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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **08/10/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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JOHN STITT

-and-

[1] PATRICIA McCLEAN
(as Personal Representative of the Estate of Margaret Stitt, deceased)
[2] MARIA KENNY
[3] ELIZABETH ORR
[4] ALEXIS STITT
[5] KIERAN STITT
[6] RICHARD STITT
[7] PAUL STITT
[8] GERALD STITT

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Cathal Doran (instructed by Peter Bowles & Co., Solicitors) for the Plaintiff
Eoghan McCarthy (instructed by Brian Feeney & Co., Solicitors) for the 2nd, 3rd, 4th, 6th, 7th and 8th Defendants
The 1st and 5th Defendants did not appear and were not represented

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SIMPSON J

Introduction

[1] All the parties to this matter, except for Patricia McClean, are the children of the late Margaret Stitt ("the deceased"), who died on 11 August 2018. By her Last Will and Testament, dated 26 June 2006, the deceased left her entire estate to her eight children in equal shares. The estate effectively consists only of a dwelling house situated at 38 Thomas Russell Park, Downpatrick, with a net probate valuation of £229,087. The plaintiff currently lives in the Thomas Russell Park dwelling house, although he jointly owns (with his brother, Paul) another property at 54 Ballylucas Road, Downpatrick.

[2] The plaintiff seeks to make a claim under the Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979, ("the 1979 Order"), Articles 3 and 4 of which provide (where material):

> "3.—(1) Where after the commencement of this Order a person dies domiciled in Northern Ireland and is survived by any of the following persons:
>
> …
>
> (c) a child of the deceased;
>
> …
>
> that person may apply to the court for an order under Article 4 on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.
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> 4.—(1) Subject to the provisions of this Order, where an application is made for an order under this Article, the court may, if it is satisfied that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant, make any one or more of the following orders:"
>
> (A variety of orders available to the court is then set out, including provision for periodical payments, lump sum payments or transfer of property)

[3] The plaintiff, being a child of the deceased, is restricted in what he can claim by virtue of Article 2(2) of the Order, by the provisions of which, in his case, the term "reasonable financial provision" — "means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance."

[4] In *Re Coventry* [1980] 1 Ch 461, Oliver J, whose decision was upheld on appeal, said this at 474G-475B, of the concept of maintenance in the equivalent English provision:

> "It seems to me, however, that in regarding the circumstances and in applying the guide lines set out in [the English equivalent section], it always has to be borne in mind that the Act, so far as it relates to applicants other

> than spouses, is an Act whose purpose is limited to the provision of reasonable maintenance. It is not the purpose of the Act to provide legacies or rewards for meritorious conduct. In order to enable the court to interfere with and reform those dispositions it must, in my judgment, be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant — and that means, in the case of an applicant other than a spouse for that applicant's maintenance. It clearly cannot be enough to say that the circumstances are such that if the deceased had made a particular provision for the applicant, that would not have been an unreasonable thing for him to do and therefore it now ought to be done. The court has no carte blanche to reform the deceased's dispositions or those which statute makes of his estate to accord with what the court itself might have thought would be sensible if it had been in the deceased's position."

[5] In April 2021 all of the other siblings issued County Court proceedings, in which the present plaintiff was the defendant, seeking the sale of the dwelling house in lieu of partition and an order that the plaintiff vacate the property. If successful, this would allow the property to be sold and the proceeds of sale divided equally among the deceased's children, including the plaintiff. In those proceedings the plaintiff is presently seeking the leave of the County Court to issue a counterclaim seeking a declaration, inter alia, that the fee simple of the subject property is vested in him. However, notwithstanding that the siblings' County Court proceedings were issued in 2021 no application for leave to file a counterclaim was issued until March 2024, some 3 years after the County Court proceedings were commenced.

[6] Thus, there are the two sets of substantive proceedings. Affidavits have been exchanged between the plaintiff and the third named defendant, Elizabeth Orr, which indicate that there are significant matters in dispute between the parties. I identify the following affidavits which have been sworn, and the proceedings in which they were sworn, although sometimes their contents overlap the two sets of proceedings:

- 14 October 2021 - (Elizabeth Orr) — possession proceedings
- 15 March 2024 - (John Stitt) — possession proceedings
- 11 April 2024 - (Elizabeth Orr) — possession proceedings
- 22 April 2024 -(John Stitt) — 1979 Order proceedings
- 22 April 2024 - (Peter Bowles, Solicitor) — 1979 Order proceedings
- 9 September 2024 - (Elizabeth Orr) — 1979 Order proceedings

- 26 September 2024 - (John Stitt) — 1979 Order proceedings and possession proceedings

[7] There is also a summons seeking removal to the High Court of the County Court proceedings and the subsequent consolidation of both sets of proceedings; alternatively, that they should be heard by the same judge at the same time. Because of the value of the property involved, only the High Court would have jurisdiction to hear the 1979 Order proceedings.

The issue for the court

[8] The issue which I have to deal with at this stage arises from the wording of Article 6 of the 1979 Order. This provides:

> "An application for an order under Article 4 shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out."

[9] In this case the grant of probate was extracted on 6 March 2019. The six-month time limit expired on 5 September 2019. These proceedings under the 1979 Order were not begun until the issue of an Originating Summons on 23 April 2024, a period in excess of 4½ years beyond the expiry of the six-month period. Accordingly, at paragraph 1 of the Originating Summons the plaintiff seeks: "An Order pursuant to Article 6 of the [1979] Order granting leave to bring this application."

[10] Most of the other siblings object to permission being granted. Ms McClean, the former Personal Representative of the deceased, took no part in this hearing, having completed all her duties to the estate of the deceased. I also record that the fifth defendant, Kieran Stitt, took no part in the hearing.

Relevant principles

[11] In *Berger v Berger* the Court of Appeal in England [2013] EWCA Civ 1305 said, in para [44], that the equivalent provision in the English legislation:

> "… does not give any guidance as to how the court should approach an application for permission but there is no dispute between the parties as to the judge's formulation of the correct approach to such an application. He distilled what he called 'the following propositions' from *Re Salmon* [1981] Ch 167 and *Re Dennis* [1981] 2 All ER 140:
>
> '(1) The court's discretion is unfettered but must be

> exercised judicially in accordance with what is right and proper.
> (2) The onus is on the Applicant to show sufficient grounds for the granting of permission to apply out of time.
>
> (3) The court must consider whether the Applicant has acted promptly and the circumstances in which she applied for an extension of time after the expiry of the time limit.
>
> (4) Were negotiations begun within the time limit?
>
> (5) Has the estate been distributed before the claim was notified to the Defendants?
>
> (6) Would dismissal of the claim leave the Applicant without recourse to other remedies?
>
> (7) Looking at the position as it is now, has the Applicant an arguable case under the Inheritance Act if I allowed the application to proceed?'"

[12] I note that in *Re Salmon* the Vice-Chancellor expressly disclaimed "any intention to lay down principles", going on to say — "though I am not sure that it makes it much better to use the term 'guidelines'" (page 174H). He further specifically stated that the list he provided was not to be treated as being exhaustive (176H). In light of his disclaimer that he was laying down principles, I treat them as appropriate guidance extracted from the authorities on how the court should approach the exercise of its discretion.

[13] I note also that in *Re Salmon* the Vice-Chancellor said [1981] 1 Ch 167, 175:

> "… the time limit is a substantive provision laid down in the Act itself and is not a mere procedural time limit imposed by rules of the court which will be treated with the indulgence appropriate to procedural rules. The burden on the applicant is thus, I think, no triviality: the applicant must make out a substantial case for it being just and proper to exercise its statutory discretion to extend the time."

[14] This observation was also quoted by Black LJ in *Berger v Berger* at para [61] of her judgment in that case, in the context of very significant delay in commencing proceedings, 6½ years in that case. She said that "faced with a claim which is as long out of time as this one, a court is bound to search for explanations for the delay in order to consider them as part of all the circumstances of the case."

[15] In *Begum v Ahmed* [2019] EWCA Civ 1794 the Court of Appeal said:

> "13. … In *Nesheim v Kosa* [2006] EWHC 2710 (Ch) Briggs J (as he was then) identified the nature and purpose of the time limit and the power to extend as follows:
>
> > '… it is in my judgment also relevant that the limitation period which has now expired in this case is one imposed under the Inheritance Act. It is both of a special type in the sense that it confers upon a court a discretionary power to permit a claim to be made out of time on well settled principles and it exists for a particular purpose, namely to avoid unnecessary delay in the administration of estates to be caused by the tardy bringing of proceedings under the Act and to avoid difficulties which might be occasioned if distributions of an estate are made before proceedings are brought, requiring possible recoveries from beneficiaries if those proceedings once brought are successful.'
>
> 14. It follows that the discretion should not normally be exercised in a way which undermines the purpose of the time limit. It will always be material to ask whether the bridging of the claim out of time will cause delay in the proper administration of the estate or have the potential to interfere with the distributions which have already been made."

[16] Finally, in *Cowan v Foreman* [2019] EWCA Civ 1336, at para [46], the Court of Appeal said of the approach to the equivalent section in England:

> "There is no disciplinary element to section 4. Unlike the provisions of the CPR, the six-month time limit in section 4 is not to be enforced for its own sake. The time limit is expressly made subject to permission of the court to bring an application after the six months has elapsed. It is designed to bring a measure of certainty for personal representatives and beneficiaries alike."

Consideration

[17] Arising from the above I remind myself, therefore, that the court has an unfettered discretion in its consideration as to whether permission should be granted to the plaintiff to make this application under the 1979 Order, but I recognise that that discretion must be exercised judicially in accordance with what is right and proper.

The onus is on the plaintiff to show sufficient grounds for the granting of permission to apply for relief out of time.

[18] Dealing with the question as to whether the plaintiff has acted promptly — as noted above the Originating Summons was not issued until more than 4½ years had passed since the grant of probate. Many of the authorities cited relate to much shorter periods of delay, yet the discretion was not exercised in the applicant's favour. The actual lapse of time in this case cannot of itself be determinative, but it is a matter to be taken into account when the court comes to exercise its discretion. As was stated in *Re Salmon* (page 175D):

> "The whole of the circumstances must be looked at, and not least the reasons for the delay, and also the promptitude with which, by letter before action or otherwise, the claimant gave warning to the defendants of the proposed application."

[19] In one of his affidavits (15 March 2024) the plaintiff has averred:

- that the deceased told him that she "wanted me to have this place, referring to Thomas Russell Park";

- that, referring to a time when he had some health problems, "Whenever I would express concerns about my health my mother would repeat that I was to get Thomas Russell Park and I could reside there for the rest of my life";

- that "I was happy that I would be able to continue to reside at Thomas Russell Park and that property would become my own if my mother ever passed";

- that, referring to works he says he carried out, "I carried out these works in reliance upon the promises made by my mother and under the belief that I would become the sole owner of Thomas Russell Park when my mother passed away."

[20] On 25 October 2018 the plaintiff first received a letter from solicitors requesting that he vacate the property or there would be no alternative "but to take proceedings against you in order to gain access to the property." In my view, if the plaintiff had had the assurances and promises from his mother as he has averred, I would have expected him to have raised those assurances and promises with his siblings or the personal representative (who was his girlfriend). He did not do so, but maintains simply that he did not make any reply to this letter hoping that such proceedings would not be commenced.

[21] Not only did he not raise any issue about a potential claim, but in May 2019 an Assent was executed between the Personal Representative of the Estate of the deceased (Ms McClean) and all eight children of the deceased — which included the plaintiff — whereby the Personal Representative assented to the vesting in all eight

siblings of the property. Thus, each became entitled to a one-eighth share of the property. At the time of this Assent, no issue was raised by the plaintiff that the deceased's disposition of her estate by will did not make reasonable financial provision for him.

[22] In submission I was told that the plaintiff did nothing because he was not aware of the 1979 Order. I am quite prepared to accept that he was ignorant of the Order, but if his case now is that reasonable financial provision for him was not made, I would have expected him to have raised that issue in 2018, when he was first asked to vacate the property, or at least raised some issue which would have put the personal representative on notice of some potential claim; or in 2019, when he joined in the execution of an Assent that the property be transferred into the names of all 8 children of the deceased, notwithstanding his belief (per his affidavit) that he was to be the sole owner; or, at the very least, well before 2024 when his claim first emerged.

[23] The case was also made that he had medical issues, and I have seen a report from a Consultant Surgeon. However, it appears that these issues first manifested themselves in May 2024. They do not provide any medical reason for the delay. I was provided with no other medical evidence which might support a valid explanation for delay.

[24] Notwithstanding that the County Court possession proceedings were issued in April 2021, for a period of some 3 years the plaintiff appears not to have engaged in those proceedings and was not represented. It also appears — from submissions made to me and not gainsaid — that those proceedings were listed to proceed undefended in the County Court on a number of occasions, but on each occasion the plaintiff (the defendant to those proceedings) appeared, unrepresented, and indicated that he wished to defend the suit. However, he took no step until 2024, when he instructed solicitors. The counterclaim followed shortly thereafter; itself followed by the claim under the 1979 Order. Thus, in the present case nothing happened to put any of the defendants on notice of a potential claim prior to early 2024, when the counterclaim was served in the County Court proceedings. This is wholly unlike the position in *Nesheim v Kosa* (op cit) where, within the 6-month period, the plaintiff's solicitors wrote a letter before action, the court noting (in a judgment deciding that the court's discretion should be exercised in favour of the plaintiff) — that "there was in this case, very shortly after the grant of probate, an early intimation of the claim followed by sensible requests for information and discussions about the claim and about the estate between the parties." Nothing like that occurred in the present case to put the Personal Representative or any of the siblings on notice of a potential claim.

[25] Next, I am enjoined also to examine any negotiations which took place in the case, as being a matter relevant to the exercise of my discretion.

[26] In February 2020, solicitors wrote to the plaintiff a second time asking him to vacate the property, and again threatening proceedings if he did not do so. This led to negotiations. However, those were not negotiations between the parties following

the notification of any potential claim being made under the 1979 Order. The plaintiff's affidavit of 26 September 2024 asserts, in parentheses, that at that time he "set out" to Elizabeth Orr that the deceased had represented to him that he "would receive Thomas Russell Park". Other than the plaintiff's ipse dixit, there is no evidence that the plaintiff raised any matter which would have pointed to a potential claim under the 1979 Order. In *Re Salmon*, the Vice-Chancellor referred to the decision in the case of *In re Ruttie* [1970] 1 WLR 89, in which negotiations between the relevant parties began before the time limit expired. This, said the Vice-Chancellor, "necessarily meant that the defendant was fully aware of the claim within time" (ie the claim under the English equivalent Act). He went on to say, 174E:

> "… it does seem to me that the existence of negotiations within the time limit is a factor which may point towards extending time under the Act of 1975. If while time is running out you negotiate with a claimant on a basis which accepts liability but disputes quantum, you must not be surprised if the court refuses to allow you to rely on the expiry of time, or if, having power to extend the time, the court exercises it."

[27] The only negotiations between the parties in 2020 in the present case after the plaintiff had been asked for a second time to vacate the subject property related to a potential sale by him of the Ballylucas Road property in order to raise the money to buy out his other siblings' share of the subject dwelling house. In the event, he did not sell the Ballylucas Road property. I say two things about those negotiations: first, unlike the negotiations in *Ruttie*, they did not take place within the six-month limitation period; secondly, they were not negotiations in relation to any potential claim under the 1979 Order. Indeed, the proposal that he would sell property to buy out the shares of his siblings is hardly consistent with such a claim.

[28] The facts remain, therefore, that prior to 2024 no claim under the 1979 Order, nor anything which might have raised the potential for such a claim, was ever intimated to the defendants, and no negotiations predicated on such a claim or potential claim ever took place. Thus, the scenarios envisaged by the court in *Nesheim* (quoted above in para [24]) and in *Salmon* (para [26]) are of no assistance to the plaintiff on the facts of this case.

[29] In all the circumstances appearing in the affidavits, I have considerable difficulty in accepting that it was only the ignorance of the 1979 Order which prevented him from intimating to his siblings any dispute or claim. Although I do not need to make any finding, this case has all the hallmarks of the plaintiff putting his head in the sand and hoping that any threat of his having to vacate the property, where he had been living rent-free, would simply go away, and it was only when it became clear to him that this was not going to happen that he then sought to put forward a claim.

[30] The outcome is — as has been acknowledged by the plaintiff in affidavit — that the estate has been duly administered in accordance with the terms of the will, the Personal Representative has effectively transferred the title to the eight children of the deceased equally, and all of this was done before any notification of a claim under the 1979 Order. Thus, there has been a distribution of the estate. I acknowledge that there remain outstanding the County Court proceedings so that, until their conclusion there is no prospect of a sale of the shared property, and that this is not, therefore, a case eg where the other beneficiaries have received, and spent, moneys which they are now being called upon to repay. Nonetheless, all of them have a present entitlement to a one-eighth share of the property, an entitlement which they obtained with the consent of the plaintiff when he, and they, executed the Assent.

[31] All the siblings are in their 60s or 70s. A one-eighth share of the property, on the basis of the probate valuation, would be something over £25,000 each. They all have an expectation of receiving this if the property is sold following the County Court proceedings. By not seeking earlier to defend the partition proceedings in the County Court, so that those proceedings are now some 3½ years vintage, the possibility of the siblings accessing their share of the estate has been substantially delayed. The implication in Mr McCarthy's submissions is that the plaintiff has deliberately vacillated so as to delay what he foresees might be an unfavourable outcome to him. I have heard no evidence, so cannot make any relevant finding or draw any relevant inference, but the reality is that the plaintiff has remained living rent-free in the subject property now for in excess of six years, and for some 5½ of those years he said nothing about claiming any interest greater than his bequeathed share. The other siblings have been unable to benefit from either renting the property, and receiving the benefit of rental income, or selling the property and sharing the proceeds of sale.

[32] The plaintiff argues that if the dwelling house is sold, he will have nowhere else to live. The plaintiff is an owner, jointly with his brother Paul of the dwelling house at Ballylucas Road. He claims that relations between himself and his brother, Paul, are not good, and he would not want to live there. As a joint owner he has the right to seek the sale of Ballylucas Road, by way of partition suit if necessary, and receive his share of the sale proceeds. If the siblings' County Court proceedings succeed, the plaintiff would also have the £25,000 or so which he would receive from the sale of Thomas Russell Park. In the particular circumstances of this case, I do not consider that the plaintiff's argument outlined in this paragraph trumps the rights of his siblings to realise their share of the estate if their County Court proceedings succeed.

[33] As to potential other remedies, the court in *Re Salmon* referred, at 176E-G, specifically, by way of example, to redress against a negligent solicitor, as did the court in *Re Dennis*, at 144h/j. There is no such suggestion in this case. However, I do not consider that that is the end of the matter relating to potential redress. Adopting what the judge in *Berger v Berger* said, which the Court of Appeal found to be a correct approach, would the dismissal of the plaintiff's case here leave him "without recourse to other remedies"? The plaintiff still, in the County Court proceedings, has an

application for leave to bring a counterclaim. The relief sought in the intended counterclaim includes a declaration that the whole of the property at Thomas Russell Park is vested in the plaintiff in fee simple or, alternatively, a declaration that he is entitled to a right of residence in the property until his death. I can make no assessment of the chances of the plaintiff's success in the counterclaim if leave was to be granted; but then, no more could a court as to the chances of success against any possibly negligent solicitor in the circumstances envisaged in *Salmon* or *Dennis*. The court can only say, in either case, that the plaintiff has potential for redress.

[34] Turning to the seventh matter to be considered, in the case of *Cowan v Foreman* [2019] EWCA Civ 1336 the Court of Appeal indicated that the appropriate threshold when considering the merits of the substantive case was that outlined in *Re Dennis*, namely whether it would meet the test for setting aside a summary judgment. At para [52] the court said:

> "… it is necessary to decide whether an applicant's claim has a real prospect of success rather than a fanciful one and if the claim has no real prospect of success, there is no point in considering the other relevant factors. That was made clear in *Re Dennis …* [1981] 2 All ER 140 per Browne-Wilkinson J at 144j-145a and 146d-e. The court will not entertain a claim with no merit which is commenced outside the six-month time limit, merely because the delays can be explained and no one is prejudiced. <u>The corollary is not necessarily true. If the claim would pass the summary judgment test, it does not mean that the court will exercise the section 4 power to extend time</u>. It is dependent upon an evaluation of all of the relevant factors in the circumstances."
> [emphasis added]

[35] Looking at the position as it is now, I confirm that I have read all the affidavits in this case, the exhibits to those affidavits, and taken into account all of the averments made in the affidavits, as yet untested by cross-examination. Clearly, I make no finding in relation to contested facts, but I do note a number of matters which appear to me to be relevant to the exercise of my discretion, in light of the court's experience of the types of material usually or frequently produced in evidence to support a case such as the plaintiff is seeking to make under the 1979 Order.

[36] First, in not one of his affidavits does the plaintiff exhibit any contemporaneous document, eg an invoice or a receipt, supporting any alleged expenditure upon which he relies in support of his case. Such absence of material is surprising, particularly in view of the fact that the plaintiff, in paragraph 17 of his affidavit of 22 April 2024 says:

> "… I carried out at my own expense and with my own labour further renovations and maintenance works to the

> property including an installation of a new stove and chimney flue, I put in new flooring in the living room, scullery and kitchen and I built a further extension to the property by the construction of a utility room that extended from the original extension I had built in the 1980s…"

[37] Secondly, nor does the plaintiff exhibit any bank statement to which he could point as evidencing relevant expenditure by him. Thirdly, there is no affidavit from any relative or friend or neighbour to the effect that the plaintiff was often or sometimes seen working on improvements or additions to the property, or who may have assisted the plaintiff in any such works. The plaintiff is represented by experienced solicitors and it seems to me not unreasonable to expect that in his affidavits grounding his applications (the 1979 Order and counterclaim) and answering the possession proceedings, the plaintiff would have put forward his best evidential foot and that if the evidence supportive of the case being made by the plaintiff existed, it would have appeared in affidavit or exhibit form by now. No such evidence has appeared.

[38] While I entertain significant doubts that the plaintiff would enjoy a meritorious claim under the 1979 Order, for the purposes of this judgment I am prepared to accept that the claim put forward by the plaintiff would pass the summary judgment test. However, as the emphasised portion of the decision in *Cowan v Foreman* illustrates (see para [34] above), that is not determinative of the matter.

[39] Having considered all the relevant factors in this case as outlined in some detail above, I am not prepared to exercise my discretion in favour of the plaintiff. Accordingly, I refuse to grant permission to the plaintiff to bring his application under the 1979 Order and I dismiss the Originating Summons. In those circumstances there is no point in the continuation of the application for removal of the possession proceedings; the County Court is appropriately seised of the possession proceedings. Nor is there any further point in the application for consolidation/that the cases should be heard by the same judge. I dismiss that summons also.

[40] The defendants who appeared and were represented in the hearing before me are entitled to their costs against the plaintiff.