THE HIGH COURT

[2024] IEHC 331

[Record No. 2008/106 S]

BETWEEN

KIERAN MULCAHY

PLAINTIFF

AND

SUSAN KEATON, PERSONAL REPRESENTATIVE OF THE LATE HILDA MULCAHY, DECEASED

DEFENDANT

JUDGMENT of Ms. Justice Bolger delivered on the 4th day of June 2024

1. This case is grounded in a protracted family dispute. The plaintiff has brought three claims against his mother's estate of which his sister is the personal representative. In these interlocutory applications the defendant applies to dismiss all three claims for delay and, separately, the plaintiff applies for summary judgment.

Background

2. The plaintiff's father, Cathal Mulcahy, died on 25 March 1982. He left his estate, which included an investment property on Temple Road, half to his wife (the plaintiff's mother), Hilda Mulcahy, and half in equal shares to his four children. Shortly before his untimely death, Cathal Mulcahy had indicated his wish that his children would make the income from their inheritance available to their mother during her lifetime as he said he did not leave his entire estate to his wife so as to avoid the inheritance tax that would have been due on a bequest of that value at that time. Subsequently two of the plaintiff's sisters issued proceedings arising from their transfer of their one eighth shares in the Temple Road property to the plaintiff; *Mulcahy and Keaton v. Mulcahy* [2011] IEHC 186. They argued that their father's will and wishes had created a secret trust in favour of their mother. This was definitively rejected by Laffoy J. who described, at para. 8.2 of her judgment, what had been put in place as:

> "*…insofar as she availed of it, the Executrix* [i.e. Hilda Mulcahy] *was the beneficiary of a gift of the income of a residuary estate from her children, which was in*

accordance with the Testator's [i.e. Cathal Mulcahy's] *wishes, rather than a beneficiary under a secret trust of the residue imposed by the Testator."*

3. For some years after Cathal Mulcahy's death, all the rent from the Temple Road property was paid to Hilda Mulcahy's bank account until 2005. In 2000 a sum of the rent in respect of the plaintiff's interest in the property was paid into an account in joint names with the plaintiff, to which she had sole access. Hilda Mulcahy made a payment to the plaintiff each year calculated to represent his tax liability on his share of the rent. The plaintiff declared and paid tax on the rental monies, even though he did not benefit from it, and it remained in the joint bank account. At some point before Hilda Mulcahy's death, the arrangement changed, and the rent was thereafter paid directly to the plaintiff.

4. The relationship between the plaintiff and Hilda Mulcahy changed over the years from having been very close and (as found by Laffoy J.) the plaintiff was the "*prime mover*" in putting the financial arrangements operated by Hilda Mulcahy in place, to the period of time before her death when relations had unfortunately become very strained both between the plaintiff and his mother and between the plaintiff and his sisters.

The plaintiff's claims

5. The plaintiff's substantive proceedings involve three separate claims against his mother's estate.

5.1 Purchase price for Bushy Park Road

In 1982, five days before the death of Cathal Mulcahy, the plaintiff sold a 20% share he had in a property at Bushy Park Road to Hilda Mulcahy for €21,578, evidenced by a Deed of Conveyance which included a receipts clause in which the plaintiff acknowledged receiving the monies from Hilda Mulcahy. The plaintiff says the monies were not paid and he relies on what he says was an acknowledgement of the debt by Hilda Mulcahy in an affidavit she swore in April 2005. Hilda Mulcahy sought to withdraw the contents of that affidavit some months later in another affidavit. The plaintiff seeks to rely on the April 2005 affidavit not as evidence of the proof of its contents but as evidence of what was said and of Hilda Mulcahy's acknowledgement of the debt thereby restarting the clock for the purposes of the Statute of Limitations.

The plaintiff now claims for what he says is the unpaid purchase price.

5.2 Rent

The plaintiff claims for his three eighths share of the rent for the Temple Road property (made up of his one eighth from his father and one eighth shares that two of his sisters transferred to him) from April 2000 to October 2007 less three eighths of the expenses and capital expenditure on the property and less repayments made by Hilda Mulcahy to the plaintiff in respect of his tax liability on his rental income.

The plaintiff claims €76,272.12 for what he says is the rent due and owing to him.

5.3 Personal Services

In August 2004 the plaintiff's sisters requested a review of the administration of their father's estate. Hilda Mulcahy instructed her solicitor, Paul O'Sullivan, to appoint an independent accountant and to ask the plaintiff to assist the accountant. Mr. O'Sullivan wrote to the plaintiff by letter dated 27 August 2004 asking him to assist the accountant with "*any information and explanations you may be able to provide and to furnish him with any documentation in your possession.*" The plaintiff thereafter commenced working on the paperwork relating to his father's estate. On 28 July 2005 he furnished an invoice to Hilda Mulcahy via her solicitor Mr. O'Sullivan for the work he had done, which was neither disputed nor paid.

The plaintiff claims €58,080 arising from that unpaid invoice for personal services.

6. The plaintiff asserts that all three claims satisfy the requirements of a summary judgment as he says the defendant has no defence to them. The defendant disputes all three claims but separately contends that they should all be dismissed on grounds of delay.

Which application should be determined first?

7. The plaintiff asserted that his application for summary judgment should be addressed first as if he succeeds, the defendant has no defence and there can then be no prejudice to his defence arising from whatever delay has occurred. However, in determining a delay application, the possibility of an unfair trial or significant prejudice to a defendant that cannot be addressed at trial is the central issue. Therefore, the first thing to be done is to establish whether there can be a fair trial in spite of the delay and thereafter, if I determine all or some of the claims can proceed, I will assess whether it is a claim that can or should be entered for summary judgment.

Delay

8. The defendant must prove that there has been inordinate delay that is inexcusable and if they do so, the court must then consider whether the balance of justice favours

dismissing the case or allowing it to proceed. There is a vast amount of case law on delay but the decision of the Court of Appeal in *Cave Projects Ltd v. Gilhooley & ors* [2022] IECA 245 is particularly instructive, where Collins J. emphasised a number of points from the jurisprudence, the following of which have particular relevance to this case:-

(i) The burden of proof rests on the defendant.

(ii) An order dismissing a claim is a far reaching one.

(iii) There must be a causal connection between the inordinate and inexcusable delay and the matters relied on to establish that the balance of justice favours dismissal.

(iv) A defendant is also responsible for the timely progress of the litigation.

(v) General prejudice may suffice but prejudice is not to be presumed.

(vi) The dismissal of a claim is an option of last resort for where permitting a claim to proceed would result in some real and tangible injustice to the defendant.

In allowing that claim to proceed, Collins J. had regard to a number of factors including the absence of evidence of (i) relevant witnesses being unavailable due to the plaintiff's delay; (ii) any steps taken by the defendants to identify and secure the attendance of witnesses at trial; (iii) lost documentary evidence.

9. There has been considerable delay in this case which includes a very lengthy period of pre-commencement delay in the plaintiff's claim for what he says was unpaid purchase money for a property at Bushy Park Road where the cause of action first arose in March 1982. There is also pre-commencement delay in the rent claim as the claim may go back to 2000 depending on the validity of the plaintiff's argument that the rule in *Clayton's* case applies such that his claim relates to the later period of unpaid rent. That is disputed by the defendants. There is some, but much less, pre-commencement delay in the plaintiff's claim for personal services.

10. Both sides blame the other for various periods of delay and neither accepts the responsibility that the other seeks to place on them, though both agree that there has been a lot of process delay for which neither is responsible due in significant part to the number of replying affidavits filed in both applications. The plaintiff issued his proceedings close to the two-year time limit for a claim on an estate and blames that delay on the failure of the estate to appoint an administrator. Thereafter there was a considerable period of delay between 2008 and 2013 which the plaintiff seems to attribute to a stay placed on these proceedings arising from the other proceedings (referred to above at para. 2) which operated

from March to June 2013. Further delay occurred between 2013 and 2015 during which time the plaintiff was both sourcing new solicitors and trying to amend his proceedings. The substitution of the present defendant for the previous administrator also took place during this time and the plaintiff attributes responsibility for the delay caused by that to the defendant. Delay continued throughout 2016 and reference was made by the plaintiff to without prejudice negotiations to excuse this delay. The defendant disputes the plaintiff's entitlement to refer to any such negotiations but, in any event, disputes any agreement to put the progress of the proceedings on hold pending any such discussion. In and around 2018 onwards, the delay was largely process delay and some Covid-19 related delay, for which blame is not ascribed. Since the institution of the within proceedings there was ongoing correspondence between the parties which made it clear that the plaintiff intended to pursue his claims.

11. I am satisfied that the delay that occurred in these three claims, including the pre-commencement delay in the Bushy Park and rent claims, was inordinate and that responsibility for this rests largely, though not exclusively, with the plaintiff. It was the plaintiff's decision to litigate and, like any plaintiff, he must progress his proceedings as expeditiously as circumstances allow them to do so. Some, but certainly not all, of the plaintiff's delay can be excused. The plaintiff seeks in particular to rely on the family arrangement that he says was in place to excuse his pre-commencement delay in the unpaid rent claim, i.e. that he did not wish to make claims against his mother during her lifetime as he had been abiding by his father's wish that his mother would have the benefit of the rental income from his inheritance insofar as she needed it during her lifetime. He says that proceeding with his claims would have been inconsistent with how he was trying to honour his father's wishes. The plaintiff relied on this same "arrangement" to excuse his pre-commencement delay in bringing the Bushy Park claim. He said that he had waited until his mother died before asserting his right to be paid the monies for which he had agreed to sell his share of the property to her in 1982 as doing so any earlier would have been inconsistent with implementing his father's wishes that the income from his inheritance would be made available to his mother during her lifetime. However the plaintiff did not suggest that the Bushy Park claim was related to his father's estate or expressed wishes about how he wanted his children to deal with the assets he had left to them during Hilda Mulcahy's lifetime.

12. The plaintiff's view of the arrangements in his family is not an excuse for his delay. In effect, he says he was seeking to avoid his mother having to part with income that he believes his father wanted her to have the benefit of during her lifetime. However, he could have done that without waiting until she died to assert his claims. He did not assert any of his claims in a legal manner prior to her death, other than the invoice for personal services he sent to her solicitor on 28 July 2005. A debt could have been acknowledged via legal steps such as a charge on one of the commercial properties in which Hilda Mulcahy had an encumbered interest. Instead, the plaintiff chose to wait until Hilda Mulcahy had died and then institute proceedings against her estate, which is now deprived of her evidence to defend claims that could have been made during her lifetime. This approach does not excuse the plaintiff's delay and, as I address further below, represents a tangible prejudice to the defendant in defending the claims that have been brought against the estate.

13. Overall and taking into account taking into account the length of delay, I consider much of the delay here to have been inexcusable. I therefore proceed to consider where the balance of justice lies and whether the plaintiff's right to a fair trial has been compromised beyond that which could be addressed by the trial judge. I will examine this separately for each of the plaintiff's three claims.

(i) Bushy Park

14. The plaintiff contends that this is a documents only case with no need for oral evidence as he says the claim is based almost exclusively on the conveyance and acknowledgement thereof, with the only other issue being whether the purchase price was paid. The receipts clause in the conveyance, signed by the plaintiff, his now deceased father and mother and his wife who was the solicitor for the transaction, asserts receipt of a payment that the plaintiff now says was never paid. The plaintiff's analysis of the case does not explain why this was so. The plaintiff's wife previously acted for the plaintiff in a professional capacity. Her current personal and previous professional support for her husband in these proceedings is commendable but does mean she could not be seen as an entirely independent witness in the court's attempts to establish what went on during this transaction.

15. The defendant relies on s. 59 of the Land and Conveyancing Law Reform Act, 2009 which provides that statements and descriptions of facts contained in instruments more than

15 years old are sufficient evidence of their truth, unless proven inaccurate. However, that is not sufficient as the plaintiff clearly asserts that the receipts clause is inaccurate.

16. The plaintiff relies on the decision of the Supreme Court in *Revenue Commissioners v. Moroney* [1972] I.R. 372 to submit that extrinsic evidence can be introduced to contradict the expressed terms of a deed in relation to payment of consideration. In that case it was clear that the parties never intended for consideration to be paid. Here the plaintiff contends the very opposite, i.e., that he signed a document confirming payment of a sum of money that he now says he did not receive and which he says his mother intended to pay him and that she acknowledged her responsibility for the debt in an affidavit she swore in 2005. Shortly afterwards she swore another affidavit in which she averred to having sworn the previous affidavit under what she described as pressure and duress, a very serious allegation to make particularly by a then elderly woman against her adult son who had previously been the "*prime mover*" (as found by Laffoy J.) in arranging aspects of her financial affairs. The plaintiff sought to rely on what he claimed was the legal definition of duress to dispute that his mother was in fact put under duress, as she said she was. However, the stark fact is that the plaintiff's mother used the words *"duress"* and *"pressure"* in describing her treatment by her son. Whatever their legal meaning, those words have a commonly understood meaning to denote treatment that would have to cause concern.

17. The plaintiff relies on the decision of *Revenue Commissioners v. Moroney* as authority for his entitlement to admit extrinsic evidence but at the same time, he disputes the defendant's need to rely on witnesses in order to defend a claim first made some 26 years after it first arose. The defendant is entitled to call relevant or appropriate witnesses to defend the claim. Of the signatories to the deed who could have or currently can vouch as to what happened, and why, two are deceased. Another family member also signed the deed but only as a witness to the signatures. The defendant does not have the witnesses who could have explained what happened and why, from the defendant's point of view, which was described by the defendant's counsel as depriving the defendant of the counter version of events. That unfairness has been caused directly by the plaintiff's delay, i.e., by the plaintiff's decision to wait until his mother's death before instituting proceedings against her estate. As a consequence of that significant pre commencement delay, which I found not to have been excused by the plaintiff's view of the family arrangements, and in circumstances where alternative options to secure the plaintiff's claim could have been

explored during Hilda Mulcahy's lifetime, I am satisfied that the cumulative delay has created an unfairness against the defendant that cannot be sufficiently addressed or neutralised by a trial judge.

18. The prejudice to the defendant is also exacerbated by the absence of Hilda Mulcahy's solicitor, Paul O'Sullivan, who died in March 2020. Mr. O'Sullivan's file is apparently available, but it was not suggested that there was anything in it dating back to this 1982 transaction. Mr. O'Sullivan did advise Hilda Mulcahy in relation to her affidavit in April 2005 and the later affidavit in which she withdrew her previous averment. She was also advised by counsel who is available even though none of the voluminous affidavits have attempted to address what counsel might be able to say. Even if counsel can give evidence of the circumstances in which Hilda Mulcahy signed the two affidavits in 2005, I do not consider that will get the defendant over the prejudice they will suffer in defending this claim at this juncture and in circumstances where they have no oral evidence to counter that evidence which is available to the plaintiff in relation to the circumstances of the 1982 conveyance and receipts clause contained therein.

19. The prejudice to the defendant in allowing a claim to proceed where the defendant, in effect, is deprived of any witnesses to counter the two surviving witnesses on the plaintiff's side, outweighs the prejudice to the plaintiff in losing his opportunity to litigate against Hilda Mulcahy's estate in respect of an alleged debt dating back to 1982 and in respect of which the plaintiff did not litigate until after Hilda Mulcahy died.

20. I therefore dismiss the plaintiff's claim for unpaid purchase money for a property at Bushy Park Road on grounds of delay.

(ii) Rent

21. The period of delay here is less but is still inordinate. Whether the rule in *Clayton's* case applies will be a question both of law and fact and may require discovery and/or oral evidence. I do not consider the delay to be excused by the plaintiff's view of the family arrangement and particularly so here where much of the arrangement for the management of the rental income was put in place by the plaintiff without the input or knowledge of his sisters (as found by Laffoy J.). For the same reasons as I set out above, I do not find the plaintiff's delay is excused by his decision to wait until the death of Hilda Mulcahy before proceeding to bring a claim against her estate.

22. In relation to the balance of justice, a number of important witnesses for the defendant are not available including Hilda Mulcahy and Paul O'Sullivan. However, I do not consider this to be as prejudicial as in relation to the unpaid purchase money claim. Firstly, the claim for unpaid rent is more recent dating at most some eight years from when the proceedings were issued and possibly less. Secondly, the presence of Mr. O'Sullivan's file is more likely to be relevant, as may be the discovery of financial records from this time. It is also possible that counsel may be in a position to give evidence about her discussions with and advice to Mr. O'Sullivan. It is also possible that the plaintiff's sisters, including the defendant, may be able to give evidence as to the arrangements they had in place vis-á-vis their one eighth share of their rent from their bequest from their father. This greater availability of oral and documentary evidence and possibly discovery leaves me to conclude that whatever prejudice the defendant may suffer, in particular from the absence of Hilda Mulcahy and Paul O'Sullivan, can be addressed by the trial judge. I do not consider the absence of two other individuals whom the defendant suggests Hilda Mulcahy may have discussed her financial affairs with, to be relevant.

23. In all of the circumstances I am satisfied that this claim should be permitted to proceed to trial.

(iii) Claim for personal services

24. The plaintiff's claim for personal services rests on correspondence, in particular, a letter from Mr. O'Sullivan to the plaintiff dated 27 August 2004 and the invoice that the plaintiff furnished to Mr. O'Sullivan following on the completion of his work. The absence of Mr. O'Sullivan and Hilda Mulcahy as witnesses is prejudicial to the defendant's defence but, for the same reasons as set out above in relation to the rent claim, not to the extent that it outweighs the prejudice to the plaintiff in not being able to pursue his claim and given the ability of the trial judge to address any such issues at trial.

25. In all of the circumstances I am satisfied that this claim should be permitted to proceed to trial.

Summary judgment

26. The court must be satisfied that it is very clear there is no defence. The court accepts the principles set out by McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, all of which are subject to the overriding consideration that McKechnie J. identified at para. 9(xii), namely, to achieve a just result while taking account of a person's right of access to

justice. The court must be satisfied that the defendant has no arguable defence before a summary judgment can be entered and the defence must be more than mere assertion (as per Clarke J. in *I.B.R.C. v. McCaughey* [2014] 1 I.R. 749). The possibility of the defendant's position being improved by discovery and/or oral testimony must be considered, albeit there must be a reasonable and viable prospect of such an improvement rather than a speculative or optimistic expectation.

27. The extent of the affidavits and replying affidavits sworn and relied on in this application merit particular mention. The plaintiff seeks to minimise the volume of averments, allegations and counter allegations on the basis that he says (at para. 35 of his submissions) that some of the affidavit evidence is not strictly relevant to the issues, but that the plaintiff "*simply wanted to ensure that certain points asserted by the Defendant were not left uncontradicted*". A court is entitled to assume that affidavits are sworn for a reason relevant to the issues put before the court. It is almost trite law to reiterate the unsuitability of the exchange of affidavits without oral evidence to resolve conflicts of facts (*RAS Medical Ltd v. The Royal College of Surgeons* [2019] IESC 4). What was going on here is not "*the mere multiplication of paperwork and reiteration of argument and grievance*" averred to by O'Sullivan J. in *Leopardstown Club Ltd v. Templeville Developments Ltd* [2006] IEHC 133. Very many pages of affidavits (448 from the plaintiff and 175 from the defendant covering all three claims) contain numerous allegations, responses and counter allegations along with many exhibits from a number of different deponents. That alone renders this application for summary judgment and the plaintiff's assertion of the absence of any real or relevant conflicts of facts, difficult to comprehend.

(i) Rent Claim

28. The plaintiff's case is, in effect, that Hilda Mulcahy held his share of the rent and could use it if she needed it, but as she did not use it, it did not belong to her and he was and is entitled to it. He contends that this version of the money as a gift from him to Hilda Mulcahy only insofar as she availed of it, has already been determined by Laffoy J. as a finding of fact in her judgment. I do not think it is that simple. The ratio of Laffoy J.'s decision was that the plaintiff's sisters were incorrect in their assertion that a secret trust had been put in place by their father's will and wishes. That is a binding finding of fact. However, Laffoy J.'s comments about what the arrangements were i.e., a gift insofar as Hilda Mulcahy availed of it, were *obiter*. More significantly, there is no teasing out of the

legal implications of this *obiter* comment or the legal ramifications of it, in the judgment. The plaintiff's current claim for rent remains a live and potentially complex issue of law and fact that is not suitable for summary judgment requiring, as it does, oral evidence and possibly discovery of records in the plaintiff's possession that the defendant has said, on affidavit, have not been provided to her.

29. The defendant also asserts that the plaintiff is estopped due to Hilda Mulcahy's reliance on her understanding of the rent as a gift and her expenditure on the property. The plaintiff disagrees and says any such expenditure was on behalf of all of the owners including the plaintiff. This is something on which evidence and/or discovery may be required.

30. The plaintiff's claim for unpaid rent is not suitable for summary judgment as there is an arguable defence. It should proceed to a plenary hearing.

(ii) The plaintiff's claim for personal services

31. The plaintiff bases his claim on a letter dated 27 August 2004 from Hilda Mulcahy's solicitor, Paul O'Sullivan, on Hilda Mulcahy's behalf which asked the plaintiff "*to assist* [the independent accountant] *with any information and explanations you may be able to provide and to furnish him with any documentation in your possession."* There is no further documentary evidence of the agreement the plaintiff says was in place for him to be paid a reasonable sum for the work he did, although there is a letter from him to Mr. O'Sullivan dated 27 May 2005 referring to the work done, but this seems to postdate the work and the agreement that he says was in place for him to be paid for it. He sent Hilda Mulcahy an invoice dated 28 July 2005 in which he says the work was carried out on an urgent basis at her request over 360 hours between 27 August 2004 to 11 January 2005. The defendant says there is no evidence of an agreement in relation to the rate or hours or of Hilda Mulcahy's acceptance of the purported agreement and disputes the plaintiff's entitlement to rely on Mr. O'Sullivan's correspondence as hearsay contrary to s. 14(3) of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 Act. The plaintiff says the letter was not in contemplation of proceedings and therefore can be relied on.

32. The defendant's main two lines of defence are, firstly, the absence of a clear intention to create legal relations to make a quantum merit claim (*Coleman v. Mullen* [2011] IEHC 179) and secondly, that any work done by the plaintiff, even if he is entitled to payment, should have been claimed from Cathal Mulcahy's estate rather than Hilda Mulcahy's estate. The plaintiff's letter to Mr. O'Sullivan of 27 May 2005, after he says he completed the work,

refers to it as work "*in connection with the administration of the estate* [of Cathal Mulcahy]" and that "*no portion of this fee is to be discharged from my share of the residuary estate.*" The correspondence also refers to work the plaintiff did for his mother for which he says he did not expect to be paid. The correspondence that is available raises an arguable defence that the plaintiff did work for Cathal Mulcahy's estate and that any claim should have been against that estate rather than against the estate of Cathal Mulcahy's executor, even if the work was only required to be done as a result of the executor's failure to attend her duties.

33. The plaintiff's claim for personal services is not suitable for summary judgment and should proceed to plenary hearing.

Conclusion

34. I dismiss the plaintiff's Bushy Park claim for delay.

35. I refuse the plaintiff's claim for summary judgment in relation to the unpaid rent claim and for personal services and direct that both shall proceed to plenary hearing. Given the delays that have already occurred, that this litigation should be progressed as expeditiously as is possible.

Indictive view on costs

36. Clarke J. in *ACC Bank Plc v. Hanrahan* [2014] 1 I.R. 1 observed that where the court remitted the matter to plenary hearing and was satisfied that a plaintiff had acted in a particularly unreasonable manner in not agreeing to that course of action, the court should consider whether the justice of the case required that some or all of the costs of the summary judgment motion should be borne by the plaintiff. He said that in the majority of these cases *"the costs of a summary judgment motion as result of which the proceedings are remitted to plenary hearing should either be reserved or become costs in the cause."*

37. In this case the plaintiff believed that the defendant had no defence to its claim. Ultimately this will be a matter for the trial judge and if the plaintiff is found to have been correct, he may be entitled to the costs of this application as well as to his substantive costs depending on the views of the trial judge. In those circumstances my indicative view on costs is that the costs of this motion should be reserved to the trial judge.

38. In the defendant's application to dismiss all three claims for delay, the defendant succeeded in dismissing one of the claims and the plaintiff succeeded in opposing her application in relation to the other two. In all the circumstances and in accordance with s.

169 of the Legal Services Regulation Act my indictive view on costs is that there should be no order as to costs in relation to the delay motion.

39. I will list the matter at 10:30a.m. on 20 June 2024 for the making of final orders including costs. If either party wishes to lodge written submissions, they should be filed with the court at least 48 hours in advance of the matter coming back before me.

Counsel for the plaintiff: Garret Byrne BL

Counsel for the defendant: Niall Buckley SC, Niall Fahy BL