

**THE HIGH COURT**

**[2012 No. 362SP]**

**IN THE MATTER OF THE SUCCESSION ACT 1965**

**BETWEEN**

**BRENDAN LOUGHREY**

**PLAINTIFF**

**AND**

**CATHLEEN DOLAN**

**DEFENDANT**

**Judgment of Ms. Justice Laffoy delivered on 30th day of November, 2012.**

**The proceedings and the application**

1. The plaintiff in these proceedings is a personal litigant. On 9th July, 2012 these proceedings were initiated by special summons. In setting out the title to the proceedings, I have adopted the approach adopted by the defendant, merely referring in the title to the Succession Act 1965. The plaintiff's summons was headed "Administration Suits" and it then referred to "Order 3(1), (2), (3), (4), (5), (6), (7), (8), (11), (18), (19), (20), (21), (22) of the succession act". The special summons was a one page document. In the special endorsement of claim at the foot thereof it was stated:

"The plaintiffs claim is monetary retribution in the sum of €8,000,000 (Eight Million Euro)."

There followed a reference to "Order 3(1),... (22)", as set out above, but without referring to any Act. There then followed the following statement:

"Additionally, negligence, concealment and suppression of bank statements, concurrent wrongdoing over a period of eleven years and still ongoing."

An unusual feature of the special summons was that there was tagged on to the statement in the prescribed form that the summons is required to be served not less than four days before the return date mentioned, which in this case was 2nd October, 2012, exclusive of the day of service, the following additional statement:

"and be served under the Succession Act, 1965 [No. 27] section 44 (jury trial)."

2. The special summons was served on the defendant in due course and it has been adjourned in the Master's Court until 15th January, 2013.

3. This application was initiated by a notice of motion dated 19th October, 2012 wherein the defendant sought the following orders in the following terms:

(a) pursuant to Order 19, rule 28 of the Rules of the Superior Courts striking out the plaintiff's proceedings on the grounds that no reasonable cause of action is disclosed;

(b) pursuant to the inherent jurisdiction of the Court striking out the proceedings on the grounds that they are frivolous and/or vexatious and/or an abuse of the process of the Court;

(c) restraining the plaintiff from instituting any further proceedings against the defendant without leave of the Court;

(d) restraining the plaintiff from instituting any further motions in proceedings bearing record No. 2005/218SP without leave of the Court; and

(e) restraining the plaintiff from instituting any motions in any proceedings currently in being in relation to the estate Michael Campbell, deceased, without the leave of the Court.

4. The plaintiff filed two affidavits in the Central Office to ground the special summons. One, which was sworn on 25th September, 2012, was filed on 25th September, 2012, but, apparently, was not served on the defendant. The other, which was sworn on 28th September, 2012, was filed on 28th September, 2012 and that was the affidavit which was served on the defendant. In fact, both affidavits are the same in substance.

5. The defendant's application is grounded on an affidavit sworn by the defendant on 18th October, 2012. No replying affidavit has been filed by the plaintiff.

**Background to the proceedings**

6. The proceedings relate to the administration of the estate of Michael MacCollion (otherwise known as Michael Campbell) (the Intestate). The Intestate died intestate on 19th December, 2000. The following is a brief summary of the administration of the estate of the Intestate based on the affidavit of the defendant:

(a) By order of the High Court (Kearns J.) made on 30th April, 2001 it was ordered that the defendant be at liberty to apply for a grant of Letters of Administration of the estate of the Intestate limited to the collection of all his property, giving discharges for all the debts which might have been due to his estate on payment of same, and doing what further

might be necessary for the preservation of the property, and it was further limited to taking appropriate steps to ascertain the next of kin.

(b) On 29th April, 2004 a grant of administration intestate to the estate of the Intestate limited as aforesaid was granted to the defendant, who is a practising solicitor.

(c) By further order of the High Court (Kearns J.) made on 26th July, 2004, it was ordered that the powers of the defendant under the order of 30th April, 2001 be extended to include the right to sell the lands of the deceased and related matters. The defendant did sell the lands of the deceased. She has averred that the proceeds of the sales are held in a separate controlled trust account at AIB, Donegal in the name of the Intestate and the current balance on the account is approximately €435,000.

(d) The defendant initiated proceedings by way of special summons on 3rd May, 2005 entitled "In the matter of the estate of Michael Campbell Deceased and in the matter of the Succession Act 1965 between Cathleen Dolan plaintiff and Mary Culloo and Brendan Loughrey defendants" (Record No. 2005/218SP) (the 2005 Proceedings). The purpose of the 2005 Proceedings was to ascertain the next of kin of the Intestate. The long drawn out process involved in the 2005 Proceedings and the ultimate outcome are recorded in the perfected order of the Court (Laffoy J.) made on 11th June, 2007. There is one obvious typographical error in the perfected order in that the order which was thereby discharged was an order dated 31st July, 2006. The outcome was that the Court declared that the defendant was entitled to distribute the estate of the Intestate to the plaintiff, Leo Campbell and the estate of Michael Campbell, the said parties being first cousins of the Intestate. There has been no appeal against that order. The effect of the order was that the plaintiff became entitled to one-third share of the net estate of the Intestate.

(e) Subsequent to the making of the order of 11th June, 2007, the plaintiff took a number of steps in the 2005 Proceedings, the most significant of which are outlined in paragraphs (f) and (g) below.

(f) On 21st May, 2008 the Master made an order on foot of an *ex parte* application made by the plaintiff that the plaintiff be at liberty to issue a citation for service upon the defendant to lodge in court the letters of administration to the estate of the Intestate. The defendant then brought a motion seeking an order to set aside the citation which had issued. By order of the Court (Laffoy J.) made on 14th July, 2008 it was ordered that the citation be set aside. The plaintiff appealed that order to the Supreme Court (Record No. 309/2008) and the appeal is still pending.

(g) On 29th March, 2011 the plaintiff applied to the Master *ex parte* seeking liberty to issue a citation. By order of the Master dated 29th March, 2011 the application was refused. The plaintiff brought a motion to the Court to set aside the order of the Master. By order of the Court (Murphy J.) made on 27th February, 2012 the plaintiff's application was refused and the order of the Master was affirmed. The plaintiff has appealed that order to the Supreme Court (Record No. 125/2012). The appeal is still pending.

(h) The plaintiff initiated separate proceedings by way of special summons in 2010 (the 2010 Proceedings). The special summons in the 2010 Proceedings (Record No. 2010/566SP), which was issued on 29th July, 2010, was in precisely the same terms as the special summons issued in these proceedings save that the amount of the "monetary retribution" claimed by the plaintiff in the 2010 Proceedings was €5,000,000. The proceedings were returnable before the Master's Court on 2nd December, 2010 and were struck out by the Master.

#### **The plaintiff's affidavit to ground the special summons**

7. In his grounding affidavit the plaintiff refers to documentation generated in connection with the administration of the estate of the Intestate commencing with correspondence received by the defendant on 4th January, 2001 and ending with an affidavit sworn by the defendant, I assume in the 2005 Proceedings, on 26th July, 2006. The documents from the intervening period referred to by the plaintiff include correspondence, affidavits sworn by the defendant, what I assume was the Inland Revenue affidavit filed in connection with the estate of the Intestate, birth certificates and suchlike. In his affidavit, by reference to those documents, the plaintiff has made serious allegations against the defendant, alleging that she deceitfully and fraudulently applied for the grant of letters of administration in the estate of the Intestate, that she committed perjury, that she suppressed documents, that she deceived the Revenue Commissioners, and that she committed an offence under the Criminal Justice (Theft and Fraud Offences) Act 2001. All of the allegations made relate to the period before the final order was made in the 2005 Proceedings. During the course of the 2005 Proceedings the plaintiff was represented by a firm of solicitors, McCloughan, Gunn & Company. As is recorded in the order of the Court dated 11th June, 2007, the Court on that day declared that McCloughan, Gunn & Co. had ceased to be solicitors acting for the plaintiff.

8. In summary, all of the complaints made by the plaintiff in the grounding affidavit against the defendant relate to matters which occurred a long time ago: in some cases, almost twelve years ago, and, as regards the remainder, in excess of six years ago. They occurred at a time when McCloughan, Gunn & Co. were acting as solicitors for the plaintiff in relation to his claim to the estate of the Intestate. Further, they relate to matters in respect of which orders were made in the High Court on the Probate side permitting the 2005 Proceedings and in respect of which there has been a final determination of the Court in the 2005 Proceedings. Some of the complaints made are quite bizarre. For instance, the plaintiff has averred that, in an affidavit sworn on 8th July, 2004, the defendant claimed "to have true copies of the Grant of Probate for Michael Campbell, when in fact she did not or ever have these, having instead letters of administration in breech (sic) of the Criminal Justice (Theft and Offences) Act 2001". To refer to a grant of probate, rather than a grant of administration, is an understandable mistake and it was of no consequence in the context in which it occurred.

#### **The plaintiff's response to the defendant's application**

9. The plaintiff did not file any affidavit in response to the defendant's application. At the hearing of the application on 23rd November, 2012, the plaintiff handed in a bundle of copy documents to the Court. One document was dated 22nd November, 2012 and was headed "Note to Presiding Judge and The Attorney General". The Court arranged for a photocopy of the document to be furnished to counsel for the defendant, no copy having been served on the defendant. The commencement of the document in bold type stated as follows:

"I Brendan Loughrey beg to request a Jury Trial under The Succession Act 1965, [No. 27] section 44(1), (2)."

It was stated in the document that under Order 60, presumably referring to Order 60 of the Rules of the Superior Courts, the Attorney General is now party to these proceedings. The Court was informed that the office of the Attorney General was represented on the

first return date before the Master, because papers had been served on the Attorney General. No issue has arisen or arises in any of the proceedings referred to in this judgment as to the validity of a law having regard to the provisions of the Constitution and, accordingly, the Attorney General has no role in any of the matters referred to in this judgment. In the document dated 22nd November, 2012 the plaintiff has also referred to Order 79, rule 65 of the Rules, which requires notice to the Attorney General in all cases where an application is made for letters of administration intestate of the estate of a person dying or presumed to have died "without known relation". It is quite clear on the plaintiff's own grounding affidavit that, when the defendant applied to the Court for a limited grant of administration under s. 27(4) of the Act of 1965, it was known that the Intestate had at least one "known relation", his second cousin, Mary Culloo, who subsequently was named as the first defendant in the 2005 Proceedings. The problem to be addressed in the 2005 Proceedings was to identify the next of kin of the Intestate, that is to say, whether there were any closer relations of the Intestate than a second cousin, and, if so, how many.

10. Unfortunately, the plaintiff appears to have a voice problem. It was impossible to understand what he was trying to convey in his oral submissions at the hearing of the application. Therefore, the Court has to rely on the grounding affidavit and the document of 22nd November, 2012.

### **Conclusions on the defendant's application**

11. The Court has had the benefit of helpful legal submissions prepared by counsel for the defendant, to which I have had regard.

12. Because of the difficulty in determining what cause of action the plaintiff is attempting to pursue against the defendant as pleaded in the special endorsement of claim on the special summons, even when considered in the context of the averments contained in the plaintiff's grounding affidavit, I propose focusing primarily on whether these proceedings should be struck out on the ground that they are vexatious and an abuse of process either under Order 19, rule 28 or the Court's inherent jurisdiction.

13. The following passage from the judgment of the High Court (Irvine J.) in *Behan v. McGinley* [2011] 1 I.R. 47 (at p. 66) explains that jurisdiction and the manner in which the Court should exercise it:

"For the purpose of the court's adjudication as to whether or not proceedings are vexatious within the meaning of O. 19, r. 28 of the Rules . . . or, indeed, for the purpose of the court's consideration as to whether it will exercise its inherent jurisdiction to stay or dismiss proceedings, the court must consider whether the proceedings have been brought without any reasonable grounds. The High Court (Ó Caoimh J.), in *Riordan v. Ireland* (No. 5) [2001] 4 I.R. 463, has referred to a helpful decision of the Ontario High Court in *Re Lang, Michener and Fabian* (1987) 37 D.L.R. (4th) 685 at p. 691, where the following matters were held to be indicators of proceedings which were potentially vexatious, namely:-

- (a) the bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
- (c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- (d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;
- (f) where the respondent persistently takes unsuccessful appeals from judicial decisions."

14. In applying the foregoing principles to the facts of this case, the following observations are apt.

15. Indicator (a) is certainly present. The Court determined by the order of 11th June, 2007 in the 2005 Proceedings that the estate of the Intestate is to be distributed between the plaintiff, Leo Campbell and the estate of Michael Campbell in equal shares. As I have already emphasised, that decision has not been appealed. The authority of the defendant to bring the 2005 Proceedings was derived from the grant of administration to the estate of the Intestate, which was granted pursuant to the order of the High Court dated 30th April, 2001, and which specifically authorised the plaintiff to take appropriate steps to ascertain the next of kin of the Intestate. In considering whether indicator (a) is present, it would clearly be inappropriate for this Court to have regard to the applications made by the plaintiff to the Master after the order of 11th June, 2007 was made, which are the subject of orders of the High Court which have been appealed, and which are still the subject of the pending appeals to the Supreme Court referred to earlier (Record No. 309/2008 and Record No. 125/2012). However, it is appropriate for the Court to consider what the objective of the plaintiff was in bringing the 2010 Proceedings and in bringing these proceedings, which, as has already been recorded, replicate the 2010 Proceedings save that the "monetary retribution" has escalated to €8m in these proceedings. The only reasonable inference is that one of the objectives of the plaintiff was in some way to undo the effect of the order of 11th June, 2007. Finally, the plaintiff brought these proceedings notwithstanding that the 2010 Proceedings, which they replicate, were struck out by the Master.

16. Indicator (b) is also present. In my view, no reasonable person could reasonably expect to obtain €8m in an action against the personal representative of a deceased person, where the Court has already directed that the personal representative distribute the estate of the deceased person on the basis that such person is entitled to one third of the estate and at the present time the estate, before costs are discharged, has a value of €435,000, and the person was a party to the proceedings in which the Court made that direction and for most of those proceedings had legal representation.

17. Indicator (c) is also present, because it is reasonable to conclude that the plaintiff has brought these proceedings with a view to harassing and oppressing the defendant, by making very serious allegations against her in relation to her involvement in the process which was before the Court, in which the plaintiff participated, mostly with the benefit of legal representation, and which process was transparent.

18. As regards indicator (d), while the defendant in the grounding affidavit has referred to the existence of proceedings brought by the plaintiff by way of special summons against his former solicitors, McCloughan, Gunn & Co. in 2010 claiming monetary compensation in the sum of €5m (Record No. 2010/568SP), which were struck out by the Master on 2nd December, 2010, I am not attaching weight to that matter in determining whether these proceedings are vexatious.

19. Apart from the presence of those indicators, the proceedings are procedurally flawed. An action for "monetary retribution" or for damages for, say, negligence cannot be brought by way of special summons. The very serious allegations made against the defendant are not particularised. The service of the proceedings on the Attorney General was inappropriate, for the reasons previously explained. The request for a trial by a jury is wholly misconceived. No undecided question of fact remains in relation to the identification of the beneficiaries of the estate of the Intestate.

20. For all of the foregoing reasons I have come to the conclusion that these proceedings are vexatious and should be dismissed.

#### **Isaac Wunder Order**

21. The purpose of making an order of the type which has come to be known as an Isaac Wunder Order, that is to say, an order restraining a person from instituting any other proceedings against parties to earlier proceedings without first obtaining the leave of the Court was outlined by Keane C. J. in *Riordan v. Ireland* (No. 5) [2001] 4 I.R. 463 as follows (at p. 370):

"It is, however, the case that there is vested in this court as there is in the High Court, an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the court is not abused by repeated attempts to re-open litigation or to pursue litigation which is plainly groundless and vexatious. The court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public office as well as by private citizens. This court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to re-open issues already determined or to pursue groundless and vexatious litigation."

22. The history of the 2005 Proceedings, the 2010 Proceedings and these proceedings, as outlined in the affidavit of the defendant, strongly suggests that the plaintiff, in the absence of Court intervention, will continue to institute groundless and vexatious litigation against the defendant and, in so doing, will abuse the process of the Court. Therefore, while acutely conscious of the need to exercise caution in making such an order, I think it is appropriate to make an order restraining the plaintiff from –

(a) instituting any proceedings against the defendant or in relation to the estate of the Intestate without the leave of the Court;

(b) from instituting any motion, application or procedure in the High Court in the 2005 Proceedings or in any proceedings currently in being in relation to the estate of the Intestate without the leave of the Court.

An order in the foregoing terms will not in any way inhibit the plaintiff in prosecuting the appeals currently pending in the Supreme Court.

#### **Orders**

23. There will be an order dismissing these proceedings.

24. There will be an Isaac Wunder order in the terms set out at para. 22 above.