THE HIGH COURT
PROBATE

[Record No. 2022 PO 012348]

[2024] IEHC 87

IN THE MATTER OF THE ESTATE OF JOSEPH KELLY, DECEASED, LATE OF 1, THE AVENUE, MULHUDDART, DUBLIN 15

AND IN THE MATTER OF THE SUCCESSION ACT, 1965

AND IN THE MATTER OF SECTION 27(4) OF THE SUCCESSION ACT, 1965

AND IN THE MATTER OF AN APPLICATION BY PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY

JUDGMENT of Ms. Justice Stack delivered on the 19th day of February, 2024.

Introduction and factual background

1. This is an application brought by Pepper Finance Corporation (Ireland) Limited ("Pepper") for an order pursuant to s. 27 (4) of the Succession Act, 1965, granting liberty to a nominated solicitor (who has consented to the making of the order) to apply to extract letters of administration in the estate of the Deceased limited to the purposes of receiving letters of demand and notices or appointment of receivers from the applicant and, if necessary, being served with any proceedings which may require to be brought.

2. The intended proceedings are the usual ones to recover monies (including interest) payable on foot of three loans, the terms of which are set out in facility letters which issued to the Deceased and his brother (as co-borrowers) in August, 2007, and to recover possession of

the properties on which the loans are secured. Two of the loan offers were signed and accepted by the Deceased and his brother on 7 September, 2007, and the third was signed and accepted by them on 12 October, 2007.

3. The Deceased died on 5 August, 2016, but no representation to his estate has ever been extracted. Furthermore, the fact that he died more than two years ago raises the question of whether s. 9 (2) of the Civil Liability Act, 1961, has the effect that the contemplated proceedings are not maintainable. These matters need to be considered as part of the overall issue of whether there are *"special circumstances"* which mean that it is either *"necessary"* or "*expedient"* within the meaning of s. 27 (4) of the 1965 Act to permit someone other than the person ordinarily entitled to extract letters of representation in the estate of the Deceased.

4. The legal principles material to whether s. 9 (2) applies are very well settled and I am providing a written judgment only for the purposes of setting out what I believe to be the appropriate practice and procedure before bringing an application of this type in the Probate List, both in terms of the requirement to notify those with a prior entitlement to extract a grant, and in terms of what is required by way of proofs in this type of application.

Notifying the persons with a prior entitlement

5. It is a fundamental aspect of any fair hearing that anyone who may be disadvantaged by the making of the order would have notice of the application. However, institutional lenders such as Pepper (and its predecessor-in-title, Bank of Scotland Ireland) may have difficulties in identifying when a borrower has died, whether he or she died testate or intestate, and who might be entitled to extract representation in his or her estate. All of this can make it difficult to notify the relevant family members.

6. Nevertheless, I do not think it would be appropriate to make an order pursuant to s. 27 (4) without requiring a lender to take some reasonable steps to identify the family members entitled to take out a grant or, at the very least, by writing to those entitled to represent the deceased at his or her last place of residence. This address will often be known to an institutional lender as it will appear on bank statements, statements of account, correspondence and possibly the loan documentation and any deed of mortgage or charge.

7. In this case, the grounding affidavit merely asserted that no one had come forward to extract a grant in the six years between the date of death and the swearing of the grounding affidavit. In my view, this averment was insufficient to ground the application as it could have led to a situation where the persons entitled were not aware of the making of the application and may have wished to take out a grant in order to defend the intended proceedings.

8. There are a number of reasons why a grant may not have been taken out. For example, it is possible that the estate is insolvent and there is nothing to distribute to those entitled to succeed. In the case of an insolvent estate, it is likely that only creditors will seek to extract a grant. In such a situation, it would be unjust if a person with a cause of action against the estate of a deceased could be prevented from obtaining redress by the inaction of those entitled to take out a grant. For that reason, there is a long-standing practice of appointing limited administrators to *"substantiate"* proceedings intended to be brought against an estate, that is, to appoint administrators for the purpose of constituting proceedings against an estate and obtaining orders against it which will be enforceable against any general administrator subsequently appointed.

9. However, there can also be reasons other than insolvency which explain why several years might have passed before an application for a grant is made. This could occur, for example, in very complex estates or where there is a dispute as to the validity of a will. It should be acknowledged, however, that in those circumstances, the persons entitled are much more

likely to respond to the notification of the application and to indicate that they wish to extract the grant themselves. Even if they are not ready to extract a full grant, they are also more likely to indicate that one of them is willing to extract a limited grant so as to allow proceedings to issue.

10. In this case, the grounding affidavit did not demonstrate any attempts to communicate with family members or to write to those claiming to represent the Deceased at his last place of residence, which is one of the addresses on the deeds of mortgage and charge by which the three loans are secured on the three relevant properties. The death notice of the Deceased as published on rip.ie — an invaluable source in the absence of more specific information — states that he was survived by a spouse, children, and siblings. Any of these individuals would have a prior entitlement to take out a grant pursuant to O. 79 of the Superior Court Rules in preference to the solicitor who has been nominated by Pepper.

11. While it might be said that, given that the Deceased died more than six years ago, none of the persons entitled intend to extract a grant, the very making of the application may alter that position as the family may wish to defend the intended proceedings. Generally speaking, it is in the interests of the estate if this is done by family members of the deceased as they will have access to more information relevant to any potential defence, including one based on expiry of the relevant limitation period.

12. Accordingly, I made various directions for the purpose of notifying the family of the intended application. These included writing to the last known residence of the Deceased and the matter adjourned from time to time to allow the family to be notified and to afford them an opportunity to be heard. A registered letter sent to the Deceased's last place of residence was signed for and subsequent post sent to that address was not returned undelivered. Furthermore, a daughter of the Deceased appeared in person on one occasion but has not taken any further part in the application. There is some reference to contact on behalf of the Deceased's brother

(and co-borrower) in the supplemental affidavits but there appears to be a dispute surrounding the authority of the solicitor with whom there was contact. While neither the Deceased's daughter nor his brother may be the person next entitled to take out a grant (as the Deceased's spouse may well be still alive), there is evidence that the family of the Deceased, including his brother (the other borrower), are aware of the fact that this application was being made and consequently that Pepper is acting to enforce its security. However, there has been no indication that an application for representation will be made.

13. These are, in my view, *"special circumstances"* which seem to warrant making an order pursuant to s. 27 (4) as it would be unjust to prevent Pepper from bringing the intended proceedings to enforce its security.

14. The next question is whether those *"special circumstances"* mean that it is *"necessary"* or *"expedient"* that an order would be made. The order is discretionary and an immediate issue springs to mind as the application is made outside the two year limitation period in s. 9 (2) of the 1961 Act. Many applications of a similar nature are brought in the non-contentious Probate List on a Monday and it is typical to have at least one such application in each list. However, the majority – probably the vast majority – of those applications are brought within two years of death and therefore no issue arises as to whether any such claim is statute barred by reason of the combined effect of ss. 8 and 9 of the 1961 Act.

15. The question then arises as to whether the order should be made where the application is brought more than two years after the death of a deceased. It would be undesirable, in my view, that such an order would be made to recover a debt where it is obvious that the debt is statute barred. The reason for this is that s. 9 – like other limitation periods – is a matter to be pleaded in a defence rather than an absolute bar to proceedings: *Cawley v. Dún Laoghaire Rathdown County Council* [2021] IECA 266. However, there is no obligation on a limited administrator to take active steps to defend proceedings and such an administrator might not,

in any event, have the instructions necessary to successfully plead a defence. It is important to recall that such an administrator is only appointed to allow a plaintiff to constitute proceedings which he or she intends to bring but where that intention is being frustrated by the failure or refusal of those entitled to take out a grant. Accordingly, the role and function of such an administrator is very limited.

16. It is, therefore, material to the exercise of the discretion under s. 27 (4) that a lender who has delayed in bringing the necessary proceedings might potentially obtain a windfall by procuring the appointment of their nominee as personal representative, as that person will have no material outcome in the proceedings, is not obliged to take steps to actively defend the proceedings, and in any event may not have access to all of the relevant information to plead a defence which may be available.

17. This is particularly the case where the availability of a defence depends on facts which would not be within the knowledge of the person who is to become the limited administrator. An example in this instance is the date of service of a demand for payment, discussed further below. Pepper acquired the loans and related security only in 2018, and it appears from the statements of account exhibited that there may have been default on at least one of the loans prior to this (but after the date of death of the Deceased). It is therefore entirely possible that a formal demand in respect of that loan was made prior to the acquisition of the loans. If so, then that fact would only be known to the family members who might have access to the documentation relating to the loan.

18. *Cawley* is a helpful authority as the issue in that case was whether a co-defendant should be joined to proceedings when it seemed likely that the cause of action was statute barred. The Court of Appeal was of the view that the additional party should be joined unless it could be said that the cause of action was *"hopelessly statute-barred"*. There has been a similar approach to applications under s. 678 of the Companies Act, 2014, for leave to sue a company

in liquidation: see *Wright-Morris v. IBRC (in Special Liquidation)* [2014] 3 I.R. 468. Short of intended litigation being doomed to fail, the general approach of the courts on a preliminary application required to permit the proceedings to be initiated (or properly constituted) is to allow the litigation to proceed and to determine its merits in the course of the litigation itself.

19. The situation here is analogous to that in *Cawley*, in my view, as the purpose for which the order pursuant to s. 27 (4) is sought is to constitute proceedings against the estate in the absence of a legal personal representative. The application does not concern the duties of a personal representative but is one made in order to vindicate a third party's right to sue the estate. It makes good sense that an order under s. 27 (4) should not be made for the purpose of constituting an action which is doomed to fail but, short of that, the merits of the action should be determined in those intended proceedings and not in the course of the s. 27 (4) application.

20. I will therefore apply the test approved by the Court of Appeal in *Cawley* in exercising my discretion under pursuant to section 27 (4) and will consider whether the intended proceedings are *"hopelessly statute-barred".*

Whether the intended proceedings are hopelessly statute-barred

21. The lead authority is *Bank of Ireland v. O'Keeffe* [1987] I.R. 47 as recently approved by the Court of Appeal in *Bank of Ireland v. Matthews* [2020] IECA 214. These cases establish that the critical issue when considering whether the relevant limitation period is that in s. 9 (2) of the Civil Liability Act, 1961, or the longer limitation periods provided for in the Statute of Limitations, is to identify when the cause of action accrues. If it accrues before death, then the claim is one which was *"subsisting"* (within the meaning of s. 8) prior to death and is therefore deemed to *"survive"*. The limitation period in s. 9 applies to all actions which *"survive"*. However, causes of action which do not accrue prior to death cannot be said to *"survive"* death:

they simply arise later and do not depend on s. 8 to be maintainable. In essence, Part II of the 1961 Act does not apply to causes of action which accrue against an estate after death.

22. The distinction arises because, at common law, causes of action which were personal in nature, notably actions in tort but also contracts creating obligations which were purely personal and not pecuniary, ceased on the death of one of the parties. This common law position was encapsulated in the maxim *actio personalis moritur cum persona* which is discussed in the judgment of the Supreme Court in *Moynihan v. Greensmyth* [1977] I.R. 55, at 67-68, and by Donaldson L.J. in *Ronex Properties v. John Laing* [1983] Q.B. 398 at 405. The purpose and effect of Part II of the 1961 Act was to expand the types of causes of action which survived death to all but those specifically excepted by the Act, and to provide for a long stop limitation period of two years for the institution of proceedings which were deemed to survive the death of one of the parties.

23. But Part II has no application to causes of action which accrued after death, such as might occur in the case of a breach of pecuniary obligations in a contract. At common law, those obligations were always enforceable by and against an estate. (See Williams, Mortimer and Sunnocks, *Executors, Administrators and Probate,* (London: Sweet & Maxwell, 2023) at para. 37-05 for a general discussion of which obligations survived at common law and, latterly, under statute.) As a result, causes of action arising out of such contracts could accrue after death. Furthermore, if the cause of action had already accrued prior to death, the action did not abate with the death of either of the parties: see Viscount Simon L.C. in *Benham v. Gambling* [1941] A.C. 157, at 160.

24. For this reason, the date of accrual of the cause of action is critical to the application of section 9. If a cause of action accrue prior to death, then it *"survives"*, that is, is not abated by death, and s. 9 requires that proceedings are instituted at the latest within two years of death. However, if it accrues after death, then the usual limitation period in the Statute of Limitations,

1957 applies, and this will be either six or twelve years from death depending on whether the relevant obligation is contained in a deed.

25. In turn, the question of when the right to sue on foot of a loan agreement accrues depends on the true interpretation of that agreement: *Irish Life and Permanent plc v. Dunne* [2016] 1 I.R. 92. The first step in proceedings such as are contemplated by Pepper in this instance is to interpret the loan documentation, which often consists of a loan offer letter which is accepted by a borrower, together with standard terms and conditions which are incorporated by reference into the facility letter.

26. Many such terms and conditions provide that where the borrower defaults, the lender can treat this as an event of default by serving a formal demand and, in that case, the lender has no cause of action until the demand is served. That was the position in *Bank of Ireland v. O'Keeffe* and therefore s. 9 did not apply to bar the claim.

27. However, this is not always the case. Indeed, shortly after his decision in *O'Keeffe*, Barron J. accepted in *First Southern Bank Ltd. v. Maher* [1990] 2 I.R. 477, that no formal demand was required and that the monies had become due and owing prior to death. Applying s. 9 (2) of the 1961 Act, he found that the action was statute barred.

28. Similarly, in *Allied Irish Banks plc v. Pollock* [2016] IEHC 581, Baker J. found that the loan was due on the repayment date specified in the facility letter which had been accepted by the borrower. This overrode the standard terms and conditions which had been incorporated into the loan agreement as special conditions generally override general conditions. Simons J. reached a similar conclusion in *Promontoria (Oyster) DAC v. Kearney* [2023] IEHC 7.

29. In this application, as I am only examining whether the intended proceedings are doomed to fail as being hopelessly statute-barred, the point for consideration is whether it is clear that the correct interpretation of the loan documentation is that the sums claimed fell due and owing prior to the date of death without the need for service of a formal demand. If that is

clear, then it follows that any intended proceedings would be statute-barred as being outside the two year period in s. 9 (2) and it would not be appropriate to grant liberty to the nominated solicitor so as to substantiate those proceedings.

30. Give that that is the issue for consideration, it is in my view a necessary proof, in an application of this kind pursuant to s. 27 (4), that the loan documentation, including any standard terms and conditions which are incorporated into the loan agreement, and any mortgage or charge would all be put in evidence. Furthermore, if it is contended that the cause of action only accrues on the making of a demand, there should also be evidence as to whether or not there has already been a formal demand for payment. In some cases, where the applicant does not have direct knowledge of that fact, it may be necessary to exhibit statements of account in order to establish on the balance of probabilities whether or not a demand has previously been made and when this is likely to have occurred. It may, for example, be likely that a demand was previously served where there was a sustained default in payments. That does not arise in this case as any default appears to have occurred after death.

31. In this case, there are three loans involved, all taken out jointly with the Deceased's brother. The three relevant facility letters have been exhibited and these each record that the agreement was for a term loan of ten years – monthly instalments were payable but these were in respect of interest only, and each loan was to be secured by way of a first legal charge on a specific property. As the facility letters were accepted in September and October, 2007, it appears that the repayment date of the loans was, as regards two of them, in September, 2017, and as regards the third, October, 2017. In the case of each loan, therefore, the repayment date in respect of the principal sum was after the death of the Deceased. That is sufficient, for the purposes of this application, to find that it cannot be said that the intended proceedings are clearly statute barred by reason of section 9 (2).

32. The facility letters also incorporated the October 2005 Terms and Conditions of Bank of Scotland Ireland. These were exhibited immediately before the hearing and appear to provide that the lender may decide to treat, *inter alia*, the death of the borrower as an event of default and to then make a demand for payment. While Pepper relied on these for the proposition that a demand was necessary for the cause of action to accrue, I am not sure that is in fact the case in circumstances where the facility letters seem to nominate a repayment date.

33. *Pollock* and *Kearney* are clear examples of the application of the principle that special conditions override general ones. Application of that principle in this instance would suggest that the specific terms of the facility letter overrode the standard terms and conditions which allow Pepper to treat default or indeed the death of the borrower as an event of default which it does by serving a demand. On those authorities, it seems reasonably clear that principal sum fell due and owing in September or October, 2017, without the need for service of a demand. Furthermore, clause 6.1. (a) of the standard terms provides that the loan must be paid at the end of the Term of the Loan. Each facility letter describes the financial product being offered as an *"Interest Only Term* [Loan]*"* with the *"Period of Agreement"* being "10 years". I think this must mean that the Term of the Loan is ten years in each case. Therefore, even the standard terms and conditions appear to provide that the principal sum became due and owing, without the need for any formal demand, ten years from the taking out of the loans.

34. Pepper also relied on the standard terms and conditions of the mortgage for the proposition that the monies were payable on demand. However, Clause 4 of those standard terms and conditions provides that the borrower is to repay the debt in accordance with the provisions of the facility letter but in the absence of a facility letter, the borrower will repay the debt when lawfully demanded in writing. As there are facility letters in this instance and as they each provide for a specific repayment date, it appears that the requirement of a written demand therefore does not apply.

35. However, as on any interpretation of the facility letters and standard terms, as the earliest date upon which the principal sums became due was after the death of the Deceased, it cannot be said that s. 9 of the 1961 Act applies so as to bar the intended proceedings.

36. In addition, since there is a covenant in the mortgage deeds to repay the loans secured on the properties, it appears that the applicable limitation period is twelve years as provided for in s. 11 (5) (a) (ii) of the Statute of Limitations, 1957. However, I cannot say that this is clearly statute barred, or what the position is in relation to interest.

Conclusion

37. In my view, there are special circumstances which made it either necessary or expedient to allow someone other than the persons next entitled to extract a grant in the estate of the Deceased. Pepper has a claim which it wishes to pursue, and it is not clear that those proceedings are statute barred.

38. In coming to that view, I am not making any final determination of the issues discussed above, including those relating to s. 9 of the 1961 Act. If the estate thinks it appropriate to raise them, they should be determined in the intended proceedings to recover monies due and owing on foot of the loan agreement and any proceedings to recover possession of the three properties. As the nominated solicitor is being appointed only to *"substantiate"* the proceedings, there is no obligation on him to raise these issues but it will be open to the relevant family member to extract a grant so as to allow them to raise these issues, if he or she so wishes.

39. For that reason, the order will be made subject to the usual condition that Pepper undertake not to take any steps in the proceedings for a period of six months from the issue and service thereof, and that the order made pursuant to s. 27 (4) would be served by registered post on the Deceased's place of residence within 14 days of the making of the order.