

THE HIGH COURT**[2010 No. 7253 P.]****BETWEEN****F. D.C.****PLAINTIFF****AND****A. C., J. O'D. AND P. O'R.****DEFENDANTS****JUDGMENT of Mr. Justice Herbert delivered the 7th day of February 2012**

By a plenary summons dated the 27th July, 2010, the plaintiff claims the following relief: -

"That in the matter of the Estate of M. P. C. (Deceased) the Doctrine of Promissory Estoppel applies in the plaintiffs case and that the reliefs claimed are equitable reliefs and any other reliefs that the Court deems meet and that the last Will and Testament of the deceased be declared void."

The plaintiff is a litigant in person. In an affidavit sworn by him on the 28th July, 2010, in these proceedings, he avers that it was represented to him by both his father, M. P. C., Deceased, (hereinafter referred to as "the Testator") and, his mother that he was the major beneficiary of their Wills and, that he would inherit the family home. He resided in the family home with his parents acting on that promise and foregoing other activities, contributed to the family home. His mother died on the 24th December, 2000 and his father died on the 18th December, 2006, having made his last Will and Testament on the 8th November, 1995. The plaintiff did not inherit the family home and the other assets as expected.

By a notice of motion dated the 1st January, 2011, the defendants seek an order striking out these proceedings on grounds, (a) that they constitute an abuse of process under the Rule in *Henderson v. Henderson* or alternatively, (b) that they are not maintainable having regard to the provisions of s. 9 of the Civil Liability Act 1961. This motion is grounded on the affidavit of the first defendant, sworn on the 23rd December, 2010.

By his then solicitors, Whitney Moore, the plaintiff, on the 12th December, 2007, entered a Caveat in respect of the goods of the Testator as a lawful son having interest. A Warning to the Caveat was issued and served on the said then solicitors for the plaintiff on the 17th October, 2007. By letter dated the 22nd October, 2007, Whitney Moore Solicitors advised the solicitors for the defendants that they no longer acted for the plaintiff. The plaintiff entered an Appearance to the Warning on the 1st November, 2007. By letter dated the 15th November, 2007, the solicitors representing the defendants notified the plaintiff that unless he set out a credible basis for disputing the validity of the Will or otherwise justified the Caveat an application would be made this Court to set aside the Caveat. No response was received from the plaintiff. By motion dated the 6th February, 2008, heard on the 3rd March, 2008, there being no appearance by the plaintiff, the Caveat and Warning were struck out.

By a Special Summons dated the 12th September, 2008, issued by the plaintiff in person, just within the permitted time limit, he claimed that:-

"The Plaintiff, the eldest child of the Testator is of the opinion that the Testator has failed in his moral duty to make proper provision for him in accordance with his means."

This matter came on for hearing and was heard by this Court (Laffoy J.), on the 23rd April, 2009. Though no notices to cross examine deponents on their affidavits had been served in the matter, the Court with the consent of the parties heard oral evidence from the plaintiff and from each of the defendants. In her judgment delivered at the conclusion of the hearing Laffoy J., found that having heard the plaintiff open the case, give his evidence, cross examine witnesses and make his final submission, she was satisfied that there was no issue concerning the plaintiff's capacity to advance his claim. Laffoy J. held that the only issue before the court was an application pursuant to the provisions of s. 117 of the Succession Act 1965, and that there was no other claim. Having considered the affidavits, the exhibits and the oral evidence, Laffoy J. held that she had absolutely no doubt that the Testator had acted prudently having regard to his knowledge of the plaintiff and how the plaintiff handled money and, that the plaintiff had not discharged the burden of proving that there had been a failure on the part of the Testator to discharge his moral duty. The plaintiff's claim was dismissed. The defendants did not seek an order for costs against the plaintiff.

By a notice of appeal dated the 24th June, 2009, the plaintiff in person appealed to the Supreme Court from the whole of the Judgment and Order of the High Court. I consider that it is relevant to the present application to note the grounds of appeal, which were as follows:-

- "1. The Judge erred on a point of Law and misapplied provisions of section 117.
2. The Judge misapplied Case Law and Precedent in matters relating to s. 117.
3. The plaintiff was not afforded his constitutional right to a fair trial of the matter before the Court.
4. A refusal by the Judge to accept my evidence.
5. The Judge failed to take account of all relevant facts."

The plaintiffs appeal was listed for hearing by the Supreme Court on the 23rd July, 2010. On that date the plaintiff informed the

Supreme Court that he was withdrawing his appeal and the same was accordingly struck out and the order of the High Court affirmed. Again, the defendants did not seek an order for costs. Four days later, on the 21st July, 2010, the plaintiff commenced the present action.

I have been furnished by the defendants with a Transcript of the proceedings had before Laffoy J. on the 23rd April, 2009, including her judgment. This is not verified by the trial judge, but is certified by the stenographer as being a true and accurate transcript of her shorthand note of the evidence. As no objection was taken by the plaintiff to any part of it, I will accept the transcript as being an accurate and complete record of the proceedings. It is evident from several references in this transcript that before he issued the Special Summons on the 12th September, 2008, the plaintiff was in possession of a written legal opinion which addressed questions of possible claims by him based on the Doctrine of Promissory Estoppel, based on s. 117 of the Succession Act 1965, and based on s. 63 of the same Act.

In his verifying affidavit sworn on the 4th December, 2008, the plaintiff averred as follows:-

"2. I say and believe that I received three years business training in England from 1966 to 1969 and was then employed by the family firm and two associated companies as Director and Managing Director until 1982.

3. I say and I believe that during the 1980's and early 1990's I was living in England and during this time my father represented to me that if I returned to Ireland and moved in with him and my mother I would be left the family home. It was represented to me that I would be the major beneficiary of my parents Wills and in reliance on this promise I returned to Ireland and both my mother and my father promised to leave me the family home in their Wills. I resided in the family home with my parents for a number of years acting on that promise and foregoing other activities contributed to the family home."

In a supplemental affidavit sworn in the same proceedings on the 22nd January, 2009, the plaintiff stated as follows:-

"2. I say and believe that at the time of my late father's death, the Testator M.P. C. herein, I had no income or assets apart from a modest capital sum sufficient only for living expenses for less than twelve months after the death of the Testator on the 18th December, 2006.

3. I say and believe that I am at present living on an amount of €700 per week which is being paid to me out of the executor's accounts, the Grant of Probate having been issued to the Defendants herein on the 13th day of March, 2008.

4. I say and believe that I have been denied access to the family home by the Defendants herein.

5. I say and believe that I have devoted my entire life to assisting my parents and working in the family business, remaining unmarried and living in the family homes whereas the Defendants herein, my three siblings, all married and are living elsewhere and have lives and careers of their own.

6. I say and believe that I acted to my detriment by so doing, having the expectation and belief that I would be left the family home and capital under my father's Will, this expectation and belief having been encouraged by my father during his lifetime.

7. I say and believe that my father failed in his legal and moral duty to me in this regard according to the terms of his Will and I say and believe and am advised that the last Will and Testament of M. P. C. should be declared void."

At paras. 3 and 4 of an extensive and detailed replying affidavit sworn by the first defendant, on the 29th January, 2009, he complained that:-

"3. Further, the affidavits do not set out any facts which might lead a Court to conclude that the provision which the Testator made for the Plaintiff by his Will was insufficient to discharge any moral duty owed by him to the Plaintiff which might have been subsisting at the date of his death. Rather than set out the basis for an application under s. 117 of the 1965 Act, in the first of his affidavits the Plaintiff makes assertions of a type which, I am advised, one might expect in a claim based on promissory estoppel and these are revisited in the second affidavit. In both affidavits the Plaintiff asserts that the Testator's Will should be declared void without identifying any legal basis for this assertion.

4. I understand that these difficulties are, in part, due the fact that the Plaintiff is representing himself and this is extremely frustrating for the Defendants...."

Rather than just responding to the assertions actually made by the plaintiff, the first defendant in his replying affidavit, in order to expedite the hearing of the action, went on to deal extensively with the Testator's Will, the Testator's means, the family background and why he believed the Testator had made his Will the terms in which he did. In reply the plaintiff swore a further affidavit on the 23rd February, 2009. For the purpose of the instant application it is only necessary to refer to the third paragraph of that affidavit which otherwise takes issue with various averments in the affidavit of the first defendant:-

"3. In reply, I say that my claim is grounded upon my affidavit sworn by me on the 4th day of December, 2008 and a supplemental affidavit sworn by me on the 22nd day of January, 2009. In both affidavits I assert that the Testator's Will should be declared void on the basis of false misrepresentations of the provisions of his Will for me during his lifetime."

The plaintiff elected to base his claim solely on the provisions of s. 117 of the Succession Act 1965. However, it is clear that he wished to rely on alleged oral promises which he claimed were made to him that he would be left the family home and other assets in the Testator's Will. At the start of the hearing before Laffoy J. on the 23rd April, 2009, having stated that he supposed the question was what the basis of the case was under s. 117, general heading, he then asked, "Based on the contents of my affidavits as I say subject to your guidance Judge, I would like the situation with regard to promissory estoppel taken into consideration". Laffoy J. pointed out that the only matter before the Court was an application pursuant to the provisions of s. 117 of the Succession Act 1965. The plaintiff agreed with this, but added that when he was preparing the papers he was not sure if promissory estoppel came under the heading of s. 117 or it was an entirely separate matter. Laffoy J. again indicated that the only matter before the Court was a s. 117 application and, that the determination she would make was whether his late father had failed in his moral duty to make provision for the plaintiff in his Will and in so doing would take into account the provision which the Testator had made for the plaintiff in his Will.

The plaintiff responded that "adequate provision" under s. 117 may include, and he meant that the evidence would be the same as it would be for promissory estoppel, it was the same sort of evidence. The plaintiff stated that it was unclear to him from legal advice, which he had been able to obtain which made reference to all three headings: promissory estoppel, s. 117 of the Succession Act 1965 and s. 63 of the Succession Act 1965, whether promissory estoppel was a separate issue which you had to apply for separately or whether it could be taken into consideration. Laffoy J. again advised the plaintiff that he would have to satisfy the Court that the Testator had failed to make proper provision for him in accordance with his means and that is what a failure of moral duty meant. To this the plaintiff replied, "Well, morally obliged to honour a commitment that you make in my view". In reply to the trial judge, the plaintiff indicated that his major point was that he had been promised the house, which was the bulk of the Estate. Laffoy J. again outlined the function of the Court in an application made pursuant to the provisions of s. 117 of the Succession Act 1965. The plaintiff then gave oral evidence and was cross examined by senior counsel for the defendants. Each of the defendants also gave evidence.

In the course of his closing submission, Laffoy J. again reminded the plaintiff that the only issue, with which the court was concerned, was whether the Testator had failed in his moral duty to make proper provision for the plaintiff in accordance with his means. The plaintiff responded:-

"Well, the question of the promise of the house, that can come under that heading I dare say, because its proper provision in the light of an undertaking given and that is my pleading in the matter and as I said the self-evident necessity to leave me sufficient money to live on if and when he deceased me [sic] following my mother's death. In other words I would take his place and that was what he had intended. Quite why those Wills were changed in the way that they were, well, I obviously don't know why because I had never seen them before today, but he was not entitled to do that.

As far as I know there are references to changing things or to misrepresenting and so on in promissory estoppel. I'm not sure if there is anything about that ins. 117, I mean if the Testator at the time of his death owe [sic] moral obligation to the applicant and if so, whether he has failed in that obligation. Well, if you promise [sic] house to somebody, that's a moral obligation and he has failed in that obligation. If you promise somebody the bulk of your fortune, that's a moral obligation. He has failed in that obligation...."

The plaintiff is an educated and articulate gentleman who has had business training and was for a number of years a director of a number of companies. For some time he had the services of a firm of Solicitors in dealing with his affairs following the death of the Testator. With the benefit of what appears to have been a detailed written legal opinion, the plaintiff elected to make his claim pursuant to the provisions of s. 117 of the Succession Act only. He maintained that election even after Laffoy J. at the commencement of the trial of the action, had carefully explained to him several times, the basis upon which a Court exercises jurisdiction in the matter of an application pursuant to the provisions of s. 117 of the Succession Act 1965. He did not apply to amend his pleading to promissory estoppel only or to a plea of promissory estoppel with an alternative plea of s. 117 of the Succession Act 1965. Given the lapse of time since the death of the Testator, such an application would be open to objection on grounds of delay or as depriving the defendants of a defence under a limitation enactment. However, from my perusal of the transcript, I am satisfied that had the application to amend been made, the defendants would have waived these objections. He argued at the trial of the action that the alleged promises made to him by the Testator that he would be left the family home and other assets in the Testator's Will was a factor which gave rise to a moral duty on the part of the Testator to make proper provision for him by leaving him the house and the remainder of the assets. It is clear from the Transcript that the Court heard all the evidence and counter evidence with regard to these alleged promises. Laffoy J. in her judgment found that the plaintiff had failed to prove that there had been a failure on the part of the Testator to discharge his moral duty and found that the provision made by the Testator for the plaintiff in his Will was a prudent provision.

The plaintiff having withdrawn his appeal against the judgment of Laffoy J. now seeks, in these new proceedings, to rely upon the same evidence, - no new evidence, much less material new evidence alleged to have been withheld or concealed from him was pointed to, - as establishing his sole entitlement to the house and the remainder of the assets of the Testator, based upon the Doctrine of Promissory Estoppel.

Section 8(1) of the Civil Liability Act 1961, provides that:-

"On the death of a person on or after the date of the passing of this Act 17th August, 1961] all causes of action (other than excepted causes of action) subsisting against him shall survive against his estate."

The Testator died on the 18th December, 2006. The plenary summons in the instant case was issued on the 21st July, 2010. Section 9(2) of the Civil Liability Act 1961, provides as follows:-

"(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 [prescribed by the Statute of Limitations or any other limitation enactment] and were pending at the date of his death, or

(b) proceedings are commenced in respect of that cause of action within the relevant period [prescribed by the Statute of Limitations or any other limitation enactment] or within the period of two years after his death, whichever period first expires."

In my judgment the provisions of s. 9(2)(b) of the Act of 1961, apply to the instant case. The plaintiff's proceedings were not commenced and were not pending at the date of the death of the Testator. As was several times pointed out by Laffoy J. the proceedings actually commenced on the 12th September, 2008, were not in respect of any cause of action other than pursuant to s. 117 of the Succession Act 1965.

In *Prendergast v. McLaughlin* [2009] I.E.H.C. 250, O'Keeffe J. had occasion to consider a claim of promissory estoppel in the context of s. 9(2)(b) of the Civil Liability Act 1961, on foot of facts not materially dissimilar to those alleged by the plaintiff in the instant case.

At paras. 28 to 35 inclusive of his judgment in that case, O'Keeffe J. held as follows:-

"28. Reverting to the statement of agreed facts, the relevant facts are:

'That the plaintiff was repeatedly told by the late John Dempsey and the deceased that the farmlands at Ballinamona would be left to him after both had died. The plaintiff relied upon these repeated promises and assurances by both the late John Dempsey and the deceased, continued to provide assistance in the management and running of the farm at Ballinamona and thereby acted to his prejudice ...'

29. Relevant facts state that in or about July 1998 a meeting took place between the late Patrick Dempsey, the Deceased, William Dempsey also deceased (being a brother of the said Patrick and John Dempsey) and the plaintiff. At the said meeting, John Dempsey stated that he was leaving the lands at Ballinamona to the plaintiff, the deceased asked the late John Dempsey to leave the lands at Ballinamona to the Deceased and that the Deceased in turn bequeath them to the plaintiff. It was alleged and agreed, John Dempsey, Patrick Dempsey and William Dempsey agreed to this arrangement and with this assurance, the plaintiff continued to provide assistance in the working of the farm at Ballinamona.

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

31. Furthermore, I prefer the reasoning of Fennelly J. in *Corrigan v. Martin* to that of Barron J. in Reidy's case. In the *Corrigan* case, Fennelly J. analysed in detail the interplay between ss. 8 and 9 of the Act. There is no such analysis or examination of the two sections in the *Reidy* case. In referring to s. 8(1) which applies to 'all causes of action (other than excepted causes of action) subsisting against him' Fennelly J. stated:-

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

I would in particular adopt the foregoing passage.

32. In my opinion the facts in *Bank of Ireland v. O'Keeffe* are distinguishable to the instant case, the cause of action only arose once the letter of demand had been sent on foot of the guarantee.

33. When a cause of action has survived the estate of the deceased while two alternative periods are provided under s. 9(2)(a) and (b), subparagraph (a) does not apply as no action was pending at the date of death of the deceased.

34. In *Corrigan v. Martin*, Fennelly J. had to consider an agreement whereby the deceased would 'transfer and/or devise the lands to' the Plaintiff. The factual position in that case is that it refers to a 'transfer' but is also based on an obligation to 'devise' the lands to the Plaintiff. In the instant case there is an obligation as set out on the agreed facts, that the deceased in turn bequeath the lands to the Plaintiff. The words of Fennelly J. are apt in the present case in:-

'That the obligation of the deceased was to perform the contract during his lifetime and not at the moment of his death. Hence the cause of action was completed immediately before his death ... the cause of action, therefore subsisted at the moment of death and survived against his estate by virtue of section 8(1).'

35. The period provided under (b) is the earlier of the relevant period, being the expiry of the limitation period under the provisions contained in the 1957 Act, or alternatively the period of two years from the date of death of the deceased. As the deceased died on 28th August, 2003, proceedings ought to have been issued by 27th August, 2005, the period of two years after the death of the deceased. The proceedings did not issue until the 25th July, 2006 and accordingly the plaintiff's claim whether it arises in contract, quasi contract or in equity is statute barred."

I adopt this decision of O'Keeffe J. and, I find the plaintiff's claim in the instant case based upon the plea of promissory estoppel to be statute barred.

In these circumstances it is unnecessary to consider whether the instant proceedings are a misuse or an abuse of the process of the Court by reason of the well established rule of law, having its origin in the judgment of Wigram V.C. in *Henderson v. Henderson* (1843) 3 Hare 100 at 114/115, (See *Carroll v. Ryan* [2003] 1 I.R. 309 at 317, per. Hardiman J. for the Supreme Court), that a litigant, except under special circumstances which would render the imposition of the limitation unfair, excessive or disproportionate, (*S.M v. Ireland* [2007] 3 I.R. 283 at 296 per. Kearns J. for the Supreme Court), should not be permitted to bring a claim or to raise a defence in later proceedings if the Court is satisfied (the onus being on the party alleging misuse or abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. (*Johnson v. Gore Wood and Company* [2002] 2 A.C. 1 at p. 31 per. Lord Bingham of Cornhill).