby they jointly and severally agreed to pay on demand up to a limit of €70,000 and interest monies which were owed by a company to Bank of Ireland. Mr. O'Keeffe died on 11th February, 1982. A demand for payment on foot of the guarantee was subsequently made against his estate on 6th May, 1982 by Bank of England. Proceedings were instituted against the defendant, as legal personal representative of Michael O'Keeffe, on 19th February, 1985 for monies due on foot of the guarantee. Barron J. rejected the defendant's submission that the claim was statute-barred by virtue of s. 9(2) of the Act of 1961. He stated (at p. 50):

> "The claim which is brought is one which was not maintainable until after demand made and no cause of action could have arisen until such demand was made — see *In re: J. Brown's Estate. Brown v. Brown* [1893] 2 Ch. 300. In that case there was a joint and several covenant in a mortgage by the deceased and his son to pay the principal on demand and in the meantime to pay interest. The deceased joined in the mortgage as a surety only. Several years after his death a demand was made against his estate on foot of the covenant. It was held that no cause of action had accrued against his estate until such demand. It seems to me that similarly in the present case no cause of action existed whereby the plaintiff could sue either the deceased or his estate until demand had been made. Since this demand was not made until after the death of the deceased, it follows that there was no cause of action subsisting against him at the date of death. Accordingly, the defence fails."

44. Counsel for S. 1 invoked the decision in *Bank of Ireland v. O'Keeffe* in answer to the defendants' contention that S. 1's claim for the declaration sought in para. (3) of the prayer in the statement of claim that the Testator is obliged to honour the guarantee allegedly given by the Testator to S. 1 is statute-barred. It was stated in S. 1's written legal submissions that "demand was made by S. 1's Bank by letter dated 16th July, 2012". There is no evidence of that statement before the Court but, in any event, I fail to see its relevance. I assume that what it is intended to convey is that S. 1's Bank made a demand on S. 1 to repay the money owed to it by him. However, as regards the relief sought by S. 1 at para. (3) in the prayer in the statement of claim, there is no nexus between

the case as pleaded in the statement of claim and S. 1's Bank calling in a debt. It seems to me that the reliance by S. 1 on the calling in of the debt due by him to S. 1's Bank as an answer to the defendants' plea that the claim on the guarantee allegedly given by the Testator to S. 1 is statute-barred is wholly misconceived.

45. However, if the basis of the reliance by S. 1 on the decision in *Bank of Ireland v. O'Keeffe* is that the money which S. 1 contends was due to him by the Testator to discharge his indebtedness to S. 1's Bank did not, as a matter of fact, become payable by the Testator during his lifetime and only became payable after his death for some other reason, for example, that the sale of the lands adjoining Blackacre was not completed until after the Testator's death, that authority may be of relevance. However, I think I am correct in stating that such argument was not articulated on behalf of S. 1. Having read all of the pleadings in the Plenary Proceedings carefully, and, in particular, the defence delivered on behalf of the defendants, it appears that the involvement of the Testator in relation to the borrowings by S. 1 may have been much more complicated than is pleaded in the statement of claim. The case being made by S. 1 in relation to the alleged guarantee given by the Testator to him, as elaborated on in the replies to notice for particulars, in my view, lacks clarity and is confusing. In the circumstances, in view of the lack of clarity, and in the absence of an agreed statement of facts in relation to the underlying facts of this aspect of the claim of S. 1, I consider that it would be inappropriate for the Court to express a definitive view on the s. 9 issue as regards the relief claimed at para. (3) in the prayer in the statement of claim. Therefore, it remains an issue to be resolved by the parties to the Plenary Proceedings in whatever way they think fit.

46. Chronologically, the next of the four authorities is a decision of the High Court (Barron J.) in *Reidy v. McGreevy* (Unreported, High Court, Barron J., 19th March, 1993). One aspect of that case was that the plaintiff was the son of the testator whom he alleged had made certain promises to him which gave rise to a constructive trust. Dealing with the claim based on the existence of a constructive trust, Barron J. stated:

> "The nature and extent of the claim is dependent upon the facts. What may be unconscionable upon one set of facts may not be on another set. So, depending upon the facts, the plaintiff may be entitled to an estate in the property; to a charge over it; or to nothing. But whatever the facts, the claim could not be maintained until the death of the testator because it could not have been ascertained until then that he had failed to honour his promise. Of course if he had repudiated his promise during his lifetime, this would have given rise to a cause of action at that stage. That, however, is not the case."

The two later decisions are irreconcilable with that decision.

47. The next judgment is the judgment of Fennelly J. delivered on 13th March, 2006 on a Circuit appeal in Monaghan in a matter entitled *Corrigan v. Martin*, a copy of which was put before the Court. The plaintiff in that case alleged that, while working on the testator's farm he had suffered injury in a tractor accident. The testator was not insured and, in consideration of forbearance to sue, it was alleged that the testator orally agreed that "he would transfer and/or devise the Lands to him". It was further alleged that the plaintiff had worked on the lands. Insofar as is relevant for present purposes, the plaintiff's claim was for specific performance of the alleged agreement. The testator had died on 29th December, 2000, but the proceedings were not issued until 24th July, 2004. The defendant pleaded that the plaintiff's claim was barred by the provisions of s. 9 of the Act of 1961. In his judgment, Fennelly considered s. 8(1) of the Act of 1961 and its application to "all causes of action . . . subsisting against him . . .". He stated:

> "The Oireachtas intended that provision to apply to all causes of action coming into existence right up to the point of death itself. It is unreal and almost metaphysical to distinguish between causes of action existing immediately prior to the death and those which matured on the death itself. I do not believe that the Oireachtas can have intended to make such a fine distinction. It could serve no useful purpose which has been identified in this case."

48. Fennelly J., emphasising that the case before him was a case in contract and that contract claims were not historically affected by the maxim *action personalis moritur cum persona*, quoted a passage from the judgment of O'Higgins C.J. in *Moynihan v. Greensmyth* [1977] I.R. 55, which concerned a claim on behalf of an infant plaintiff in tort. Fennelly J. stated that he believed that the Supreme Court was drawing attention to general policy considerations affecting claims against estates of deceased persons, and he continued:

> "One relevant consideration is that those charged as executors or administrators of estates of deceased persons are entitled and indeed bound to carry out their tasks with reasonable expedition and that creditors of the estate and ultimately the beneficiaries are entitled to have the estate administered in a reasonable time. I believe the Oireachtas deliberately chose to impose a short but fair time limit on claims so that these desirable objectives would be attained."

49. A rather ingenious argument had been advanced on behalf of the plaintiff in *Corrigan v. Martin*, namely, that there is no limitation period for an action for specific performance laid down in the Statute of Limitations 1957, and, therefore, no "relevant period", so sub-paragraph (b) of s. 9(2) could not apply. On that point Fennelly J. stated:

> "That, in my view, is a misinterpretation of the provision. The important and governing words are the introductory ones. The action cannot be maintained unless the plaintiff can bring himself within one of the two sub-paragraphs, in this case sub-paragraph (b). That is not affected by the fact that there is no 'relevant period' for the purposes of the Statute of Limitations. The applicable period is the one which 'first expires". That may or may not be the two year period. If the 'relevant period' expires within two years of the death, the claim is barred. If there is no such period it is barred after two years. I believe this interpretation is in accordance with commonsense and with the clear intention of the legislature."

Fennelly J. held that the plaintiff's claim was barred by the provisions of s. 9 of the Act of 1961.

50. The most recent authority referred to by the parties is the decision of the High Court (O'Keeffe J.) in *Prendergast v. McLaughlin* [2011] 1 I.R. 102. The facts in this case were that the plaintiff had been a neighbour of the deceased. He claimed a declaration that he was entitled to the entire beneficial interest in lands the deceased owned, based on promises made by the deceased during his lifetime that he would bequeath the lands in question to the plaintiff. The deceased had died on 28th August, 2003, but the plaintiff did not institute his proceedings until 25th July, 2006. The issue the Court had to determine was a preliminary issue as to whether the plaintiff's claim was statute-barred. Unlike this case, there was an agreed statement of facts for the purpose of determining the plenary issue, which addressed the facts underlying the plaintiff's claim that he was entitled to the entire beneficial ownership in the lands, outlining what the plaintiff claimed transpired between him and the deceased. To digress briefly, in my view, there should have been a similar agreed statement of facts in this case as to the facts underlying the claims of S. 1 which the defendants contend are statute-barred by s. 9 and, if there had been, the Court could probably have determined the issue in relation to the claim at para. (3) of the prayer in the statement of claim. In any event, in his judgment O'Keeffe J. addressed the nature of the plaintiff's cause of

action as follows (at para. 30):

> "I accept the defendant's submission that the plaintiff's cause of action is founded in contract or *quasi*-contract as the plaintiff is suing the defendant in his capacity as personal representative of the deceased . . . for breach of the deceased's promise to bequeath the lands to the plaintiff. The breach could only have occurred during the life time of the deceased and the cause of action therefore accrued before the death of the deceased. I also conclude, based on the agreed facts, that the plaintiff's claim can alternatively be based on promissory estoppel or equity. As such it is not a claim arising after the death of the deceased but a claim subsisting at death, namely, the failure of the deceased to execute a will bequeathing the lands to the plaintiff during his lifetime. I do accept that the evidence relating to such cause of action emerged after death, but the plaintiff's cause of action in contract, quasi-contract or in equity subsisted during the lifetime of the deceased. I reject the plaintiff's submission to the contrary."

51. O'Keeffe J. went on to consider the authorities to which reference has been made earlier. He stated that he preferred the reasoning in *Corrigan v. Martin* to that in *Reidy v. McGreevy* and he adopted the passage from the judgment of Fennelly J. which I have quoted earlier as to the application of s. 8(1) of the Act of 1961 to "all causes of action . . . subsisting against him". He expressed the view that the facts in *Bank of Ireland v. O'Keeffe* were distinguishable from the facts of the case before him, because the cause of action only arose once Bank of Ireland had issued the demand on foot of the guarantee. On the specifics of the case before him, O'Keeffe J. compared the agreement Fennelly J. had to consider, whereby the testator would "transfer and/devise" the lands to the plaintiff to the factual position in the case before him. In the case before him, there was an obligation, as set out in the agreed facts, that the deceased bequeath the lands to the plaintiff, and having regard to that comparison he quoted a passage from the judgment of Fennelly J. as being apt. In that passage Fennelly J. stated:

> ". . . I am satisfied that the correct interpretation of the plaintiff's cause of action in the light of s. 8 is that the obligation of the deceased was to perform the contract during his lifetime and not at the moment of his death. Hence, the cause of action was complete immediately before his death. It is unnecessary to decide how long before the death. The cause of action, therefore, subsisted at the moment of death and survived against his estate by virtue of s. 8(1)."

52. O'Keeffe J. found that the plaintiff's claim came within s. 9(2)(b) of the Act of 1961 and that, as the proceedings had not been issued within two years of the death of the deceased, the plaintiff's claim, whether arising in contract, quasi-contract or in equity, was statute-barred.

53. I respectfully agree with the analysis of the law set out in the judgments of Fennelly J. and O'Keeffe J. I reject the submission made on behalf on S. 1 that they were wrongly decided.

Application of the law

54. Having already addressed the application of the law to the relief sought by the plaintiff at para. (3) of the prayer in the statement of claim, I am now concerned with the reliefs sought in paras. (1) and (2).

55. In this case, S. 1's claim as formulated in the pleadings seems to be founded on promissory estoppel or on a constructive trust in equity, as distinct from being founded in contract or in quasi-contract. Either way, the civil wrong on which S. 1 grounds his action is a wrong alleged to have been perpetrated by the Testator by reason of his failure to fulfil his promise. It is a wrong which must have occurred during the lifetime of the Testator, even if it came into existence just before the point of death. Accordingly, the plaintiff's cause of action against the Testator must have subsisted at the time of the Testator's death. It was a cause of action which, by operation of s. 8 of the Act of 1961, survived against the estate of the Testator on his death. Accordingly, the limitation period in s. 9(2)(b) applied to it. As these proceedings were not commenced within the period of two years after the Testator's death, the claims at (1) and (2) in the prayer in the statement of claim are not maintainable.

Answer to preliminary issue on s. 9 of the Act of 1961

56. The answer to the question whether the plaintiff, S.1, is statute-barred from claiming the reliefs set out in paras. (1) and (2) of the prayer in the statement of claim by virtue of the provisions of s. 9 of the Act of 1961 is that the plaintiff, S. 1, is statute-barred. As regards the relief claimed at para. (3), for the reasons outlined earlier, I consider that it is not possible to answer that question and I decline to do so.