Neutral Citation No: [2021] NICh 22	*Ref:* **McB11668**
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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **22/11/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

MATTHEW GRAHAM

Plaintiff/Respondent

and

ERNEST GRAHAM
(as the personal representative of Beryl Mildred Graham, Deceased)

Defendant/Applicant

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Ms Fee BL (instructed by Murnaghan and Fee, solicitors) for the Applicant
Matthew Graham appeared as a Litigant in Person

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McBRIDE J

Introduction

[1] By Notice dated 27 September 2021 the defendant, Ernest Graham as the personal representative of Beryl Mildred Graham, deceased, ("Ernest Graham") applies to strike out two sets of proceedings brought by the plaintiff ("Matthew Graham"), namely:

(a) A writ action in which Matthew Graham claims that the deceased's Will was invalid on the grounds of lack of capacity and/or undue influence.

(b) An Originating Summons in which Matthew Graham seeks reasonable financial provision from the estate of the deceased pursuant to the provisions of the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979 ("the 1979 Order").

[2] The application by Ernest Graham is made pursuant to the provisions of Order 18 Rule 19 of the Rules of the Court of Judicature in Northern Ireland and/or under the inherent jurisdiction of the court.

[3] Matthew Graham acted as a litigant in person and Ernest Graham was represented by Ms Fee of counsel. I am grateful to all parties for their helpful written and oral submissions.

[4] The application is grounded on the affidavit of Mr Donal Fee, Solicitor, sworn on 11 August 2021 together with a supplemental affidavit dated 24 September 2021. Matthew Graham replied by way of affidavit sworn on 13 October 2021.

Background

[5] Matthew Graham is the 45 year old son of Ernest Graham aged 93 and Beryl Mildred Graham (deceased).

[6] Relationships between Matthew Graham and his parents became strained from in or about December 2013 when the Northern Bank sought to repossess lands guaranteed by Ernest Graham and his wife in respect of debts secured by Matthew Graham.

[7] Beryl Graham died on 30 October 2016. At that time relationships were so strained Matthew Graham did not attend her funeral.

[8] The deceased made her last Will on 24 February 2015 and it was admitted to probate on 22 February 2021. Her Will provided essentially that her entire estate was to pass to her husband, Ernest Graham, absolutely provided that he did not pre-decease her.

[9] The deceased's estate consisted of:

(a) Fifty per cent share as tenant in common with her husband of a house and lands at The Grann;

(b) Joint ownership of lands at Moneyourgan and Cleggan; and

(c) Joint ownership of a house at Rossnowlagh.

[10] On 17 January 2017 Matthew Graham phoned the deceased's solicitors enquiring whether his mother's Will concerned him and was advised it did not. The deceased's Will was provided to Matthew Graham in January/February 2018.

[11] On 27 January 2017 Matthew Graham sent a letter of claim to Ernest Graham in which he claimed an interest in all the lands at The Grann, Moneyourgan and Cleggan on the basis of proprietary estoppel. In response Ernest Graham issued

proceedings in the High Court seeking a declaration that he was the sole legal and beneficial owner of all the lands at The Grann, Moneyourgan and Cleggan ("the lands"). Matthew Graham defended the proceedings and issued a counterclaim that he owned the entire beneficial interest in the lands on the basis of proprietary estoppel ("the Chancery proceedings").

[12] In the Chancery proceedings' pleadings Matthew Graham put his father on strict proof of the transfer of his mother's interest in the lands to him. Ernest Graham's solicitors stated in affidavit that Ernest Graham was the sole registered owner of these lands. This was inaccurate, as of that date he was not registered as a sole owner of the land. This appears from the title documentation. Matthew Graham was provided with all the relevant title documentation in or around May 2017 and these documents reflected the true nature of the ownership of the lands. Under the terms of the deceased's Will, Ernest Graham was entitled to be registered as the sole legal owner of the lands by reason of the provisions of the deceased's Will.

[13] During the course of the Chancery proceedings Ernest Graham applied on the grounds of ill health for his evidence to be taken on commission. In support of his application he provided a medical report by Mr Oro Etaluku. In his report dated 7 December 2017 Mr Etaluku stated that Ernest Graham had advised him that his wife had been in the advancing stages of Alzheimer's type dementia before she died. This report was shared with Matthew Graham and formed the basis of some cross-examination by his counsel of Ernest Graham.

[14] The Chancery proceedings were heard over a 12 day period between November 2018 and May 2019. Judgment was handed down on 28 April 2020 and a supplemental judgment was provided on 3 July 2020. The matter was then appealed to the Court of Appeal and the Court of Appeal granted the appeal in part on 14 June 2021.

[15] The Court of Appeal made a number of findings and, in particular, held that Matthew Graham persistently failed to co-operate with the court to the extent that contempt proceedings may well have been appropriate.

[16] On 27 July 2021 the plaintiff issued a letter of claim in respect of the deceased's Will and then issued the present proceedings on 30 July 2021.

Relevant Legal Principles

[17] Order 18 Rule 19 provides:

> "19.-(1) … The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

[18] The courts may therefore strike out proceedings under this provision and in addition it can strike out proceedings under its inherent jurisdiction.

[19] Ernest Graham's counsel submitted that the proceedings should be struck out on the basis of:

(a) Issue estoppel; and

(b) On the grounds that they represented an abuse of process.

Issue Estoppel

[20] The doctrine of res judicata provides that where a decision is made by a judicial authority, the same matter cannot be re-opened by parties bound by the decision. Res judicata embraces both cause of action estoppel and issue estoppel. Issue estoppel is defined in Halsbury's Laws of England Volume 12A paragraph 1568 as follows:

> "A term that is used to describe a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, but, in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue." (See *Arnold v National West Bank* [1991] 2 AC 93 at 105 per Lord Keith.)

[21] The purpose of the principle of res judicata is to prevent abusive and duplicative litigation. It is in the interest of the public to stop courts being clogged by re-determinations of the same disputes; and in the private interest because it is unjust for a man to be vexed twice in litigation on the same subject matter.

[22] Therefore, if an issue has been distinctly raised and decided in an action in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or parties claiming under them – see *New Brunswick Railway Company v British and French Trust Corporation Limited* [1939] AC 1 19-20 HL per Lord Maughan LC.

Abuse of Process

[23] An abuse of the process of court connotes that the process of the court must be used bona fide and properly and must not be abused. The court will therefore prevent its machinery from being used as a means of vexation and oppression in the process of litigation.

[24] The categories of conduct rendering a claim an abuse of court are not closed. Whether a claim is an abuse of court will depend on all the circumstances and the court will have regard, in particular, to considerations of public interest and the interests of justice. The public and private interest is that there should be finality in litigation and the parties should not have to be twice vexed in the same matter. Further, there should be efficiency and economy in the conduct of litigation.

[25] In determining whether a claim is an abuse of court the court will look at all the circumstances of the case and in particular consider the following non-exhaustive list of factors:-

- Whether there has been, and if so, the extent of delay.
- Whether the proceedings are hopeless and doomed to failure.
- Whether the real purpose of bringing the proceedings is for some ulterior or collateral purpose such as causing vexation to the other party.
- Whether the issue could have been brought and determined in earlier proceedings – see *Henderson v Henderson* 3 Hare 100

[26] In respect of the last bullet point above it was noted in *Hashwani v Jivraj* [2015] EWHC 988 at paragraph [59]:

> "Those who litigate have no right to litigate piecemeal. If a party wishes to be able to rely upon additional or alternative claims, then the general rule is that all claims must be brought in the same proceedings. … At the very least, … the court must be told about any additional or alternative claims which a party wishes to reserve."

[27] In *Johnston v Gorewood* [2001] 1 All ER 481 however Lord Bingham stated at page 499 as follows:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. … It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

[28] Consequently, in the exercise of its discretionary power the court will have to look at all the circumstances to determine whether the proceedings are an abuse of process and in this regard can consider the earlier record of the proceedings before it.

Consideration

[29] Two issues arise for consideration:

(a) Should the proceedings be struck out on the basis of issue estoppel; and

(b) Should the proceedings be struck out as an abuse of process?

Issue Estoppel

[30] The present proceedings issued by Matthew Graham comprise a writ action challenging the validity of his mother's Will and an originating summons seeking a claim to his mother's estate pursuant to the provisions of the 1979 Order.

[31] Ms Fee on behalf of Ernest Graham submitted that the 1979 Order proceedings should be struck out on the basis that all the ingredients necessary to a claim under the 1979 Order were considered and determined in the earlier Chancery proceedings. In particular, Ms Fee noted that in the Chancery proceedings before the trial judge and the Court of Appeal the court considered all the relevant factors

set out in Article 5 of the 1979 Order, namely the financial resources and needs of the parties, the obligations and responsibilities which the deceased had towards Matthew Graham, the size and nature of the estate she had and any other relevant matters including the conduct of Matthew Graham.

[32] I do not consider that the 1979 Order claim is barred on the basis of issue estoppel. In the Chancery proceedings the court had to consider whether Ernest Graham made a promise in respect of the lands to Matthew Graham and if so whether Matthew Graham had placed detrimental reliance upon that promise. In both the lower court and the Court of Appeal the court found that Matthew had made out an equitable claim. In those circumstances the court had to consider what relief if any it should grant. In considering the appropriate form of relief the court took into account equitable principles and had regard to all the circumstances including the nature of the promise, the detrimental reliance and gave such relief as it considered just in all the circumstances. By contrast in a 1979 Order the court has to consider whether the deceased has made reasonable financial provision for the applicant and whether relief should be granted and if so the nature of the relief having regard to the factors set out in Article 5. I consider very different issues arise for consideration in a claim under the 1979 Order and a proprietary estoppel claim and very different tests are applied to the questions whether a claim is made out and if so what relief should be granted. Whilst many of the Article 5 factors may be relevant to an equitable estoppel claim (and indeed were considered in the earlier Chancery proceedings), because different considerations and different tests are applied in proprietary estoppel claims and 1979 Order claims the outcomes can be very different even though based on the same factual scenario. Indeed, for this reason parties often elect to make one claim in the absence of the other on the basis that one will produce a better outcome. I therefore do not consider that the 1979 Order proceedings should be struck out on the basis of issue estoppel.

[33] The writ action involves consideration of the question whether the deceased had capacity to make a Will and/or whether she was subject to undue influence when making the Will. These issues, whilst forming part of the evidence in the Chancery proceedings were not the subject of adjudication by the court and therefore in the absence of determination by the earlier court in respect of these issues I do not consider that the present writ action can or should be barred on the basis of issue estoppel.

Abuse of Process

[34] A review of the record of the earlier Chancery proceedings indicates that the plaintiff knew about the death of his mother and the contents of his mother's Will from in or around January/February 2018 and further records that he received a copy of her Will at or around that time. The court records also indicate that Matthew Graham had available to him the medical report from Mr Etaluku. Accordingly, Matthew Graham had available to him all the information he required and indeed now relies upon to bring the present Writ action in which he seeks to

challenge his mother's capacity to make a Will. In addition, at the time when the Chancery proceedings were issued Matthew Graham was aware of all the factual matters which would have supported his present claim that his mother was placed under undue influence to make the Will.

[35] Notwithstanding his knowledge of these matters Matthew Graham did not bring a claim challenging the validity of the Will or a claim under the 1979 Order at that time. Further, he did not intimate to the court during the Chancery proceedings that he had alternative claims which he wished to reserve.

[36] Matthew Graham has advanced no reasons as to why he did not or could not have brought these claims at the same time as the Chancery proceedings. In these circumstances I consider there has been significant unexplained delay in the issuing of the present proceedings.

[37] Normally when a proprietary estoppel claim is brought in circumstances where the owner of the lands has died the plaintiff who is considering other potential claims usually advises the other parties that he has other causes of actions which he intends to reserve. In contrast in this case I find Matthew Graham made a firm election not to bring a claim to challenge his mother's Will or to bring a claim under the 1979 Order. As appears from paragraph 8 of his affidavit sworn on 15 October 2021 he understood that the lands were to pass to him on the second death of his parents. With this knowledge he put his father upon proof of the ownership of the lands and when satisfied that the lands which formed part of his mother's estate passed to his father under the terms of her will and that his father was now the sole legal owner of all the lands or at least entitled to be registered as the legal owner of all the lands, he elected to pursue his claim to the lands by way of a proprietary estoppel claim only. In these circumstances I am satisfied that he was clearly electing not to make a claim on his mother's estate either by challenging her Will or under the 1979 Order. His proprietary estoppel claim by laying claim to all the lands including the lands formerly owned by his mother makes clear that he had no additional or alternative claim which he wanted to pursue in respect of the lands which formed part of his mother's estate.

[38] In relation to the writ action I further consider that this litigation is hopeless. All the earlier Wills drafted by the deceased left the entirety of her estate absolutely to her husband. In these circumstances even if Matthew Graham was successful in having the Will declared invalid on the grounds of incapacity and/or undue influence it would simply mean that her earlier Will would govern the distribution of her estate. All of her earlier Wills left her entire estate to her husband and therefore there would be no advantage to Matthew Graham in pursuing this cause of action.

[39] In all the circumstances I consider that the real purpose of the proceedings now brought by Matthew Graham is to get a second bite at the cherry and in essence he is seeking to appeal the Court of Appeal decision.

[40] I also consider that he is bringing the proceedings for a vexatious and collateral purpose. I am satisfied that he is bringing these proceedings to cause further vexation to his elderly father and to put him through further litigation despite the fact that his father has already been subjected to very lengthy and acrimonious litigation in his later years.

[41] I am satisfied that Matthew Graham was fully aware of all the facts which would have enabled him to bring these matters to the attention of the court at the stage of the Chancery proceedings and/or at least to notify the parties and the court that he had alternative proceedings. His failure to do so means that he is now seeking to litigate in a piecemeal fashion. There is a public interest in finality and economy of proceedings. There is also a private interest in finality of litigation so that Ernest Graham should not be vexed by having to deal with litigation on two occasions. For all these reasons I consider that both the writ action and the originating summons are an abuse of process and accordingly I strike out both sets of proceedings. I will hear the parties in respect of costs.