THE HIGH COURT

[2023] IEHC 561

[Record No. 2022 / 81 CA]

BETWEEN

M.B.

PLAINTIFF / APPELLANT

AND

P. D.

DEFENDANT / RESPONDENT

RULING OF Ms. Justice Siobhan Phelan delivered on the 13th of June, 2023

INTRODUCTION

1. This matter comes before me as an appeal against a decision of the Circuit Court to refuse to join a Co-Plaintiff in proceedings initiated under s. 117 of the Succession Act, 1965. Central to the determination of this application is whether the contention that the renunciation of a grant of representation is capable of suspending time running in respect of making a claim under s. 117 of the Succession Act, 1965 is correct. A further issue arises as to whether a defendant can be estopped from relying on the time-bar provided under s. 117(6) on the basis of his or her conduct and representations made, subsequently resiled from.

BACKGROUND

2. The proposed Co-plaintiff is the sister of the Plaintiff in extant proceedings in which relief is sought pursuant to s. 117 of the Succession Act, 1965 in respect of their late father's provision for them. From the case as pleaded, the Plaintiff suffers from a disability since birth, is wheelchair bound and dependent on welfare payments. There is a suggestion in the papers that several of the Plaintiff's other siblings have also issued separate proceedings, but their circumstances are not before me. No issue concerning those proceedings is before the Court.

3. The circumstances as outlined in the papers appear to be that the Deceased, the Plaintiff and proposed Co-Plaintiff's father, died testate leaving his property to extended family (nieces and grandnieces), excluding his children. It further appears that the Deceased was long separated from his former wife and the Plaintiff and proposed Co-Plaintiff's mother, leaving the family home and travelling abroad with a new partner while the Plaintiff and his siblings were still children. The Deceased's estate consists in the main of four medium-sized houses, which even taken together, fall well within the cumulative rateable valuation of the Circuit Court jurisdiction, in consequence of which it is contended that there is no impediment to the Plaintiff and Co-Plaintiff's claims being maintained together in one set of proceedings.

4. The Defendant is a solicitor by profession and is sued by the Plaintiff in his capacity as the sole proving Executor of the Will of the Deceased. A grant of representation was extracted by him in respect of the administration of the Deceased's Estate on or about the 5th of May, 2021. The Plaintiff's proceedings in turn issued in the Circuit Court on the 1st of June, 2021, within a short number of weeks. It appears, however, from the Affidavit evidence grounding the within application that proceedings did not issue on behalf of the proposed Co-Plaintiff at that time or within six months of the 5th of May, 2021. It is averred that proceedings did not issue because it was represented by the Defendant that he had decided to renounce representation. This was confirmed no less than three times in open correspondence.

5. It appears that the Plaintiff and proposed Co-Plaintiff's solicitor relied on this correspondence to conclude that there was no need to issue proceedings to protect the Co-Plaintiff's interest. This conclusion was reached in large part, however, because it was understood by the said solicitor that the act of renunciation would operate to suspend the six-month time limit which applies to the extraction of a grant of representation under s. 117(6) of the Succession Act, 1965 and proceedings could issue when new representation was determined.

6. In the event, the Defendant did not renounce representation and has remained as Executor. His decision to remain as Executor was only communicated after a period of six months from the extraction of the grant of representation had expired. As no proceedings issued on behalf of the proposed Co-Plaintiff within this six months period, this means that an issue now arises in relation to the consequence of the failure to commence proceedings within

six months for the maintenance of any claim under s. 117 of the Succession Act, 1965 on behalf of the Co-Plaintiff.

SUBMISSIONS

7. It is submitted on behalf of the moving party that the governing test for adding a co-plaintiff, in existing proceedings, is that such person may be joined if the Court deem it necessary so as to enable it to '*adjudicate upon and settle all the questions involved in the cause or matter'*. It is contended that the Co-Plaintiff's claim arises out of her late father's will and failure to make provision for her in it or during his lifetime, just as the Plaintiff's does. It is contended that this means that a common question of law or fact arises and the two relevant plaintiffs' claims should be joined in the one action.

8. As for the failure to issue proceedings within six-months, it is contended that the renunciation of a grant of representation causes time to stop running. It is contended that as s. 117 proceedings can only be brought if the Defendant holds a current and valid Grant of Probate or Administration, by necessary implication, that means that if the Grant be renounced (given up), then the time stops running. It is submitted that where the limitation period would imminently stop time running, until some new replacement personal representative got a fresh Grant in the Estate, it would have been wasteful and pointless for the proposed Co-Plaintiff (or her Solicitor) to sue, as proceedings would then have to be reconstituted or amended. It is submitted that where reliance was placed on representations made by the Defendant not to issue proceedings because of the Defendant's promise of an imminent intention to renounce, the Defendant is now estopped from relying on s. 117(6) of the Succession Act, 1965 to frustrate the proposed Co-Plaintiff's claim.

9. The Defendant, for his part, argues that the application to join the Co-Plaintiff should be refused. It is maintained that the claims are different in that a jurisdictional impediment precludes the maintenance in these proceedings of a claim on behalf of the Co-Plaintiff by reason of the failure to commence proceedings within six months of the extract of a Grant of Representation. It is contended that the Co-Plaintiff has erred in law as to the effect of renunciation. It is argued that it is clear from the terms of s. 117(6) that relief under s. 117 of the Succession Act, 1965 can only be granted in respect of an application made within six months from the first taking out of representation of the deceased's estate and no provision is made for a suspension of time in the event that the grant is renounced. It is pointed out that

communication from the Defendant regarding an intention to renounce representation should not have prevented proceedings issuing.

DISCUSSION AND DECISION

10. While the Plaintiff's claim is set out in clear terms on the papers and it is noted that he is a person with a disability who relies on specific facts to make his s. 117 claim, the proposed Co-Plaintiff's claim has not been particularized in the same way. Nonetheless, it seems likely that there is some similarity between her claim and the Plaintiff's, insofar as it is pleaded that the Deceased left the family home while they remained dependent and did not provide or adequately provide for the needs of his children. This does not mean that the proceedings involve the same issues, however, for the purpose of determining an application to join a Co-Plaintiff because of a fundamental question which arises regarding the time within which such proceedings may be commenced.

11. Proceedings under s. 117 of the Succession Act, 1965 require to be instituted within six months from the first taking out of a Grant of Representation as clear from the wording of s. 117(6) of the Act as amended by s. 46 of the Family Law (Divorce) Act 1996. In its amended form, s. 117 (6) provides:

> *"(6) An order under this section shall not be made except on an application made within six months from the first taking out of representation of the deceased's estate."*

12. It is common case that a Grant of Representation was extracted in May, 2021 which meant that at the latest, proceedings under s. 117 required to issue before a date in November, 2021, being six months from the first taking out of representation.

13. As the Plaintiff's claim issued in June, 2021, no issue arises in respect of his proceedings. As no proceedings issued during this period on behalf of the proposed Co-Plaintiff, the same cannot be said for her. I note that while this appears to have been in circumstances where it was understood by the solicitor acting for both the Plaintiff and the proposed Co-Plaintiff that the Grant of Representation was to be renounced and in consequence time would be suspended or extended, it was not suggested in the correspondence relied upon either that the Plaintiff's solicitor should refrain from issuing further proceedings because of

an intended renunciation or to indicate that time would cease to run if representation was renounced. The Plaintiff and co-Plaintiff's solicitor appears to have arrived at an understanding of the legal position as to the effect of renunciation on time entirely separately from anything the Defendant said in open correspondence. This notwithstanding reliance in support of joinder is placed on cases such as *Murphy –v- Grealish* [2009] 3 I.R. 366 to invoke estoppel principles in response to the argument that proceedings may not be brought outside the six-month time limit and to respond to any contention that the proposed Co-Plaintiff cannot now maintain an action under s. 117 of the Succession Act, 1965 having failed to issue proceedings within six months of the first taking out of representation of the deceased's estate.

14. Before we get to a point where I must determine whether conduct on the part of the Defendant in writing in the terms in which he did could give rise to an estoppel took place, however, I must first consider whether there is a basis in law for the moving party's contention that renunciation of a grant of representation "*stops the clock*". I am satisfied that an intention to bring proceedings on behalf of the proposed Co-Plaintiff existed within six months of extract of the grant of representation in this case because it is referred to in correspondence. There is undoubtedly affidavit evidence before me to support a conclusion that proceedings did not issue in view of the communicated intention to renounce executorship. This appears to be because it was the Plaintiff and proposed Co-Plaintiff's solicitor's understanding that the fact of renunciation would suspend time. There is no evidence, however, that they were induced into believing this to be the case by the Defendant and this understanding of the law is unilateral.

15. I know of no authority and none has been cited for what I consider to be the novel proposition that the renunciation of a grant of representation stops time running for the purpose of a s. 117 application. Given that even the moving party accepts that there is no authority which confirms this understanding, I find it surprising that steps were not taken to issue a protective writ to avoid any issue in this regard.

16. While accepting that no authority has been identified directly on point to explain the position adopted on behalf of the Co-Plaintiff in not issuing proceedings, the moving party relies on a first principles argument that it must be the case that renunciation suspends time. Reliance is placed on the decision of Laffoy J. in *S.I. v. PR 1 and PR 2* [2013] IECH 407 to support a conclusion that the renunciation of representation has suspensory effect in view of

her interpretation of the triggering event which starts time running under s. 117(6) of the Succession Act, 1965 as being the extraction of a full Grant of Representation rather than a limited one and that time does not run in the absence of a full grant. It is argued by extension from Laffoy J.'s reasoning as to the imperative for a full grant that where the grant is renounced, then time must stop running.

17. I have considered the terms of Laffoy J.'s judgment in *S.I. v. PR 1 and PR 2* and I am compelled to conclude that an argument that renunciation has suspensive effect finds no real support from the terms of the judgment and having regard to the express and unambiguous terms of s. 117 of the 1965 Act. Unlike the position in this case, in the *S.I.* case only a limited grant had been extracted and Laffoy J. concluded that s. 117(6) should be construed as referring to a full as opposed to partial grant of representation such that time did not commence running in that case. This is a very different proposition to the one contended for in these proceedings. Laffoy J. arrived at this conclusion having regard to the purpose of requiring the extract of a grant of representation before time would run.

18. The purpose of requiring a full grant, as expressed by Laffoy J., was to allow for the terms of the last will, including any codicils, of the Testator to be proved and to identify the estate. The reasoning of the Court in this regard flows from the fact that these were necessary elements for the Court's consideration of whether proper provision has been made by the Testator in accordance with his or her means. I am quite satisfied therefore that on its proper reading *S.I. v. PR 1 and PR 2* is not authority for the proposition that time is suspended if a full Grant of Representation is extracted but renounced and only runs again when a new administrator is appointed.

19. In view of the foregoing and having regard to the language of s. 117(6) which is clear and unequivocal, I am satisfied that there is no basis in law for the understanding adopted by the proposed Co- Plaintiff's solicitor, without any prompting from the Defendant, that time would be suspended by the renunciation of the Grant of Representation and would not run to preclude a claim on behalf of the Co-Plaintiff. It seems to me that the failure to issue proceedings within the prescribed six months arose from an error of law which is not attributable to the Defendant. The logical consequence of my conclusion in this regard is that it does not matter that the Defendant incorrectly represented that the grant would be renounced.

The proposed Co-Plaintiff was led into error by mistake of law which did not originate in or derive from any representation on the part of the Defendant.

20. Assuming for the sake of completeness, however, that the proposed Co-Plaintiff was somehow induced by an incorrect representation from the Defendant into not bringing proceedings in time where it had otherwise been decided to bring such proceedings, a further question arises as to whether an estoppel could operate to prevent reliance being placed on the time limit in s. 117(6) of the Succession Act, 1965.

21. Compliance with s. 117(6) of the Succession Act, 1965 has been found to be a jurisdictional requirement by Carroll J. in *M.P.D. v. M.D.* [1981] ILRM 179. As she stated (p. 184):

> *"Normally, unless a defendant specifically relies on the defence of effluxion of time as barring a claim, the claim will be decided on the merits. However, this appears to me to be a case where both the right and the remedy are barred. I am reluctantly forced to the conclusion that s. 117(6) lays down a strict time limit which goes to the jurisdiction of the court and which cannot be ignored even though the defendant did not rely on the time until the last minute when the case was relisted. ....I do not see how I can make an order in view of the wording of the section."*

22. While Carroll J. suggested *obiter* in *M.P.D.* that had the parties agreed the Court had jurisdiction, she would have been prepared to proceed to determine the point raised, she considered she was precluded from doing so in the face of objection as the issue went to the jurisdiction of the Court. Given that s. 117(6) creates a jurisdictional impediment, it seems to me that authorities relating to reliance on the Statute of Limitations 1957 (as amended) are not on point. To my mind, an important difference between s. 117(6) and a plea that a claim is statute barred is that the parties cannot elect not to rely on a jurisdictional bar, as they can in the case of the Statute of Limitations.

23. While there was some *obiter* suggestion by Carroll J. in *MPD v.* MD that she would have been prepared to entertain an application on consent of the parties notwithstanding a jurisdictional issue, I do not consider that the Circuit Court, being a court of limited and local jurisdiction, can grant relief under s. 117 of the Succession Act, 1965 save in proceedings which have been initiated in accordance with s. 117(6) as mandated by the Oireachtas irrespective of the position of the parties. The power to grant s. 117 relief is constrained by the parameters of

the jurisdiction vested in the Court by legislation which clearly provides for the exercise of jurisdiction only in respect of an application brought within six months of the first extraction of a grant of representation. In consequence of the jurisdictional nature of the time-bar in s. 117(6) of the 1965 Act, I do not consider authorities to the effect that a defendant is estopped from reliance on the Statute of Limitations to be helpful or on point. Jurisdiction cannot be conferred on the Court by estoppel. The Court has either been vested with jurisdiction or it has not.

24. In contending that the factual and legal issues are the same in the existing proceedings and the proceedings for the proposed Co-Plaintiff as the moving party does, the fundamental jurisdictional difference which arises as between the existing Plaintiff's proceedings and the Co-Plaintiff's claim is not satisfactorily addressed. In the absence of an answer to this question, I have concluded that the two claims are not the same and different questions arise for determination as between the two proceedings.

25. Where, as a matter of law, the Court has no jurisdiction to entertain an application under s. 117 on the part of the Co-Plaintiff then her joinder would be entirely futile and pointless. Further, her joinder would inevitably result in additional costs depleting an already small estate to the disadvantage of beneficiaries under the will and those several siblings who have commenced proceedings within six months from the first taking out of representation as required by s. 117(6) of the Succession Act, 1965.

CONCLUSION

26. For the reasons set out, I have decided to dismiss the appeal and refuse the application for relief.