

THE HIGH COURT

[2016 No. 5869 P.]

BETWEEN

PATRICK MCCORMACK

(AS PERSONAL REPRESENTATIVE IN THE ESTATE

OF JAMES MCCORMACK DECEASED)

PLAINTIFF/RESPONDENT

AND

OUR LADY QUEEN OF PEACE ACHILL HOUSE

OF PRAYER LIMITED

DEFENDANT/APPLICANT

JUDGMENT of Ms. Justice Faherty delivered on the 23rd day of January, 2018

1. This matter comes before the Court by way of application on behalf of the defendant for an order dismissing the within proceedings on grounds that the claim is barred by virtue of the Statute of Limitations 1957, as amended ("the Statute") and/or the equitable doctrine of *laches*.

Background

2. The within proceedings were commenced on 1st July, 2016, in the name of the James McCormack. Pursuant to the general indorsement of claim on the plenary summons, the plaintiff's claim is that "an agent acting behalf of the defendant exacted undue influence on the Plaintiff and His Wife Mary McCormack which caused the plaintiff to hand over 200,000 euro to defendant through an agent of the defendant. The agent who contacted the plaintiff is a Roman Catholic priest named Father Gerard McGinnity. It is claimed that Fr. Gerard McGinnity acting on behalf of the defendant caused Spiritual Injury to the plaintiff by undue influence when he requested the plaintiff to give him 200,000 euro in the name of devotion to Our Lady in Heaven." Mr. James McCormack died on 5th July, 2016.

3. An appearance was entered for the defendant on 11th July, 2016. A statement of claim was delivered on 17th December, 2016, under the title "James McCormack Plaintiff (Deceased) Patrick McCormack Personal Representative of the Estate of the Plaintiff And Our Lady Queen of Peace House of Prayer Achill Limited Defendant". It pleads, *inter alia*, as follows:

"(a) The Plaintiff will prove undue influence and negligence occurred leading to a request to the plaintiff to give over 200,000 euro to a priest acting on behalf of the defendant.

(b) The plaintiff will say that undue influence was the cause of action of the plaintiff to hand over 200,000 euro in August 2005 to a priest named Father Gerard McGinnity, a Parish Priest of Knock Bridge Parish, Co. Louth, Ireland.

(c) The Plaintiff will say the 200,000 euro transaction was imposed upon old, weak and vulnerable persons, namely the plaintiff James and his wife Mary McCormack a housewife of Antonia House, Main Street, Moate, Co. Westmeath. The plaintiff was unduly influenced by Father Gerard McGinnity and the plaintiff's judgment was impaired during the three phone calls to the plaintiff's home from Fr. Gerard McGinnity as he Father Gerard McGinnity appeared to be crying on the phone and begging for 200,000 euro to be given to him by the plaintiff and his wife. The phone calls from Father Gerard McGinnity to the plaintiff's home happened on dates in 2005 and left the plaintiff susceptible to overreaching.

(d) The Plaintiff will say Fr. Gerard McGinnity acting on behalf of Our Lady Queen of Peace House Prayer Achill had a confidential relationship with the plaintiff and his wife. This relationship was a relationship between a priest ...and the plaintiff's wife Mary McCormack a solemn devoted practising Catholic whom in her lifetime has devoted much prayer to Our Lady. Arising out of this relationship between Father McGinnity as spiritual advisor of the plaintiff and his wife, Father Gerard McGinnity used this opportunity to unduly influence the plaintiff and his wife."

4. A defence was delivered on 31st January, 2017. In the defence, the defendant objects to the claim on the ground that it is statute-barred pursuant to s. 11 and s. 12 of the Statute and/or on the ground that the plaintiff has been guilty of inordinate and/or inexcusable delay and/or *laches*. Without prejudice to the question of the Statute, the defendant also pleads that it is a stranger to the allegations set forth in the statement of claim. Each and every factual matter is denied. It is denied that the defendant exerted any improper or undue influence as alleged or that the defendant was a party to an unnatural or suspicious transaction or that there was misrepresentation on its part.

5. The application to dismiss the proceedings is grounded on the affidavit of Josephine Butler, a Director of the defendant, sworn on 27th February, 2017. She avers, *inter alia*, as follows:

...

3. s is apparent or implicit from the facts pleaded in the statement of claim, the plaintiff asserts that the defendant exerted undue influence in relation to a transaction that took place in 2005. Although not expressly stated, the import of the claim is to set aside such transaction.

4. Although the plaintiff accepts at paragraph (f) of the statement of claim that there is no evidence in relation to this transaction, it is apparent that his claim relates to factual circumstances that took place in excess of six years prior to the institution of proceedings in 2016.

5. I am advised that in any event, the position of the defendant will be that any donation given by the deceased in 2005

to or for the benefit of the defendant, whether directly or indirectly, was freely given.

6. I am advised that as a consequence, any such claim is now out of time, although that is more properly a matter for legal submission at the hearing of this application."

6. In his replying affidavit sworn 29th March, 2015, including in the appendices contained within the affidavit, Mr. Patrick McCormack, son of the late James McCormack, advances twelve reasons as to why the proceedings should not be dismissed by reason of the Statute or on the grounds of *laches*. Specifically, Mr. James McCormack avers:

- His late father, James McCormack "remained under the continuous undue influence of the Catholic priest Fr. McGinnity, who retained some form of spiritual dominance over him even up to the date of his death";
- The late James McCormack was diagnosed with Alzheimer's Disease in 2009 and he suffered from dementia, something which occurred before any limitation period could have expired;
- "[T]he real truth of the lies surrounding the House of Prayer only came to light considerably after 2009. The whole matter amounted to a fraudulent extortion of money from [the late James McCormack]";
- People involved in the House of Prayer "were arguably involved in a cult". The Court will have to consider to what extent Fr. McGinnity was so influenced and to what extent the late James McCormack was in turn influenced by Fr. McGinnity;
- Contrary to his denial, Fr. McGinnity has asked other people for money;
- The payment of €200,000 was made payable to Dunwall Construction Limited at Fr. McGinnity's request which "raises further suspicions";
- Payments made by people to the defendant were at a later date found to be fundamentally suspect as the charitable status and standing of the defendant was withdrawn by the Revenue;
- Some people more capable than the late James McCormack were able to seek recovery of their money;
- "Christina Gallagher seems to have benefitted personally from the many donations obtained for the House of Prayer";
- The loss to the McCormack family resulting from the payment of the €200,000 of the defendant "was only ascertainable or fully appreciated by considering the shortfall that would occur to the estate of James McCormack Snr. as the monies had been paid by James McCormack junior at the request of James McCormack senior." The circumstances in which it came to pass that James McCormack Jnr. in fact paid the money to the defendant was that he did so at the behest of James McCormack Snr. on the basis that James McCormack Jnr. would be reimbursed from the estate of James McCormack Snr.;
- The defendants are not under any prejudice in the case because they must have known that people would make claims to be reimbursed as a result of the adverse publicity that engulfed the House of Prayer; and
- The issues in the proceedings "are matters of grave public import which require to be tried with proper consideration and care".

7. Mr. Patrick McCormack's affidavit includes twelve appendices, said by Mr. McCormack to support the factual matters to which he avers, and which contain, *inter alia*, Mr. McCormack's legal submissions on the Statute, undue influence and the doctrine of *laches*.

8. On 22nd May, 2017, Mr. James Lynn, swore an affidavit on behalf of the defendant in reply to Mr. Patrick McCormack. Mr. Lynn avers that he has "full knowledge" of the circumstances that surround the plaintiff's claim and assertions made in Mr. McCormack's affidavit. Specifically, Mr. Lynn avers as follows:

"...

5. say, believe and am so advised that the parents Mr. Patrick McCormack, the Plaintiff in the above entitled proceedings, contacted a representative of the Defendant in August, 2005 to inform the Defendant institution he wished to make a donation in order to contribute towards building works being carried out on the Defendant's premises.

6. The said building works were carried out by Dunwall Construction.

7. ceding to an invitation that was voluntarily made, representatives of the Defendant – Ms Majella Meade and Father Gerard McGinty visited the home of Mr James McCormack and Mrs Mary McCormack, the parents of the above named Plaintiff.

8. say and believe that prior to the said meeting Ms Majella Meade and Father Gerard McGinty had only met Mr James and Mrs Mary McCormack on a small number of occasions, namely at a large-scale celebration held on an annual basis at the Defendant's premises on the 16th of July each year.

9. At the aforementioned meeting, Mr James McCormack and Mrs Mary McCormack bestowed a joint and absolute gift upon the Defendants in the form of a cheque in the sum of €200,000, dated the 5th August, 2005. For convenience and at the request of the Defendant, Mr and Mrs McCormack made the cheque out to Dunwall Construction – the contractors responsible for building works the Defendant's premises, and Mr James and Mrs Mary McCormack did so voluntarily."

9. At para. 11 of his affidavit, Mr. Lynn refers to a letter written by Mr. Patrick McCormack to the defendant shortly after the defendant's appearance to the proceedings was entered on 11th July, 2016. This letter, dated 24th August, 2016, reads, in part, as follows:

As the plaintiff in the above matter Mr. James McCormack (RIP) has died, I Patrick McCormack son [of] the plaintiff am

prepared to make an application to the court seeking an order directing that I be made a plaintiff in the above matter. Could you advise if you will object to this application please?

...

am hoping that we will not to go to court in this case for the following reasons

A) he transaction took place 11 years ago in 2005 and this is a long time in excess the 6 years statute of limitations. My Father is no longer with us to give evidence of what happened and I do not think it will be easy to avoid hearsay and inaccurate information in the proceedings.

B) I am advised [that] ...legal costs could run to ten of thousands of euro and I am not a man of means that can afford to pay out this money with the result, currently, I have no legal representation.

C) If there exists a possibility to resolve this matter and avoid proceedings in the courts I am very open to discussing. Perhaps you might discuss with your client please.

D) Because of the time elapsed since the transaction, you maybe wondering why [it took] so long before taking actions to recover the money. It is important to say my Father took this case only when he and the family became aware of other cases against your client similar to his in the High Court where court orders were made in favour of the plaintiff and the defendant returned.

E) My Father was diagnosed with a mental illness post handing over the funds and was limited in what he could achieve in terms of decision making. I can further expand on this point when necessary.

F) I am not focussed on legal proceedings if the matter can be resolved between the parties."

10. Mr. Lynn avers to a medical certificate of Dr. Mark McCormick dated 24th March, 2017, as exhibited in Mr. McCormack's affidavit which states that the late James McCormack commenced treatment for Alzheimer's in 2009. It is further averred by Mr. Lynn that notwithstanding awareness in 2009 of the basis of the alleged claim, no grounds have been provided by the plaintiff to justify the delay in bringing the proceedings.

11. Mr. Lynn avers that as a result of the significant passing of time and the death of the late James McCormack severe prejudice has been caused to the defendant.

12. Mr. Lynn also takes issue with Mr. Patrick McCormack's claim to act as "personal representative" of the late James McCormack given that at the date of the swearing of Mr. McCormack's affidavit no grant of probate had been extracted to the estate of the late James McCormack.

13. At the hearing of the within application, the Court was advised that an application for grant of probate is being processed by Mr. Patrick McCormack as executor of the late James McCormack's will.

14. Accordingly, the Court is satisfied that no issue arises with regard to Mr. Patrick McCormack's standing, at this juncture. As Keating on Probate (5th Ed. Thompson Reuters) outlines:

"It is well established that an executor can institute proceedings and maintain an action before probate of the testators will is obtained, but a grant will be necessary before the hearing of the action".

15. Mr. Lynn also refers to telephone communication he had with Mr. James McCormack Jnr., son of the late Mr. James McCormack, concerning the donation, following which Ms. Karla O'Kane (a Director and Company Secretary of the defendant) wrote to Mr. James McCormack Jnr. on 6th June, 2015, requesting full details of the transaction in question. Mr. James McCormack Jnr. responded by letter of 22nd June, 2015, advising that the €200,000 cheque was given to Fr. Gerard McGinnity at the latter's residence at Knock Bridge. He advised that the €200,000 "was borrowed funds" and that "[i]t has been a big struggle to repay this and the repayment greatly added to my financial difficulties". Mr. James McCormack Jnr. undertook to retrieve details of the cheque from his bank. He attached a repayment demand from his bank and advised that his parents were now aged in their mid 80s and failing in health. It was stated that "[o]ur financial situation is in crisis and this is the main reason I am writing to you".

16. On 7th November, 2015, Ms. O'Kane wrote to Mr. James McCormack Jnr. advising that the defendant had taken legal advice and Ms O'Kane confirmed that the defendant was unable to return the donation. She advised that the House of Prayer continued to be reliant upon donations and the goodwill of pilgrims in order to sustain, and sympathised with Mr. McCormack for the financial difficulties he was experiencing.

17. In the course of his submissions to the Court, counsel for the defendant placed emphasised on the absence in Mr. James McCormack Jnr's correspondence with the defendant in 2015 of any complaint of undue influence having been exerted by the defendant over the late James McCormack or his wife.

18. The final affidavit for the purposes of this application is that of Mr. James McCormack Jnr., sworn on 26th May, 2017. He avers that on or around 5th August, 2005, he had a prearranged meeting with Fr. McGinnity at the latter's home where he handed a cheque for €200,000 to Fr. McGinnity payable to Dunwall Construction at Fr. McGinnity's request. Mr. McCormack alleges that his request for a receipt was declined by Fr. McGinnity. Contrary to what is set out in Mr. Lynn's affidavit, Mr. McCormack avers that Fr. McGinnity and Ms Meade never visited the home of the late James McCormack.

The Issues

19. The issues to be determined in this application are:-

(1) Whether the circumstances of the case are such that they are covered solely by the Statute; and

(2) If not, whether there has been delay of such a nature that the proceedings should be struck out at this juncture.

20. It is the defendant's core submission that the within proceedings relate solely to an alleged payment of €200,000 to the

defendant on 5th August, 2005 which Mr. Patrick McCormack, as executor of the estate of his late father James McCormack, now wishes to set aside. The defendant asserts that the claim is statute barred by virtue of s. 11 of the Statute.

21. Section 11 of the Statute provides, in relevant part, :-

"(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued—

- (a) actions founded on simple contract;
- (b) actions founded on quasi-contract;
- (c) actions to enforce a recognizance;
- (d) actions to enforce an award, where the arbitration agreement is not under seal or where the arbitration is under any Act other than the Arbitration Act, 1954 (No. 26 of 1954);
- (e) actions to recover any sum recoverable by virtue of any enactment, other than—
 - (i) a penalty or forfeiture or sum by way of penalty or forfeiture, or
 - (ii) a debt created by subsection (2) of section 14 or section 125 of the Companies (Consolidation) Act, 1908

...

(2) (a) Subject to paragraph (c) of this subsection and to section 3 (1) of the Statute of Limitations (Amendment) Act, 1991, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

(b) [...]

(c) A defamation action within the meaning of the Defamation Act 2009 shall not be brought after the expiration of —

- (i) one year, or
 - (ii) such longer period as the court may direct not exceeding 2 years,
- from the date on which the cause of action accrued.

(d) An action for damages under section 13 (7) of the Sale of Goods and Supply of Services Act, 1980, shall not be brought after the expiration of two years from the date on which the cause of action accrued.

(3A) The court shall not give a direction under subsection (2)(c)(ii) (inserted by section 38 (1) (a) of the Defamation Act 2009) unless it is satisfied that —

- (a) the interests of justice require the giving of the direction,
- (b) the prejudice that the plaintiff would suffer if the direction were not given would significantly outweigh the prejudice that the defendant would suffer if the direction were given,

and the court shall, in deciding whether to give such a direction, have regard to the reason for the failure to bring the action within the period specified in subparagraph (i) of the said subsection (2)(c) and the extent to which any evidence relevant to the matter is by virtue of the delay no longer capable of being adduced.

(3B) For the purposes of bringing a defamation action within the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and, where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium.

(4) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

(5) The following actions shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:—

- (a) an action upon an instrument under seal, other than an action upon an instrument under seal to recover—
 - (i) arrears of a rent charge or of a conventional rent, or
 - (ii) any principal sum of money secured by a mortgage or other charge, or
 - (iii) arrears of interest in respect of any sum of money secured by a mortgage or other charge, or
 - (iv) arrears of an annuity charged on personal property;
- (b) an action to enforce an award, where the arbitration agreement is under seal;
- (c) an action to recover a debt created by subsection (2) of section 14 or section 125 of the Companies (Consolidation) Act, 1908.

(6) (a) An action shall not be brought upon a judgment after the expiration of twelve years from the date on which the judgment became enforceable.

(b) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

(7) (a) In this subsection “*penalty*” does not include a fine to which any person is liable on conviction of a criminal offence.

(b) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any enactment shall not be brought after the expiration of two years from the date on which the cause of action accrued.

(8) (a) Subsection (1) of this section shall apply to an action to recover seamen’s wages.

(b) Save as provided by paragraph (a) of this subsection, this section shall not apply to any cause of action within the Admiralty jurisdiction of the High Court which is enforceable in *rem*.

(9) (a) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief.

(b) Paragraph (a) of this subsection shall not be construed as preventing a Court from applying by analogy any provision of this section in like manner as the corresponding enactment repealed by this Act has heretofore been applied.”

22. It is the defendant’s contention that given the reference in the statement of claims to a €200,000 “transaction”, alleged “misrepresentation” and alleged “negligence” on the part of the defendant, the claim is clearly covered by s. 11 of the Statute. Moreover, counsel points to the nature of the relief claimed in the statement of claim, which is for a sum of €200,000. Specifically, counsel points to the letter written Mr. Patrick McCormack on 24th August, 2016 (quoted earlier in this judgment) where it is expressly acknowledged that the transactions of 2005 “is a long time in excess of the 6 years statute of limitations ...” It is submitted that the statutory provision relevant to the within application – s. 11 of the Statute – provides that actions founded on tort or quasi-contracts as, it is contended, is the situation here, “shall not be brought after the expiration six years from the date on which the cause of action accrued.” Counsel submits that the necessity for temporal limitations on the institution of proceedings is well recognised in jurisprudence and cites *A’Court v. Cross* [1825] 130 E.R. 540, where Best C.J. stated:-

“Long dormant claims have often more of cruelty than of justice in them.”

23. The defendant further submits that notwithstanding that the plaintiff’s claim is clearly statute-barred it would in any event be dismissed at a hearing of the substantive matter. In this regard, Counsel relies on the observations of McKechnie J. in *McHugh v. McHugh* [2015] IESC 101, at para. 44:

“... there is no doubt but that both under the Rules of the Superior Courts and by its inherent jurisdiction, a court not only has the competence but also is duty bound to strike out a case at that point in the proceedings, if justified in so doing. An unsuccessful claimant can have no justifiable grievance at such a course, as a respondent also has an equal right to justice and should not be forced to continue meeting a claim which, within established parameters, is, for example, bound to fail. Classically, this doctrine most appropriately fits situations where the facts (both primary and secondary), their meaning, and any inference(s) that may be relied upon are not disputed and are positioned in the context of particular statutory provisions, such as, for example, limitation periods. This is one such type case. Accordingly, if the learned trial judge on the limitation issue correctly applied the relevant provisions of either the Civil Liability Act 1961 and/or the Statute of Limitations 1957 to the undisputed facts, taking the appellant’s version at its highest, then he would have been justified in law in dismissing the action.”

24. It is also contended that notwithstanding the fact that a claim in negligence (as is made in the present proceedings) is statute-barred six years after the accrual of the action, the plaintiff’s claim for negligence would ultimately be dismissed on the basis that it would be bound to fail. It is submitted that the plaintiff has not established a sufficient relationship of proximity between the plaintiff and the defendant to establish a duty of care. Nor does the plaintiff provide any factual circumstances to ground a claim of tortious liability on the part of the defendant.

25. In response to the defendant arguments, Mr. Patrick McCormack submits that while the defence implies or states that time began to run on 15th August, 2005, that is not the case given that the late James McCormack suffered from dementia since in or about 16th April, 2009. Mr. Patrick McCormack contends that albeit the late James McCormack commenced treatment for Alzheimer’s in or about April, 2009, it is possible that he was suffering from Alzheimer’s disease on 15th August, 2005, although Mr. Patrick McCormack concedes that he does not have any proof of this. Mr. Patrick McCormack relies on s. 49(1) (a) of the Statute which provides:

“If, on the date when any right of action accrued for which a period of limitation is fixed by this Act, the person to whom it accrued was under a disability, the action may, subject to the subsequent provisions of this section, be brought at any time before the expiration of six years from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired.”

26. Counsel for the defendant disputes the applicability of the provisions of s. 49 and contends that s. 49 cannot assist the plaintiff given that the section provides that the disability must be present “on the date when any right of action accrued for which a limitation period is fixed by [the] Act.” It is submitted that, as far as the present case is concerned, there is no evidence that the late James McCormack was under a disability on 5th August, 2005. For the purpose of the within application, I am satisfied to accept the defendant’s counsel’s submission in this regard, were the Court to find that the circumstances of this case come within s.11 of the Statute.

27. The question which arises is whether the case falls squarely within the provisions of s. 11 of the Statute. If it does then the defendant’s application must succeed. The rationale for this is well established. Canny, *Limitation of Actions* (2nd Ed. Roundhall, 2016), at p.3 states:

“With the passage of time recollections fade, witnesses pass away, records are lost, insurance policy lapse and people

move on with their lives [...] The 1957 Act brings closure for old grievances: for most causes of action, the effect of the expiry of the limitation period being that, if a defendant raises a defence of limitation, a plaintiff will be denied a remedy by the courts”.

28. However, the principal thrust of the pleadings in this case is that undue influence was brought to bear on the late James McCormack by the defendant or its agents, as pleaded in the statement of claim. It is further pleaded that Fr. McGinnity did not encourage the late James McCormack to seek independent legal advice; that the €200,000 payment was made “secretly” in a car park of Fr. McGinnity’s parish church; that Fr. McGinnity discouraged publicity about the matter and refused to give a receipt. It is pleaded that the late James McCormack was 76 years of age at the time the cheque was handed over and that Fr. McGinnity applied pressure and took advantage of the late Mr. McCormack’s “dependency on the priest’s position of spiritual advisor”.

Undue influence

29. According to Biehler, *Equity and the Law of Trusts in Ireland* (6th Ed. Round Hall, 2016), at p.791:

“Gifts or agreements concluded on the basis of wholly inadequate consideration are liable to be set aside in equity where they have been given or made as a result of the exercise of undue influence over the donor...”.

30. This was emphasised in the famous passage of Lindley L. J. in *Allcard and Skinner* [1887] 36 ChD 145, at p. 182:

“It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.”

31. For the presumption of undue influence to arise one party must have derived a significant benefit from the transaction, and the relationship between the parties must be such that the donor places a special degree of trust on the donee, who is in a position, because of the relationship, to exert a degree influence on the donor. According to Keane, *Equity and the Law of Trusts in the Republic of Ireland*, (2nd Ed., Bloomsbury Professional, 2011), at para. 28:03:

“The law has recognised certain categories of relationships as being of this nature, such as parent and child, guardian and ward, solicitor and client, spiritual advisor and believer, and trustee and beneficiary”.

32. As set out in Keane, at para. 28.14:

“...where a gift to a religious community is apparently prompted solely by the devotion of a particular member and without any evidence of pressure being brought to bear on him by the community, the presumption in the first class will arise. In all such cases, whether they come within the categories already expressly recognised or are instances of other relationships of trust sufficient to give rise to a presumption in the first class, the reason underlying the doctrine is public policy....”.

33. In *Allcard v. Skinner* Cotton L.J. stated:

“The Court interferes not on the ground that any wrongful act has been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.”

34. In the plaintiff’s pleadings in this case, and in Mr. Patrick McCormack’s affidavit, it is alleged that undue influence was brought to bear on the late James McCormack by Fr. McGinnity acting as agent of the defendant. This is disputed by the defendant in the defence and also rejected by Ms Butler and Mr. Lynn in their respective affidavits.

35. At this juncture, it is important to state that this Court is not tasked with trying the substantive issues in this case. As opined by McKechnie J. in *McHugh*:

“At the outset, it is important to note that on an application such as this the Court does not involve itself in an exercise of adjudicating on disputed issues of fact, or of resolving rival contentions made by or on behalf of the respective parties. It proceeds on the basis of taking the claim as made ‘at its high watermark’, and as assuming that the factual context pleaded, unless demonstrably wrong or self-evidently incredulous, is correct. This particular approach is required by law and should not be taken as being in any way equivalent to a judgment following a full trial, wherein the judge sets out his findings and prefers or accepts one version of the story as against and above another version. Therefore, in the context of this case the conflicting accounts, whilst noted, are not to be regarded as having been resolved. In fact, they are not, as it is not necessary to do so in order to apply the principles of law above set out. It is on such basis that this appeal is being determined.” (at para. 45)

36. Suffice it to say that I am satisfied that the equitable jurisdiction of the Court is invoked by the nature of the plaintiff’s pleadings.

37. The defendant submits that even in circumstances where the Court does not find that the proceedings fall within the remit of the Statute it is still the case that both the late James McCormack and Mr. Patrick McCormack failed to act with reasonable diligence in commencing their proceedings. It is thus submitted that the proceedings should be dismissed on the basis of the equitable doctrine of *laches*.

38. As defined in *Snell’s Equity* (31st Ed. Sweet and Maxwell, 2005), at p.101:

“[...] *laches* essentially consists of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim”.

39. In the course of his submissions, counsel for the defendant points to the observation of Rimer J. in the UK case of *Humphreys v. Humphreys* [2004] EWHC 2201 (Ch), at para. 99 of his judgment:

“[...] once the complainant is no longer under the defendant’s influence, a claim to set aside the transaction must be

brought within a reasonable time. A failure to do so will be likely to attract a defence based on the equitable doctrine of laches [...]".

40. It is also the defendant's contention that had any undue influence occurred in this case, it would have ceased immediately after the €200,000 was donated to the defendant. It is submitted that at that point the plaintiff was clearly under a legal obligation to act within a reasonable period of time. However this was not done and the proceedings were not instituted until some eleven years after alleged event. It is thus submitted that the defence of *laches* applies to the present case.

41. On the other hand, the plaintiff contends that the core issue in this case is unfairness or unconscionability in equity and that delay of itself should not be sufficient to prevent a claimant from obtaining relief. It is submitted that the issue for the Court is whether the consequences of the delay are such that it would be unfair for the court to grant relief to the plaintiff.

42. In the course of his submissions, counsel for the defendant cited *Toal v. Duignan (No.1)* [1991] ILRM 135, where Finlay C.J. stated:

"...where there is clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that defendant has not himself contributed to the delay, irrespective of whether the plaintiff has contributed to it or not, the court may as a matter of justice have to dismiss the action."

43. The defendant contends that based on the relevant test which emanates from the jurisprudence, the Court should be satisfied on the basis of the plaintiff's delay in this case that there would be a clear unfairness in asking the defendant to defend the action. It is submitted that the factual nexus of the proceedings means that would be the case if this matter were allowed to proceed to trial. In this regard, the defendant asserts that the fact of the death of the late James McCormack causes the defence of the case to be severely prejudiced.

44. It is further submitted on the part of the defendant that in cases of delay, as occurred here, witnesses will no longer be as reliable as they may have been previously or indeed they may be wholly unreliable.

45. Moreover, the defendant submits that if the Court is not satisfied that the defendant is prejudiced by the plaintiff's proceedings, such a holding may not necessarily need to be fatal to the within application given recent jurisprudence that has outlined that it is no longer incumbent on the defendant to demonstrate that it is prejudiced. In this regard, counsel cites *Quinn v. Francis Faulkner trading as Faulkner's Garage and MMC Commercial Limited* [2011] IEHC 103 where Hogan J. acknowledged an earlier judgment Peart J. in *Byrne v. Minister for Defence* [2005] IEHC 147 and stated: "[...]as illustrated by decisions such as *Byrne and Donnellan*, undue delay on the part of litigants can compromise the public interest, even if the defendants were not specifically prejudiced as a result."

46. In *Byrne*, Peart J. had stated:

"Finally, there is the public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up the valuable and important time of the Courts, and thereby reduce the availability of that much used and needed resource to plaintiffs and defendants who have acted promptly in the conduct of their litigation..."

Considerations

47. Clearly, a substantial number of years have elapsed since the event which is said by the plaintiff to give rise to these proceedings. Undoubtedly, actions based on alleged undue influence require promptitude, as set in *Allcard v. Skinner*. Thus, the first issue is whether the Court can be satisfied, at this juncture, that the plaintiff has delayed unreasonably in bring the claim, and, secondly, whether prejudice would be suffered by the defendant if the case is permitted to go to trial.

48. As regards the first issue, I am not satisfied that the Court can, at this juncture, adjudicate on whether there has been unreasonable delay, in circumstances where it is alleged on affidavit that Father McGinnity "retained some form of spiritual dominance" over the late James McCormack "even up to the date of his death". Of course, this is a matter for the trial of the substantive issue and the Court makes no determination in this respect.

49. Notwithstanding that this Court finds that it is not in a position to make a finding as to whether there has been unreasonable delay, the Court must take cognisance of the actual number of years that elapsed since the late James McCormack made the donation to the defendant. This is so in the context of the arguments the defendant makes as to prejudice and unfairness if the trial is allowed to proceed. Counsel for the defendant submits that the Court should place considerable emphasis of the question of whether there is delay, and the effect of that delay on the defendant. Undoubtedly, the fact that a considerable number of years that have passed since the dealing complained of in the proceedings must be taken account of for the purpose of determining whether the defendant is prejudiced. If it is established that the defendant would be substantially prejudiced by allowing the trial to proceed, then this Court should make an order striking out the proceedings.

50. The principal unfairness raised by the defendant is the fact that James McCormack senior has passed away. It is the defendant's case that had the late James McCormack been called to give evidence, his account of events could have supported that of the defendant. Even if that was not found to be the case and that the late James McCormack's evidence would have challenged the defendant's account of the nature of the transaction, the defendant contends that it is left in the position where it has no opportunity to cross-examine the late James McCormack. It is submitted that given that the burden of proof lies on the defendant to demonstrate that the transaction was not categorised by undue influence, the prejudice caused by the death of the late James McCormack is clearly heightened.

51. The defendant also contends that it is prejudiced by virtue of the fact that Ms. Majella Meade, a key witness to the transaction and a former representative of the defendant, is no longer involved with the defendant and her whereabouts are not known to the Board of the defendant institution. It is submitted that the situation is similar to one where an employee has left her place of employment, her location is not known and therefore she is not available to give evidence.

52. Moreover, the defendant maintains, without prejudicing the defendant's position, that the only documentary evidence that the defendant is aware of at this time is the actual cheque made out to Dunwall Construction Limited. It is submitted that that document only goes to prove that a transaction took place but provides absolutely no evidence as to the nature of the transaction. In those

circumstances, counsel contends that it is imperative that account be taken of the prejudice that will be caused to the defendant as a result. In this regard, counsel cites McGuinness J. in *Carroll Shipping Limited v. Mathews Mulcahy and Sutherland Limited* [1996] IEHC 46 where she states:

"[W]here matters are at issue which are not, or are not fully, covered by documentary evidence, there is a greater likelihood prejudice resulting from delay".

53. The Court takes cognisance of the defendant's argument that there is a greater likelihood of prejudice resulting from delay where matters at issue are not fully covered by documentary evidence, as, the Court accepts, is the case here. Accordingly, this is a factor which must be weighed by the Court in determining the extent to which the defendant will be prejudiced by allowing the trial to proceed.

54. As regards Ms Meade, while I note the defendant's submission as to the defendant's lack of knowledge as to her whereabouts, I note that there is no evidence before the Court in this regard, or in relation to what efforts, if any, have been made to try and ascertain her current circumstances and whereabouts. It seems to me that something more than an assertion in written submissions was required in order to persuade the Court to place weight on what is contended by the defendant vis a vis Ms Meade.

55. It is not suggested that other individuals such as Father McGinnity or Mr. Lynn are not available to the defendant for the trial. Clearly, Father McGinnity was closely associated with the receipt of the donation in 2005, as deposed to by Mr. Lynn on affidavit. Moreover, Mr. Lynn avers that he has "full knowledge of the circumstances that surround the Plaintiff's claim" and presumably is available to testify on behalf of the defendant.

56. In referring to the fact that James McCormack snr. has passed away, counsel for the defendant referred to the decision of Kelly J. in *Ryan v. Doyle* [2004] IEHC 80 where proceedings were struck out because of the death of a witness. Counsel also referred to the dictum of Peart J. in *Fahy v. Scanlon* [2011] IEHC 293 where it is stated, at p. 11:

"Obviously his death in 2010 has deprived the plaintiffs of the benefit of that evidence. But in so far as the defendants are deprived of an opportunity to cross-examine him in relation to whatever evidence he would give in support of the plaintiffs, they may also be prejudiced by his absence, and have stated that they are so prejudiced. But they are also clearly prejudiced because of the effect of this length of delay on the recollection of relevant witnesses, and, in a case of this kind, that prejudice can be presumed to be real. It must be borne in mind at all times that more than 11 years has already passed since these events, and further time will inevitably pass before this case is ultimately heard, if the case is allowed to proceed."

57. While I am cognisant of the difficulty that the death of James McCormack Snr. presents for the defendant, and while the Court must attach considerable weight to this factor, I am not persuaded that this factor is sufficiently prejudicial to the defendant's position to warrant the striking out of the proceedings at this juncture given that the defendant has witnesses available to it to advance its defence to the proceedings. Furthermore, insofar as the defendant relies on *Ryan v. Doyle*, I am satisfied that that case can be distinguished on its facts from the circumstances which give rise to the present proceedings.

58. The defendant also makes the case that any testimony which Mr. Patrick McCormack may provide as to the events alleged in the plaintiff's pleadings, such testimony can only amount to hearsay since there is no evidence that Mr. Patrick McCormack was present at the time of the actual transaction. The Court refrains from commenting on the nature or status of any evidence Mr. Patrick McCormack might tender, being satisfied that any such assessment is a matter for the trial judge.

59. In all the circumstances of this case, I am not persuaded that there are circumstances of such magnitude which render it inequitable for the trial of the action to advance. Accordingly, the relief sought in the notice of motion is denied