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Ex Tempore Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:* **09/04/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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CATHERINE JOSEPHINE (Kathleen) AIKEN

v

MICHAEL BLANEY AND JOHN CULLINAN AS EXECUTORS OF THE ESTATE OF MICHAEL JOSEPH AIKEN , DECEASED AND CARA AIKEN SUED AS THE EXECUTRIX AND SOLE BENEFICIARY OF THE ESTATE OF PATRICK JOSEPH AIKEN, DECEASED

And in the Matter of the Inheritance (Provision for Family and Dependants) Order (NI) 1979.

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DEENY LJ (sitting as a judge of the Chancery Division)

[1] The court has before it today an application made by a lady known as Mrs Kathleen Aiken. She is the widow of the late Michael Joseph Aiken. She was born on 20 March 1944 and is now 75 years old. She was married to Michael Joseph Aiken, whom I might refer to as Michael Senior, as he has a son of the same name, on 9 September 1965. They had a long and happy marriage; that is not in dispute between the parties. It lasted some 47 years before he died on 26 September 2012. They had four children, Michael Junior, Ciara, Bronagh and Patrick.

[2] Following the death of Michael Senior his estate was not administered and indeed probate was not taken out until 23 May 2016 by his executors, who seem to be his two sons in law, Mr Blaney and Mr Cullinan. They took out the grant of probate on foot of his will of 26 September 2012 and it is the disposition under that will which is the basis for the application before this court, Mrs Kathleen Aiken having in 2018 issued an originating summons seeking to challenge the provision made for her by her late husband and to do so under the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979. I will say a word more about the surrounding facts of the matter before turning to the point of law which is

whether she is to be granted an extension of time by the court for bringing that originating summons after the time limit fixed by the statute.

[3] Of her four children her son, Patrick, had been given by his father an insurance broking business in the Republic of Ireland after the father faced some embarrassment and reputational criticism in or about the year 2002. It is clear from the papers I have read that the son, Patrick, was an able and energetic man who built up that business further and increased his own wealth substantially. Sadly he was diagnosed with cancer in 2013 and he died on 18 October 2014 leaving a widow who is the third defendant in these proceedings, Mrs Cara Aiken, who is both the sole beneficiary and the executrix of the estate of her late husband, Patrick Joseph Aiken. She has two sons, reference to whom was made at various points in the papers.

[4] The probate of that man's will, which was made on 15 September 2014, was on 10 December 2015. The plaintiff contends, and it is not in dispute, that, as I have mentioned, at least in part, with the reference to the insurance broking firm, there were substantial lifetime transfers to Patrick.

[5] The parties before the court are only the plaintiff and the third defendant. The court is grateful to counsel for their able written and oral submissions. Mr Liam McCollum QC appeared with Mr Philip McEvoy for the plaintiff and Mr Mark Orr QC appeared with Mr Mark McEwan for the third defendant. The first and second defendants i.e. the executors, did not take any part in the proceedings and nor did the three other siblings whom I have named. Rather they wrote through the solicitors to the estate, Messrs McShane & Company of Newry, on 6 April 2018, in response to pre-action protocol letters from Mrs Kathleen Aiken's solicitors saying they did not oppose her application. They were prepared to admit it in principal in the following paragraph:

> "We are instructed that Ciara, Bronagh and Michael wish to surrender their interest under their father's estate (as set out in A-D above) to their mother your client. They agree to execute any documentation required to effect the transfer of their beneficial interest to their mother."

[6] On foot of a submission of Mr Orr I may return to that but it can be seen that that letter is an offer, one might think a handsome offer, by them to waive their inheritance from their late father but as it is without consideration and as it is phrased in the way it is it is not a legally binding document. Even if it were I bear in mind the submissions of Mr McCollum in that regard.

[7] The third defendant's solicitors declined to follow that attitude and declined to waive the time point and it is the time point that is now being taken and colloquially we can see why the plaintiff considers she has a strong claim. She has been left a right of residence in the former matrimonial home and as residuary legatee has received the benefit of an insurance policy in the sum of approximately

£14,000 but nothing further from her late husband's will. He distributed the rest of his estate, valued at approximately £600,000 on the current valuation, to his four children. In particular, he left lands valued at some £315,000 to his son, Patrick, who, of course, was still alive at that time. So one has to note that she therefore received from her husband one twentieth of what was left to the son. The surprise I express at that disposition is increased by the fact that her other assets were limited. She avers on affidavit, to ownership of just a few fields with a rental value of less than £1,000 a year. The son's assets following his tragic premature death amounted to some €7,000,000. So it is a quite remarkable disposition by the late Michael Joseph Aiken and one that I do not recollect ever seeing in my 8 years as the Chancery judge in this jurisdiction.

[8] The issue before me today however is not the distribution of the estate, because the court will not be able to redistribute the estate unless it finds that Mrs Kathleen Aiken is entitled to proceed with the originating summons, her daughter-in-law having chosen to take the time point against her.

[9] I turn therefore to the 1979 Order. Article 3(1) reads:

> "Where after the commencement of this order a person dies domiciled in Northern Ireland and is survived by any of the following persons:
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> (a) the wife or husband of the deceased;
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> (b) a former wife or former husband of the deceased who is not remarried;
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> (c) a child of the deceased;
>
> (d) any person….. who in the case of any marriage to which the deceased was at the time a party was treated by the deceased as a child of the family in relation to that marriage; and
>
> (e) any person …who immediately before the death of the deceased was being maintained either wholly or partly by 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."

[10] Reasonable financial provision is defined in Article 2 of the Order where a distinction is drawn between a spouse and another claimant so at (a) we find in the case of an application made by virtue of Article 3(1)(a), that is by a wife or husband reasonable financial provision means "such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance".

For other parties it is merely enough to receive maintenance.

[11] Now it has not been discussed in this case but it is a pointer to the special status that a wife or husband has in making a claim under these statutory provisions he or she is not limited to a claim for maintenance but can make a larger claim for reasonable provision. In this case the late Mr Michael Aiken did not appear on his will to make provision for her maintenance. It is true to say she recovers a state pension and she has another small pension of £3,000 a year but her total income is about £11,000 a year which is inconsistent with maintaining the house in which she lives and leading a normal life at all similar to that that she previously enjoyed. She has set out the details of her expenditure on affidavit and I note that. It is relevant in assessing the strength or otherwise of her case on the merits, if one gets to that, that the statute contemplated her getting not only maintenance but something more as well.

[12] The difficulty that she faces is under Article 6 of the 1979 Order which reads as follows:

> "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 6 months from the date on which representation with respect to the estate of the deceased is first taken out."

[13] I have received both written and oral submissions from counsel with regard to that. I make the observation that on the face of the statute this court is being left a fairly wide discretion in this matter. Parliament might have provided that that time limit apply 'save in exceptional circumstances' or words to that effect. If he had to, of course, Mr McCollum might have argued that these were exceptional circumstances. But the use of the words 'except with the permission of the court' seems to me to leave a fairly wide discretion. I am reinforced in that view by the consideration of these provisions or the equivalent provisions in England and Wales by previous courts and I propose to refer to some of the leading cases at this point. The late Sir Robert Megarry, Vice Chancellor, in *Salmon Coard v National Westminster Bank Limited* [1981] Chancery 167, [1983] All ER 532, dealt with the equivalent provisions in the 1975 Act and his dicta, the Megarry guidelines, as Ms Grattan has called them in her work on Succession law in Northern Ireland has been followed since and they are helpfully set out in the skeleton argument of the third defendant. I quote.

> "(a) The discretion is unfettered by any statutory provisions but must be exercised judicially in accordance with what is good and proper."

So that is strong support for this being an unfettered discretion to do what is good and proper.

> "(b) The time limit is a substantive provision laid down by a statute and not a mere procedural one which can be extended with the indulgence generally accorded to procedural time limits. The onus is on the applicant to show that there is a substantial case for the court to exercise its discretion to extend the time limit."

Pausing there again, therefore, the court in this case is presented with a fairly long delay, not by any means the longest that the courts have been asked to address, but a fairly long delay approaching two years from the date of the grant of probate which is the initiating date under Article 6. It is also, as Mr Orr points out, a much longer period from the actual death of the late Michael Aiken. It seems to me there are pointers to there being a substantial case for the reasons I have mentioned regarding reasonable financial provision and a case where the unusual circumstances of the perhaps not wholly unexpected death of Michael Aiken and then the tragically early death of his son two years later are relevant. To return to the guidelines:

> "(c) Consideration must be given to how promptly after the time limit has expired that permission is being sought.
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> (d) It is relevant whether or not any negotiations had been commenced within the time limit.
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> (e) It is relevant whether or not the estate has already been distributed.
>
> (f) It is relevant whether if permission to extend this time is not granted the applicant would have any form of redress against anyone else."

[14] I will return to those in due course. It has been pointed out that in Re Dennis [1981] 2 All ER 140 a seventh guideline was proposed at page 145:

> "to show that he has an arguable case, a case fit to go to trial, and that in approaching that matter the court's approach is rather the same as it adopts when

> considering whether a defendant ought to have leave to defend in proceedings for summary judgment."

[15] I certainly do not dissent from that statement of law although there would have at be at least an arguable case to justify extending the time but it seems to me that the Vice Chancellor had in mind the weight and merits of the case being of more substance than that. [See also Re Stone Deceased (1969) 114 Sol Jo 36]. Both counsel refer to a judgment of Mr Justice Girvan, as he then was, in *McAteer and McAteer*, unreported, 1999. There the judge was presented with a delay of about 13 months on the part of the applicant and he granted an extension of time and in his concluding paragraph he made the following points:

> "In this instance the plaintiff has an arguable case. This case does not fall at either end of the spectrum ranging from unarguable to very meritorious. The estate has not been administered and his sister shares have not fallen into possession. There is nothing to suggest they have taken any steps such as selling their remainder interests which would have caused them or any successor entitled significant prejudice if the matter were to proceed. There clearly were some family discussions from which the plaintiff hoped to achieve some sort of amicable resolution of his complaints about the adequacy of the will's provisions. The sisters clearly must have understood that he was not happy with the terms of the will of the deceased. While in context of ordinary civil litigation the fact that negotiations are taking place is not normally a good reason not to issue proceedings to avoid a limitation defence. Family disputes represent a somewhat different type of case. Time and again the court stresses the desirability of family members resolving their disputes out of court and a court involved in such family disputes can understand the reluctance of family members resorting to litigation if this can be avoided. In this case, I consider, that on balance the court should grant an extension of time to allow the matter to proceed."

[16] Pausing there he draws attention to matters which I consider of relevance and of assistance to me. This is not a case of someone coming belatedly after the executors have administered the estate and transferred property into the name of another person who may then in turn have sold the property or mortgaged it or moved into it. There there would be real prejudice in granting an extension of time to the applicant who has been responsible for delay. But that was not the case before the judge there and it is not the case before me today because his estate has not been administered.

[17] Furthermore, I agree with what Mr Justice Girvan said that family disputes are a different type of case and that is why in the Chancery court there is a pre-action protocol requiring any possible claimant to write to the interested parties in advance of issuing proceedings as was done here. Admittedly, that was only done 6 weeks or so before the originating summons issued in the case of the third defendant but it was right to do that. So it seems to me that the case of *McAteer* is of assistance to Mrs Kathleen Aiken in this particular case.

[18] Counsel also properly referred to a decision of Mr Justice Horner in *Moffett v Moffett* [2016] NI Ch. 17, also in this jurisdiction. He cited the Megarry Guidelines to which I have referred. At paragraph 12 of his judgment he refers to the English Court of Appeal authority of *Berger and Berger* [2013] EWCA Civ 1305 where there was a delay of 6½ years. He cites the following passage which I think is of interest:

> "Taking all the factors in the case together, I would not permit the appellant to make her claim. I give full weight to the potential merits of the claim and to the fact that the estate has not yet been fully distributed and that it is likely that sufficient capital could be found to fund whatever award the appellant might reasonably expect without disturbing any gifts that have already taken effect. I also remind myself that the evidence does not establish that the appellant was advised about the possibility of a claim under the Act when she consulted solicitors in 2006/7. Against these factors must be set not just the fact of the very substantial delay in bringing proceedings but the history during the period since the deceased died. This is not a claim which has been provoked by a particular event, be it something for which the respondents were responsible (as in the late discovery in *McNulty* of the true value of the land which the defendants had concealed) or something extraneous (such as the dramatic fall in interest rates in *Stock v Brown*). It appears much more likely that the appellant, who had hitherto understandably not wished to litigate with her family, eventually decided that proceedings were appropriate."

[19] It seems to me there is some resonance there with this case in that it is understandable that over the period there would be an understandable reluctance on the part of Mrs Kathleen Aiken to litigate with her family and, indeed, as is apparent from the proceedings to litigate both with her two sons in law as the executors and the third defendant as the executrix of the estate of her late son. I think that is a pointer to the understandable nature. I note further that the delay in that case was not less than two years but 6½ years so clearly a distinguishing factor also.

[20] I think it is right perhaps at this point to draw attention to a further distinguishing factor which clearly was not present in that case but is to be mentioned. The late Mr Patrick Aiken from his business Aiken Insurances in the Republic of Ireland paid a sum of €1,250 per month to his parents in his father's lifetime and he continued in his lifetime to pay the same amount to his mother monthly. But his widow, Mrs Cara Aiken, thought it appropriate following her late husband's death to stop those payments. No doubt she was upset at the tragedy which had befallen her, that may have played a part. When asked about this by a daughter it is averred on affidavit she said that her late husband had kept Mrs Kathleen Aiken long enough and it was for the other siblings to do that. Well that is perhaps understandable but it is concerning because when we look at the notes made by the solicitors for the late Mr Michael Aiken when the will was being made we find an express reference to that payment. The solicitor's note records clearly the testator saying at the time he signed the will: "Patrick is keeping us financially". One notes, as I said with a little bit of surprise, perhaps disapproval on my part, that Patrick Aiken seems to have been in the house at the time that the will was made though clearly not in the room when the two solicitors took the will, which is proper. It may be that he had some influence therefore with his late father when the will was made. But in any event certainly the father was conscious that he was keeping him AND the Plaintiff. The very surprising disproportion in the late Michael Aiken's will between his wife of 47 years and his successful son may be explained by the fact that he assumed that his son would go on keeping his mother to the extent of this monthly payment of €1,250. That would certainly explain it and that desisted of course, on the time point, ceased before the probate of the will was taken out. But it seems to me a relevant factor when considering the other cases.

[21] To return to Mr Justice Horner in *Moffett* and having dealt with *Berger* he noted the case of *Stock v Brown* [1994] 1 FLR 840 where a widow was granted permission to bring a claim 5½ years after the appropriate date. He noted again the case of *Re C (Deceased)* [1995] 2 FLR 24 where again the fact that the estate had not been distributed was considered important and a minor was allowed to bring a claim 18 months after the expiry of the time limit and he noted the case of *McNulty and McNulty* [2002] WTLR 737 where a claim was permitted 3½ years out of time albeit in unusual circumstances. What these all show of course is that these cases are fact specific cases and each individual judge has to exercise a discretion in deciding the matter. In that case Mr Justice Horner refused to extend the time for Mrs Moffett but she was bringing the claim for redress against her father's will some <u>18 years</u> after probate was granted and in relation to her mother's estate 3½ years and as the judge said with regard to the latter claim any claim she had was "very weak". So it seems to me again that authority is very properly drawn to the attention of the court by both counsel but points towards the applicant, Mrs Kathleen Aiken, in this case rather than the defendant as indeed really do all the authorities except *Berger* which I have pointed out can be distinguished and the case of *Cowan v Foreman and others* [2019] EWHC 349 Family. Counsel have referred to that decision of Mr Justice Mostyn and I note several things of interest to it and for completeness I

am just going to mention them briefly. At paragraph [4] he quotes Mr Justice Briggs, as he then was, now Lord Briggs, in *Nasham and Cosa* [2006] EWHC 2710 Chancery as follows:

> "Before leaving the relevant legal principles, 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 the 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 the unnecessary delay in the administration of estates to be caused by the tardy bringing of proceedings under the Act and to avoid the 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 "

[22] I respectfully agree with what the judge said there. That is the key driver of this limitation period that otherwise executors may be deterred from the efficient administration of an estate or if a claim is allowed belatedly that legal relationships which will have been entered into will need to be altered. Mr Justice Mostyn went on to quote Lady Justice Black, as she then was, now Baroness Black, in *Berger and Berger* to which I have referred, that is [2013] EWCA 1305 and rather startlingly he then goes on to flatly contradict her and say at paragraph [6]:

> "Of course, the discretion is not "unfettered". … In fact, I doubt whether the exercise is correctly to be framed as one of "discretion" at all."

[23] Well I respectively differ with Mr Justice Mostyn in that regard. It seems to me that the wording of the statute clearly points to a discretion in the court and that is the view that it would seem every other judge who has had to consider these provisions has arrived at and I cannot agree with his view there, nor his view expressed at paragraph [38] of the judgment where he says that highly exceptional factors are required in the modern era to allow an extension of time. Again that seems to me plainly against the wording of the statute and against the consideration of these provisions by other judges over a lengthy period of time. So one commends counsel for the third defendant for their industry and ingenuity but I think that authority does not ultimately assist them.

[24] So if we therefore turn to the matter and bear in mind the Megarry factors to be applied and the submissions of Mr Orr it seems to me to use Mr Justice Girvan's phrase that Mrs Kathleen Aiken's claim here is likely to be in the category of 'very meritorious'. I say that despite the ingenious submission of Mr Orr that in reality

she is getting 50% of the estate and the son, Patrick, 50% which would accord with the provision made under divorce which is a check that is contemplated in the statute but I do not think that is right. I do not think it would be morally right for one child to escape due to the generosity of the other children but I think it is not legally right because there is no binding contract, they are not bound by it and quite understandably the mother has chosen not to accept their offer but to go with the proceedings. As I indicated it may well be right that the third defendant thinks that her two sisters-in-law are well off. It may well not be the case that the other sibling is so well off. It seems to me therefore there is a substantial case, a more than arguable case, here on the facts as so far open to me. Against Mrs Kathleen Aiken is that the time limit had expired by a substantial period. I accept Mr Orr's submissions she was not sitting totally by the fire in Jonesborough. She should have gone and sought advice about this earlier. But she is 75 years old, she has averred on affidavit she depended on her husband and his active able son for advice and it is understandable it seems to me, as the Court of Appeal in England contemplated, that she was reluctant to issue proceedings against her own children and grandchildren.

[25] Mr Orr has given examples of four steps that she took and I note them but it does not seem to me that they alter the point. She signed a return which by law she was obliged to sign. She did not instruct solicitors to write about land, her children did that apparently. She did apply for planning permission, that is true. So I take those factors in account but it seems to me that it understandable that she was slow to issue the proceedings in this nature. One of the other factors is the issue of negotiations and that would be something that she did do and might reduce her time wasted by a couple of months. But most importantly factors (e) and (f), (e) says it is relevant whether or not the estate has already been distributed, well it has not been and that is strongly in her favour. (f) it is relevant whether if permission to extend this time is not granted the applicant would have any form of redress against anyone else, well it is now clear that she does not, no other proceedings have been issued and its clear from the papers and the argument before me that there is no other valid cause of action that she would have; this is the only one that she would be able to bring or enjoy.

[26] It seems to me that whether Mr Michael Joseph Aiken had lost the judgment that he may have had earlier in life or whether he was relying on this monthly payment of €1,250 to his widow to continue, for whatever reason that there is a prima facie case that he failed to make reasonable provision for her. I do not think that the delay that has existed here is sufficient to defeat that meritorious claim by a lady who had the double misfortune of losing a husband and then a favoured son. I think it is understandable that an elderly lady in those circumstances might well not be quick or expeditious in seeking solicitors to issue proceedings.

[27] Applying the statute, the case law and taking into account all of Mr Orr's helpful submissions I consider that I should extend time. The court permits this originating summons to proceed.