THE HIGH COURT

[2004 No. 2719 P]

BETWEEN

GERARD McHUGH

PLAINTIFF

AND

MYLES McHUGH AND ANTHONY McHUGH

DEFENDANTS

JUDGMENT of Mr. Justice Roderick Murphy dated the 10th day of February 2012

1. Pleadings

1.1 First Motion
The first application is that of the defendants to dismiss the plaintiff's action. The motion was filed on the 9th June, 2011, and heard by the court on Monday the 21st November, 2011. The plaintiff's claim, *inter alia*is for an order setting aside a transfer of certain lands on the 5th February 1990 between the deceased and the defendants. The deceased made a Will on 9th July 1987 leaving those lands to the plaintiff and appointing him as executor thereof. On 19th February 1991 the defendants became the registered owners of the subject lands. The deceased died on 12th January 1998.

The defendants applied to the court for an order dismissing the plaintiff action save to the extent that the same comprised a claim to prove the purported last Will and Testament of the late Margaret (otherwise Rita) McHugh dated the 9th July, 1987. The grounds for the application were that the several claims made by the plaintiff were not maintainable against the defendants. They were unsustainable and bound to fail. The plaintiff's inordinate and inexcusable delay in instituting, prosecuting, and maintaining the claims constituted an abuse of process.

The defendants also applied for a declaration that the Will constituted the valid and duly executed last Will and Testament of the deceased and sought an order granting the plaintiff liberty to prove same in common form.

The defendants also sought judgment in default of defence to the counterclaim together with an order directing that the damages to which the defendants would be entitled on foot thereof be assessed by a judge with a jury.

1.2 Grounding Affidavit in First Motion
The notice of motion dated the 9th June, 2011, seeking to dismiss the plaintiff's action, was grounded on the affidavit of John Murphy, solicitor for the defendants and filed on the 9th June, 2011.

Mr. Murphy outlined the proceedings brought by the plaintiff on the grounds of capacity and the undue influence or duress of the deceased and alternatively, the plaintiff sought directions pursuant to s. 117 and 121 of the Succession Act 1965.

Following a change of solicitors, Mr. Murphy took instructions and consulted with counsel and formed the view that certain matters ought to have been pleaded. By order of this court on the 17th January, 2001, an amended defence and counterclaim were served on the plaintiff on the 23rd March, 2001.

Mr. Murphy could not understand why it was considered necessary for the plaintiff to seek an order proving the last Will and Testament of the deceased. No caveat had been lodged. There had been no question or issue in relation to the validity of the Will. The claim originally in the defence and counterclaim that the plaintiff had brought the deceased into a firm of solicitors and that the deceased was under duress in making the Will was deleted from the defence and counterclaim on the basis that there would be no evidence to support that assertion. Accordingly, there was no impediment to the Will being proved.

Mr. Murphy averred that at the time of swearing of his affidavit on the 8th June, 2011, that the plaintiff was not the personal representative of the deceased and not entitled to maintain his claim.

The plaintiff was granted representation as executor by probate dated the 26th October 2011.

Mr Murphy averred that he was advised and believed that the lands with which the proceedings were concerned had a value of not more than €90,000. Proceedings commenced on the 4th March, 2004, with a view to setting aside a transfer which had been executed on the 5th February, 1990, some fourteen years earlier, it was then seven years after proceedings commenced, the court was being asked to set aside a transfer executed 21 years earlier.

In the circumstances, Mr. Murphy believed that the plaintiff had been guilty of inordinate and inexcusable delay both in instituting the proceedings and in prosecuting same. The proceedings in their present form were oppressive and constituted an abuse of process.

He asked that the defendants' counterclaim for damages and trespass be assessed by a judge sitting without a jury.

By supplemental affidavit sworn on the 4th July, 2011, Mr. Murphy said that given that the plaintiff has indicated that he wished to make a claim against the Estate of the deceased. It was not appropriate that he be allowed to prove the Will.

He was not entitled to maintain his claim for any of the reliefs sought. Such reliefs could only be sought as against the personal representative.

A notice of appointment of new solicitors for the defendants was delivered on the 9th February, 2010. The plaintiff's solicitors came

off record on the 13th December, 2010. His new solicitors, Scarry O'Connor, came on record on the 1st July, 2010.

By replying affidavit of 3rd October 2011, Michelle Scarry of Scarry O'Connor, solicitors for the plaintiff, said that she had recently come on record and that the plaintiff had instructed her that he had every intention of prosecuting the proceedings.

In relation to the defendants' accusation of inordinate and/or inexcusable delay, she outlined the chronology of pleadings from the plenary summons in a statement of claim in March 2004, and appearance by the second named defendant on the 23rd March, 2004, and by the first named defendant on the 5th August, 2004.

Following notice and replies to particulars of each defendant, the joint defence of the first and second named defendants was filed on the 24th March. 2007. The particulars on the defence was raised on the 22nd July, 2008, and replied to on the 26th January, 2009. Further particulars were raised by the plaintiff on the 7th April, 2009, and replied on the 25th May, 2009. On the 23rd November, the plaintiff applied for an order directing the defendants to reply to certain particulars.

The Court made an order on the 17th January, 2011, allowing the defendants to amend their defence and counterclaim and which was delivered on the 23rd March, 2011, outside the period of fourteen days provided for by O. 28, rule 7.

Ms. Scarry said that the amended defence and counterclaim was, *ipso facto*, void and in default of the rules, unless the time is extended by the court.

She believed that a detailed notice of particulars had been raised and replied to and it did not appear that there was excessive delay in the conduct of the proceedings, by the plaintiffs other than in the time taken for the previous solicitors for the plaintiff to come off record.

Ms. Scarry said that at the heart of the plaintiff's case was that the deed of the 5th February, 1990 was void by reason of unsoundness of mind of the Testatrix. She referred to a report from the deceased's general practitioner of the 9th July, 2003, and a report from Dr. Morrow of the Mater Hospital dated the 5th September, 1990, which cast a significant doubt on the veracity of the Deed entered into by the deceased.

Ms. Scarry referred to the "said report" these reports were exhibited at MS1 in the affidavit of Michelle Scarry

The report of Dr. Morrow was dated some seven months subsequent to the deed being executed. The report referred to the deceased having delusions of parasitosis, having rheumatoid arthritis and having developed progressive weakness of the limbs. She was not in good health in 1990.

The deponent was instructed that the plaintiff was first made aware of the defendants' purported ownership of the lands in or about the month of May 1998, some four months after the death of the deceased when the defendants sought to exclude the plaintiff from the lands which up to then, he had been farming.

The plaintiff's attempt to register the lands by way of adverse possession failed.

Ms. Scarry believed and was advised by counsel that the plaintiff was the sole beneficiary under the Will which had the requisite *locus standi* to maintain the action.

Ms. Scarry said that there was some merit in the parties agreeing to both amending their pleadings and that it would be unjust and inequitable for the court to shut the plaintiff out from having the case proceed to trial.

By further affidavit filed on the 28th October, 2011, Ms. Scarry having repeated some of the matters contained in her affidavit of the 3rd October, 2011, referred to the plaintiff's previous lawyers as not advising him to take out a grant of probate. The deponent said that she had extracted a grant of probate on behalf of the plaintiff and exhibited the grant.

2.1 Second Motion
The plaintiff, in the second motion filed the 28th October, 2011, already referred to above, sought an order to amend his statement of claim to claim certain losses, to plead unjust enrichment to claim for expenses of the deceased. An order was sought directing the Registrar of Titles to register the plaintiff a full owner of the lands.

2.2 Grounding Affidavit
The application was grounded on the affidavit of Michele Scarry a partner in the firm of Scarry O'Connor solicitors for the plaintiff which was sworn the 28th October, 2011. Ms. Scarry referred to the pleadings initiated by plenary summons and statement of claim in March 2004. Appearances were entered by the second named defendant, also in March 2004, and by the first named defendant in August 2004, together with a notice for particulars, which were replied to on the 5th January, 2006. The first named defendant issued a notice for particulars later in January 2006, which was replied to on the 3rd May, 2006.

The defence of the first and second named defendants was dated the 24th January, 2007.

Eighteen months later the plaintiff's notice for particulars by the plaintiff was served on the defendants dated the 22nd July, 2008. The reply, which seems to have been delivered on the 26th January, 2009, was followed by a further notice for particulars raised by the plaintiff on the 7th April, 2009, and replied to on the 25th May of that year.

Following a further notice of motion the High Court made an order directing the defendants to reply to certain particulars on November 2009.

Notice of change of new solicitors for the defendants was given on the 9th February, 2010.

By order of this Court dated the 17th January 2011, the defendants had been allowed, to amend their defence and counterclaim which was delivered on the 23rd March, 2011.

3. Plaintiff's legal submissions
Counsel for the plaintiff referred to s. 10(1) of the Succession Act 1965, which provided that the real and personal Estate of the deceased person should devolve and be vested in his personal representatives. It was submitted that an executor who carried out certain acts or functions in relation to an Estate might be deemed to have accepted the office. While the executor ought to have

been advised to obtain a grant earlier, his intention from the outset to prove the Will in solemn form was clear. As sole beneficiary he had an interest in the prosecution of the proceedings.

Counsel referred to *McGlynn v. Gallagher* [2007] I.E.H.C. 329 regarding the conferral of *locus standi* for an administration suit on a party by virtue of their status as beneficiary. In that case the plaintiff extracted a grant of probate 18 months after the death of the deceased. Edwards J. dismissed the first named defendants' appeal from an order of the Circuit Court. The plaintiff had a grant of probate and the Court was not entitled to look behind it. While the defendants were beneficiaries and the plaintiff was not, the issue of the *locus standi* of the beneficiary did not arise.

Barry v. Buckley [1981] I.R. 306 at 308, outlined the jurisdiction of the court to strike out or stay proceedings. Costello J held that the jurisdiction existed to ensure that an abuse of process of the court does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail.

In relation to "frivolous and vexatious" Costello J. was of the view that the courts were entitled to ensure that access to the courts, would only be used as to the resolution of genuine disputes and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed.

In *McMahon and Another v. W.J. Law and Co. Ltd and Others* [2007] I.E.H.C. 51, MacMenamin J. referred to 0.19, r. 28 of the RSC and to McCracken J.'s judgment in *Fay v. Tegral Pipes Limited* [2005] 2 I.R. 261 and to *Barry v. Buckley* [1981] I.R. 306 at 308 but declined to make an order at the motion stage but proposed to request the chairman of the Bar Council to nominate a mediator.

The plaintiff freely conceded that the claim under s. 117 of the Succession Act 1965, and the claim in estoppel could not succeed against the defendants. Nevertheless the remainder of the plaintiff's claim was a serious and significant claim concerning the validity of the deed of transfer. Counsel referred to *Carroll v. Carroll* (Supreme Court) [1999] 4 I.R. 241 where Denham J. (as she then was) held that once a relationship giving rise to presumption of undue influence was established and it was shown that a "substantial benefit" had been obtained, the onus lay on the donee to establish that the gift or transaction resulted from the "free exercise of the donor's will".

It was also submitted that there could be no prejudice as the key witnesses indicated, the solicitor for the deceased, the defendants and two medical practitioners were able to give evidence.

4. Defendants legal submissions
Counsel for the defendants referred to the key dates which have already been summarised by the court and to O. 19, rr. 27 and 28 and s. 27(5) of the Judicature (Ireland) Act 1877.

> The defendants' application was founded on four propositions:
>
> (a) A third party does not have *locus standi* to seek to set aside a transaction on equitable grounds. Only the original parties to the transaction or their personal representatives can do so.
>
> (b) A claim under s. 117 of the Succession Act 1965 (whether it includes a claim under s. 121 thereof or not) is a claim which can only be made against the personal representative of the deceased Testator or Testatrix; and
>
> (c) A claim to property alleged to constitute part of a deceased's personal Estate based on promissory estoppel, a testamentary contract, proprietary estoppel or legitimate expectation can only be brought against a deceased person's personal representative.
>
> (d) The purported claims herein are in any event not maintainable by reason of the efflux of time and the statutory periods allowing for the bringing of same as well as by reason of unconscionable and inexcusable delay

The amended defence and counterclaim was delivered two months after the making of the order, and it was submitted that the court has jurisdiction to extend time in accordance with O. 122, r, 7 which allows the court to enlarge or abridge the time appointed by the rules upon such terms (if any) as the court may direct.

It was submitted that the plaintiff did not, as a potential legatee of land which the deceased had disposed of prior to her death, have any entitlement to the said land *per se*, but merely has an entitlement to secure proper administration of the deceased's Estate as provided for by s. 45 of the Succession Act 1965.

Section 48 of the Succession Act provides that personal representatives may be sued in respect of all causes of action which survive for the benefit of or against the Estate of the deceased. The plaintiff, as specific or general legatee or beneficiary does not have any entitlement to sue third parties in respect of a claim alleging a wrong done to a deceased and cannot sue them for an alleged wrong by the deceased against the plaintiff.

While the plaintiff is named as sole executor of the deceased's Will, he has in the proceedings articulated an intention to make a claim against the deceased's Estate. He cannot purport to prosecute a claim both on behalf of and against the Estate of the deceased. If the plaintiff sues the Estate of his late mother, as he has purported to do in the proceedings, he would not be in a position to extract a grant of representation to her Estate.

An independent person would be required to extract a grant of representation with Will annexed in order to independently administer the Estate. No such person had been proposed by or on behalf of the plaintiff. Spierin: the Succession Act 1965 and related legislation: *A Commentary* at p. 56 (para. 97) refers to *Re. Flood; Flood v. Flood* [1999] 2 I.R. 234, where an executor was removed from office because he wished to defend a claim in respect of money received from the deceased. The next of kin alleged that the money was a loan and repayable, the executor claimed it was a gift and that if it was a loan, claims to recover it was statute barred. The court held that she could not act because of the conflict of interest.

It was submitted by the defendants that the same principle applies to the present case.

(Spierin, referred to in the defendants' submissions, cautions against a person appointed executor accepting the office if there is any potential for a conflict of interest, eg. when the executor may wish to bring s. 117 proceedings).

Counsel's submissions also referred to s. 121 which empowers the court to order that dispositions made within three years of the date of death, for the purpose of disinheriting a spouse or children may be deemed never to have had effect and the donee of the property or any person representing or deriving title under him shall be a debtor of the Estate for such amount as the court may direct accordingly. This was not pleaded - even if it were, the disposition must be made within three years of death.

While the section does not specifically state who should be the appropriate respondent to an application made under this section (and, indeed, under s. 117(6)), the nature of the application would seem to indicate that it is the legal personal representative of the deceased.

It was further submitted that in relation to the claim for promissory estoppel, that the promissor or the promissor's legal personal legal representative must be a defendant to any action based on promissory estoppel. Such a claim cannot be maintained against defendants who are not the personal representatives of the deceased.

The statement of claim states that an agreement had been made between the plaintiff and the deceased to the effect that she would ensure that the subject lands became vested in him on her death. Such a claim was dismissed by O'Keeffe J. in *Prendergast v. McLaughlin* [2009] I.E.H.C 250. Such a claim must be brought within two years of the deceased's death. The proceedings were not commenced for more than four years after the death and are not maintainable by virtue of s. 9(2) of the Civil Liability Act 1961, which defines the relevant period in para. (b) of that subsection, where the relevant period means the period of limitation prescribed by the statute of limitations or any other limitation enactment or within a period of two years after the death, whichever period first expires.

The submissions in relation to inordinate and inexcusable delay stress the claim being sought as one to set aside the transfer executed more than 21 years ago. The plaintiff asserted that he was not aware of the transfer until after the deceased died in 1998.

The defendants submit that the delay in issuing proceedings for more than six years after the deceased's death was both inordinate and inexcusable. The plaintiff's failure to progress the same after they were commenced on the 4th March, 2004, was likewise inordinate and inexcusable and, on the balance of justice, the proceedings should be dismissed.

The stated intention of the plaintiff to seek to amend the proceedings at this stage would save the proceedings being brought within a period of time during which proceedings are maintainable against the Estate of the deceased.

Barry v. Buckley [1981] I.R.306, approved by McCarthy J. in *Sun Fat Chan v. Osseous* (Supreme Court) [1992] 1 I.R. 425, held that the High Court has inherent jurisdiction to dismiss an action on the basis that, on admitted facts, it cannot succeed. McCarthy J. at p. 428, expressed the view that if a statement of claim admits an amendment which might save it and the action founded upon it, then the action should not be dismissed. Generally in the High Court it should be slow to entertain an application of that kind and grant the relief sought.

In the present case the defendants contend that the pleadings themselves fail to disclose a cause of action which is reasonable in relation to all the matters pleaded on behalf of the plaintiff, or necessary (in relation to the admission of Will to form a proof) or which is maintainable or is other than frivolous or vexatious (in the case of all substantial relief claimed therein).

In the circumstances the defendants claims an entitlement to such order as the court deems fit on foot of the counterclaim.

5. Decision of the Court

5.1 Motion to Dismiss
The court has carefully considered the evidence in this matter, the applications for an amendment of the defence and of the statement of claim and of the respective submissions of counsel.

The court is of the view that, at the time of initiation of the action in 2004, the plaintiff was not the legal personal representative of the deceased.

The grant of probate in October 2011, extracted thirteen years after the death and seven years after the issue of proceedings, allowed the plaintiff to prove the Will. Insofar as the plaintiff purported to claim as against the Estate, he is precluded from doing to in his capacity as executor for the reasons given in the defendants submissions. The plaintiff seeks to set aside a transfer of certain lands transferred to the defendants on the 5th February, 1990 and registered on the 19th February, 1991.

This applies, not alone in the case of the s. 117 application, but also in relation to the application under s. 121 of the Succession Act 1965.

It is clear from the provisions of s. 9(2)(b) of the Civil Liability Act that the relevant limitation period is that which first expires, the period of two years after date of death, or, at most, a twelve year period from the 5th February, 1990.

> In s. 9 of the Civil Liability Act 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 death 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.

In *Monaghan v. Greensmyth* (1977) IR 55, the Supreme Court held, in a personal injuries claim for damages, that some reasonable limitation on actions against the estate was reasonable. The period of two years could not be deemed unreasonable.

The plaintiff wished to proceed with a claim to challenge the validity of a deed entered by the deceased on 5th February 1990,

subsequent to the deceased's last Will and Testament made on 9th July 1987 on the grounds of incapacity and of undue influence.

The Court is satisfied that the plaintiff does not have *locus standi* and that the purported claims are not maintainable by reason of the efflux of time and the statutory period of time for the bringing of same. There has been undue and inordinate delay. The court is not satisfied that the reason given for the delay, including the application for adverse possession, excuse the plaintiff in delaying issuing and progressing proceedings.

The transfer to the defendants by the deceased was made in 1990 and registered in 1991. The deceased died on the 12th January 1998. Proceedings did not issue until the 4th March 2004.

The question whether such an inordinate delay is excusable has to be further considered in the light of the circumstances of the plaintiff remaining for some time on the land after the deceased's death on 12th January 1998. Six years passed from that date until proceedings commenced.

The Court is satisfied that such a delay was in the circumstances, also inexcusable.

While the plaintiff submits that he was not aware of the transfer until the defendants sought possession after their mother's death, no action was taken by the plaintiff for further six years.

The Court is satisfied that s. 9(2) of the Civil Liability Act 1961 precludes the plaintiff from making a claim after two years from the date of the death of the deceased.

Accordingly, the court will grant the defendant' application and dismiss the plaintiffs claim.

5.2 Motion to Amend Statement of Claim
The plaintiff, in the second motion seeks to amend of the statement of claim subsequent to extracting a grant of probate on the 26th October 2011.

The amendments are substantial. Paragraphs 17 to 25 deal with him not having independent advice, the deed to the defendants not reserving a life interest, his mother's mental and physical disability, all of which he submits make the transaction improvident.

Furthermore he sought damages particularised largely in terms of loss of aid and grants, and loss of livestock, hay, barley and the costs of re-seeding all of which damages arose in the years 2000 to 2003.

He said he expended time and money and that, while he had the benefit of the income between 1990 and 1998, much of that income was expended on care for the deceased and her funeral expenses.

He sought orders directing the Registrar of Titles to transfer the land to him.

The Court is of the view that even allowing such amendments, they do not cure the inordinate and inexcusable delay and, more specifically do not answer the statutory bar provided for in s. 9(2) of the Civil Liability Act 1961.

In the circumstances the plaintiff's application for amendment does not arise where the court has granted defendants' application in terms of the notice of motion.