

THE HIGH COURT**[2008 No. 210P]****MR DERMOT LEONARD****PLAINTIFF****MOTOR INSURANCE BUREAU OF IRELAND****DEFENDANT****Judgment of Mr. Justice Feeney delivered on 11th day of April, 2011**

1. I have had the opportunity of considering the authorities and the submissions over the last number of days and over the weekend and as I indicated last week I had hoped to be in a position to give judgement in relation to the matter and I am now in a position to do so. It is in relation to the two separate cases, Leonard v Leonard and Leonard v the MIBI. The background which gives rise to this case is that the Plaintiff is now a 39 year old chef who resides in Enniskillen in County Fermanagh. On the 13th November 2005 he was involved in a road traffic accident at Castleblaney in County Monaghan. On that occasion Dermot Leonard was participating in a charity event organised in support of a local motor cyclist who had been fatally injured in an accident and the Plaintiff and his twin brother were participating in that event. The Plaintiff was a pillion passenger on a motor cycle owned and driven by his twin brother Paul. The motor cycle went on to the wrong side of the road and collided with an oncoming vehicle which resulted in the death of Paul Leonard and in the Plaintiff, Dermot Leonard, receiving serious personal injuries. A Personal Injury Summons issued against the defendant, Mary Jane Leonard. She was named in that summons as the personal representative of the late Paul Leonard when the summons was issued on the 8th November 2007. The late Paul Leonard was not insured to drive the motor cycle involved in the fatal collision and accordingly a Personal Injury Summons also issued against the Motor Insurance Bureau of Ireland. That summons issuing on the 11th January 2008. An appearance was entered to both those sets of proceedings by solicitors for the Motor Insurance Bureau of Ireland. Sorry, an appearance was entered to the Motor Insurance Bureau of Ireland's proceedings by solicitors on the 27th February 2008.

2. Prior to the summons issuing against the MIB, that body was put on notice by way of a claim notification form dated the 7th October 2007. By that date the Plaintiffs solicitors were already in correspondence with the Personal Injuries Assessment Board. Authorisations issued from the Personal Injuries Assessment Board in the proceedings against Mary Jane Leonard on the 22nd October 2007 and the proceedings against the Motor Insurance Bureau of Ireland on the 28th November 2007. The proceedings which were being taken against Mary Jane Leonard were deemed urgent as it was nearly two years since the accident and since Paul Leonard died. Section 9.1 of the Civil Liability Act defines the relevant period for claiming against the Estate of a Deceased as two years. On the 22nd October 2007 Dermot Leonard issued proceedings against Mary Jane Leonard, High Court proceedings 2007, number 8310P. The defendant in those proceedings was identified as the personal representative of Paul Leonard. She was not in fact the personal representative she was so identified and why she was so identified is not disclosed in the Affidavits. The position is that a defence was delivered on the 18th January 2010 by the MIB and in that defence they raised an objection stating that the proceedings were in respect of a cause of action that survived against the Estate of Paul Leonard and claimed as they were not commenced within two years they were statute barred having regard to the provisions of Section 9, subsection 2 of the Civil Liability Act 1961. The Plaintiff claimed in the summons that Mary Leonard was the personal representative and that was denied. Nothing occurred until Mary Leonard took out letters of administration on the 3rd November 2010 and the following day the Plaintiffs solicitors swore that Mary Leonard was both the Mother and personal representative of the deceased but provided no explanation as to the circumstances of the application the previous day.

3. There are two motions before the Court. In one of those motions which was the first issued in time the Motor Insurance Bureau of Ireland seeks an Order directing a trial of the preliminary issue and in fact the trial of the preliminary issue as to whether the proceedings are statute barred and in addition seeks an Order determining whether the proceedings are maintainable having regard to the provisions of clause 2, sub paragraph 3 of the MIB agreement of 2004.

4. The other motion which is before the Court is brought by the Plaintiff and the Plaintiff seeks Orders consolidating the two sets of proceedings that have issued and for an Order permitting the amendment of the Personal Injury Summons to reflect the joinder and consolidation of proceedings. To facilitate that application a draft of the proposed joined and consolidated proceedings is exhibited before the Court. As matters stand the defendant relies on Section-- sorry, in relation to the Plaintiffs motion to consolidate the defendant relies on paragraph 2 of the 2004 agreement in the Motor Insurance agreement of that date which deals with the -- Section 2 or paragraph 2 deals with the enforcement of a judgement and enforcement of a claim against the MIB but is not identified as is the case in paragraph 3 with condition precedence. Clause 2.2 of the MIB agreement states that the MIB must be a co-defendant in any proceedings against the owner and user of the vehicle giving rise to a claim except where the owner and user of the vehicle remain unidentified or untraced. That is not the case here. The owner and user of the vehicle was identified and traced. There is because of the wording in Clause 2 there is a basis for the MIB's contention that the Estate of Paul Leonard and the MIB should be named as co-defendants. The agreement only refers to the fact that the Plaintiff must seek enforcement against the MIB as a co-defendant. The wording says enforcement. It is not a condition precedent as per paragraph 3. Here separate proceedings issued and an application is brought joining those proceedings in consolidating them. That application is within the jurisdiction of the Court. It is not prohibited in any way and the Court has the jurisdiction and the discretion for good reason to allow and permit for such consolidation. In this case there is good reason. It was a case of having to issue two sets of proceedings because of different time limits which potentially applied and the Court is satisfied that it has both the jurisdiction and the discretion to consolidate. Nothing in justice or fairness to suggest that the Court should not exercise the powers which it has under Order 18, Rule 1 of the Rules of the Superior Courts that provides that subject to the rules of that Order the Plaintiff may unite in the same action several causes of action but it appears to the Court that any such causes of action cannot be conveniently tried or disposed of together the Court may order separate trials. In this instance there was a good reason for issuing the two summons at separate times. It was always the position that it was open to the Court and the Court had jurisdiction to consolidate those actions as per the agreement which the MIB entered into in 2004 enforcement could only be achieved or must be achieved where the MIB is a co-defendant. That position can be established by means of a Court Order exercising its proper discretion and the Court is satisfied that in relation to the relief sought by the Plaintiff seeking Orders consolidating the two sets of proceedings that have issued that such an Order should be made.

5. The second matter for consideration is the claim by the Motor Insurance Bureau of Ireland that the proceedings are statute barred. Section 9, subsection 2 of the Civil Liability Act 1961 sets out the time limits in respect of causes of action which survive against the Estate of deceased persons and the Section reads:

"No proceedings shall be maintainable in respect of any cause of action whatsoever which have survived against the Estate of a deceased person unless either"

And then there is not a relevant subsection but in subsection B it says:

"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"

6. The important words for the matter under consideration by this Court are the words *"against the Estate"*. Here is what happened was that the proceedings were commenced against the defendant in her personal capacity as she was not the administrator of the Estate of the deceased at the time that the proceedings were commenced. The accident, the subject matter of the proceedings occurred on the 13th November 2005. It was also on that date that the late Paul Leonard was killed. Proceedings against the Estate of Paul Leonard issued on the 8th November 2007. That was within the two year statutory period. Letters of administration to his Estate were granted to Mary Jane Leonard on the 3rd November 2010. The proceedings against the Estate were issued within time but the question is whether or not the proceedings were issued properly against the Estate or whether Mary Jane Leonard could be identified with the Estate as at the time that the proceedings commenced.

7. Proceedings against the MIB did not commence until the 11th January 2008. It was sued on foot of a particular authorisation which issued from PIAB on the 28th November and the letter which was sent by the Plaintiffs solicitors on the date of issue sets out the proceedings in relation to the time allowed which was a time which also permitted in a six month period to bring proceedings against that body from the date of the authorisation. Those proceedings against the MIB were in fact commenced within that six month period. The significant issue therefore relates to the proceeding which were commenced against Mary Jane Leonard. There are two different approaches which have urged by counsel who have moved the applications and responded thereto before this Court and those two different approaches have been identified in two different decisions of the High Court in this jurisdiction. Firstly in the case of *Finnegan v Richards* reported at 2007 3I R671 and in a later decision of Ms Justice Laffoy which is dealt with later in this judgement and is to be found in the decision of *Gaffney v Vaughan* reported in 2006 1ILRM at 481. Each party effectively recognises that for their argument to succeed one or other of those decisions has to be in effect incorrect and therefore the Court has taken particular care to read and consider both the judgements and the authorities referred to in those judgements to endeavour to ascertain which of the two different approaches would be appropriate to apply and which are particularly apposite to the facts of this particular case. In the *Finnegan v Richards* case Mr Justice McKechnie held that:

"Section 13 of the Succession Act was not designed to overcome a difficulty where no grant of administration had issued or was likely to issue and where administrators might not have been appointed, on whom proceedings could be served. Its provisions ensured however that the Estate of an Intestate person or the High Court even in the interval between the death and the issue of a grant. It was also held that the administrator derived the administrator's title solely from the grant of administration quite unlike an executor upon whom the real and personal estate of a deceased vested immediately upon the death of a testator. "

8. That is of some significance in relation to this Court identifying which is the authority which this Court should follow and it is of significance that the administrator derives in this case her title solely from the grant of an administration and that has consequences which are highlighted in the approach identified by Ms Justice Laffoy in her decision. The position also is as found in the *Finnegan v Richards* case:

"that an administrator was as a matter of general law quite different to an Executor and until such time as a grant of administration was obtained that person had no rights or entitlement to and otherwise had no control over the Estate. That proposition was however subject to the doctrine of relation back. That doctrine of relation back meant that for limited purposes a grant of administration would relate back to the date of the death of the deceased. The primary purpose of this rule was to protect the Estate in the intervening period between death and the obtaining of a grant but the rule of relation back was not all embracing and did not in fact include actions commenced prior to the obtaining of a grant even though the Plaintiff subsequently obtained letters of administration"

9. The judgement also dealt with the fact that the intended Plaintiff in the *Finnegan v Richards* case who discovered, there was no grant of administration and no administrator existed could have applied to obtain the appointment of administrator ad litem and joined him or her to the proceedings. The facts of that case was also that the collection and preservation of an Estate for those entitled to it was of first importance and if a law suit existed which potentially jeopardised this process it must have been of equal importance that the Estate was properly represented. On the facts of this case there is a different factual position pertaining from that identified in the *Finnegan v Richards* case. Here it is a case against the Estate of a deceased rather than an action being taken on behalf of the Estate. The Court has considered the Judgement of Ms Justice Laffoy in *Gaffney v Vaughan* [2006] 1 ILRM starting at 481 and prefers the approach identified in that case and is satisfied that is has a more direct application to the facts of this case and is more directly related to the circumstances where this is a claim against the Estate with a potential effect on the assets of an Estate. In the case of *Gaffney v Vaughan* Ms Justice Laffoy identified (at page 483) that:

"it was a fundamental principle of law that the authority of an administrator of the Estate of a deceased person derives from the grant of the letters of administration and that until he obtains the grant the Estate of the deceased person does not vest in him".

10. That is the position in this case. That fundamental principle of law applied to the facts of this case. It was also held by Ms Justice Laffoy that when a summons was issued the person named as a defendant must be competent at that time to answer the alleged wrong doing. In this case the person named as the defendant had no status as the representative of the deceased when the summons issued. That equally is the position in this case. The subsequent obtaining of a grant of administration would not cure what was identified by Ms Justice Laffoy as a fundamental defect. That fundamental defect is equally not cured in this case by the later taking out of the grant by the named defendant.

In the course of the judgement at page 483 Ms Justice Laffoy held that:

"there is no doubt that when he issued the Plenary Summons in this matter the Plaintiff could not have maintained an action in relation to the matters he complains of in the statement of claim against the defendant. The defendant was not the administrator of the Estate of the deceased and was no answerable for the matters alleged by the Plaintiff. But the defendant is now the personal representative of the deceased, and the question which arises is whether this action can be prosecuted by the Plaintiff against the defendant in that capacity".

11. That is indeed the same question and the same set of circumstances which pertain in this case. At the time that the proceedings were issued the defendant was not the administrator of the deceased and the grant was taken out later at a stage after the two year period. Ms Justice Laffoy went on in the judgement as page 485 to hold that:

"When a summons is issued the person named as a defendant must be competent at that time to answer the alleged wrongdoing and meet the remedy sought. If he is not the action is not maintainable. If he subsequently obtains the grant of administration he will not cure the fundamental defect and render the action maintainable".

12. The Plaintiff had available in this case the statutory provisions to deal with the situation which arose in relation to the running of a two year period against the deceased contained in Section 27.4 of the Succession Act. That Section reads that "*where by reason of any special circumstances it appears to the High Court ... to be necessary or expedient to do so the Court may order that administration be granted to such person as it thinks fit*". That provision was not availed of in this particular case. It was open to the Plaintiff to do so at that stage. The Plaintiff in the application before the Court provides no explanation as to why that provision was not used -- was not availed of. There is argument contained in the submissions as to the cost and expense but that is not averred in the Affidavits nor is any factual explanation provided as to why the provisions of Section 27.4 of the Succession Act 1965 which are designed to deal with a situation where there is not a personal representative and where time is about to run in relation to a claim arising out of such matters as a personal injury claim against a deceased. It is a provision which is regularly availed of and is well known and indeed on the facts of this case the very reason for the urgency of the matter as taken up with the PIAB, with PIAB, was because of the two year period. The proceedings were issued within two years of the date of the death of the deceased but they were done so against a named defendant who was not the personal representative. She was asserted as being the personal representative but the position is that that person was both the Mother of the deceased and the Mother of the Plaintiff in the action and there is no explanation provided, no indication as to any misapprehension or misunderstanding which would explain why she was chosen to be identified as the personal representative notwithstanding the position and it would appear on the facts that it must have been known that she was not the personal representative of the deceased but merely had been designated as such. Designating the defendant as the personal representative does not make her competent even if there was the capacity in her at some future stage to become the personal representative.

13. It is a fundamental position that grants of letter of administration date from the date of the issue of the grant and not from the date of death and in the circumstances of this case no explanation is provided as to why she was designated as the personal representative. The Court is satisfied that the approach identified by Ms Justice Laffoy in the *Gaffney v Vaughan* case equally applies to the facts of this case and that it is a fundamental principle that the administrator of the Estate of the deceased derives their power of authority from the grants of letters of administration. The assets of an Estate are to be protected and it is the grant of the letters of administration which gives the authority for the person to deal with the assets in the way provided in the letters of administration to deal with the Estate of a deceased.

14. The issue of a summons in the name of a defendant must be issued against a person who is competent to answer on behalf of the deceased as of that time. If the person named has no status as the personal representative of the deceased when the summons was issued the Court is satisfied that the subsequent obtaining of a grant does not cure what is a fundamental defect and that the letters of administration date from the issue of the grant and not from the date of the death. In those circumstances this Court is therefore satisfied that the position which was identified by Ms Justice Laffoy at the conclusion of the Judgement in *Gaffney and Vaughan* equally applies in this case and that the proceedings are not maintainable and that the Court has no jurisdiction to deal with the issue raised and in those circumstances the Court is satisfied that the defendant is entitled to the relief sought in its Notice of Motion and that the position which pertains is that the defendant, that is the MIB, is entitled to proceed on the basis that the proceedings are statute barred and that an Order will be made determining that the proceedings in those circumstances against the Motor Insurance Bureau of Ireland, that is the joined proceedings should be struck out as against the Motor Insurance Bureau of Ireland.