Neutral Citation No. [2005] IEHC 367

THE HIGH COURT

2004 No. 4634 P

BETWEEN/

PADRAIG GAFFNEY

PLAINTIFF

AND
JAMES FAUGHNAN

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 9th November, 2005.

1. The plaintiff's uncle, Michael Gaffney (the Deceased) died on 15th April, 2002, intestate. The defendant is his personal representative under a Grant of Administration dated 16th November, 2004 which issued to him as the attorney lawfully appointed of Patrick Gaffney, the brother of the Deceased, who resides out of the jurisdiction, the grant being limited for the use and benefit of Patrick Gaffney until he shall apply and obtain a grant himself.

2. On 15th April, 2004, before the Grant of Administration issued to the defendant, the plaintiff instituted these proceedings against the defendant by plenary summons. The summons does not disclose on its face that the defendant is being sued in a representative capacity. The defendant did not accept service of the plenary summons until 25th January, 2005, after the Grant of Administration had issued to him. He entered an unqualified appearance on 1st February, 2005. The plaintiff's statement of claim was delivered on 28th January, 2005. In it, it was pleaded that the defendant was the administrator of the estate of the Deceased. The basis of the plaintiff's claim is that he rendered services to the Deceased during his lifetime on foot of an express or implied promise that the Deceased would bequeath his farm to the plaintiff. The plaintiff alleges that, by dying intestate, the Deceased was in breach of his agreement and the defendant, as administrator of the estate of the Deceased, has failed to perform the promise, resulting in loss, damage and expense to the plaintiff. The reliefs sought in the statement of claim are an order for specific performance of the promise, an order compelling the defendant to transfer the lands in question to the plaintiff, damages for breach of contract and payment of the sum of €90,000 in *quantum meruit and/or quantum valebant.*

3. Without taking any further action in the matter the defendant issued the motion which is now before the court on 22nd March, 2005. In it he sought, *inter alia*, the following reliefs:

> (a) an order striking out the proceedings and/or a declaration that the proceedings are void and have no effect on the basis that the defendant, who was sued solely in his alleged capacity as administrator of the estate of the Deceased, did not have that capacity at the time the proceedings were issued on 15th April, 2004 and that the proceedings are accordingly void;
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> (b) an order striking out the proceedings and/or a declaration that the proceedings are void and have no effect on the basis that the proceedings could not be maintained against the estate of the Deceased pursuant to the provisions of s. 9(2) of the Civil Liability Act, 1961, by reason of not having been commenced within the period of two years after the Deceased's death.

4. In the notice of motion the defendant also invoked O. 19, r. 28 of the Rules of the Superior Courts, 1986 and the inherent jurisdiction of the court to strike out the plaintiff's claim. He also sought the vacation of a *lis pendens* which has been registered by the plaintiff.

5. It is a fundamental principle of law that the authority of an administrator of the estate of a deceased person derives from the grant of letters of administration and that, until he obtains the grant, the estate of the deceased person does not vest in him. Section 13 of the Succession Act 1965 provides that where a person dies intestate, until administration is granted, his estate vests in the President of the High Court. *In Flack & Anor. v. The President of the High Court & Ors.*, in which judgment (unreported) delivered on 29th November, 1983, Costello J., as he then was, explained the proper approach to be taken when it is desired to institute proceedings before a grant of letters of administration in issues to bind the estate of a deceased person in the following passage:

> "Under the old law a plaintiff faced with the difficulties with which the plaintiffs in these proceedings were confronted was not without remedy; he could apply for and obtain the appointment of an administrator ad litem and join him as a defendant in the suit. The Court has a similar power under s. 27 of the Succession Act, 1965 to make a grant limited to the defence of these proceedings."

6. In that case, the President was struck out as a defendant.

7. There is no doubt that when he issued the plenary summons in this matter the plaintiff could not have maintained an action in relation to the matters he complains of in the statement of claim against the defendant. The defendant was not the administrator of the estate of the deceased and he was not answerable for the matters alleged by the plaintiff. But the defendant is now the personal representative of the Deceased, and the question which arises is whether this action can now be prosecuted by the plaintiff against the defendant in that capacity. The authorities suggest that it cannot.

8. In *Creed v. Creed* [1913] 1 I.R. 48, the plaintiff sought to amend the summons and the statement of claim to show that she was suing as administratrix with the will annexed of John Creed deceased. What had happened was that the plaintiff, believing that John Creed had died intestate, took out letters of administration intestate to his estate and commenced an action as such administrator against the defendant. The defendant, who had been aware that John Creed left a will appointing him executor, declared that fact for the first time in his defence. The plaintiff then took out administration with the will annexed, the defendant having renounced. It was held by Barton J. that the summons should be dismissed, as the plaintiff's letters of administration were void ab initio and she had no title to sue when the action was brought. The judgment merely records the decision and it contains no analysis of the basis of the decision.

9. However, in *Ingall v. Moran* [1944] 1 K.B. 160, in which *Creed v. Creed* was cited in argument, the status of an administrator in the period before a grant is taken out and after the grant is taken out was analysed. The plaintiff in that case had issued a writ claiming to sue in a representative capacity as administrator of the estate of his son, who was killed in a motor accident, but he did not take out the letters of administration until nearly two months after the date of the writ. It was held by the Court of Appeal that the action was incompetent at the date of its inception by the issue of the writ, and that the doctrine of relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death could not be invoked so as to render the action

competent. In his judgment, Luxmoore L.J. considered whether the doctrine of relation back, which is well established in respect of an administrator's title to a deceased's estate, has any application to the status of a plaintiff who can only sue in a representative capacity in an action started before the grant of letters of administration. He stated as follows at p. 167:

> "It is, I think, well established that an executor can institute an action before probate of his testator's will is granted, and that, so long as probate is granted before the hearing of the action, the action is well constituted, although it may in some cases be stayed until the plaintiff has obtained his grant. The reason is plain. The executor derives his legal title to sue from his testator's will. The grant of probate before the hearing is necessary only because it is the only method recognised by the rules of court by which the executor can prove the fact that he is the executor. … An administrator is of course in a different position, for his title to sue depends solely on the grant of administration. It is true that, when a grant of administration is made, the intestate's estate, including all *choses* in action, vests in the person to whom the grant is made, and that the title thereto then relates back to the date of the intestate's death, but there is no doubt that both at common law and in equity, in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ."

10. Goddard L.J., in his judgment, considered a number of authorities cited in Daniell's Chancery Practice, 8th ed., p. 352, all of which were administration suits or suits relating to the administration of estates. He stated that the modern practice would be to issue a writ asking for the appointment of a receiver pending a grant of letters, and, if brought by a person who would be a beneficiary in the administration, there would be no objection to the action because the person entitled to take out letters is and must be made a defendant though the grant has not yet been made. In relation to the authorities he stated as follows at p. 172:

> "The cases mentioned in Daniell are not an exception to this rule of law. They are cases in which letters were not necessary for a plaintiff to establish his title to sue or in which the absence of letters did not afford a defence to a defendant. Nor is it necessary to consider the many cases which show that once letters are granted the title of the administrator relates back to the death. They have no application to this question. All they show is that, once letters have been obtained, the title relates back so that the administrator may sue in respect of matters which have arisen between the date of the death and the date of the grant, just as he may sue in respect of a cause of action that had accrued to the intestate before his death, provided the cause of action survives."

11. The court has not been referred to any authority in which, as here, it was the defendant who was a party in a representative capacity. However, in my view, the same principle must apply. When a summons is issued the person named as defendant must be competent at that time to answer the alleged wrongdoing and meet the remedy sought. If he is not the action is not maintainable. If he subsequently obtains a grant of administration, that will not cure the fundamental defect and render the action maintainable.

12. In this case, the person named as defendant had no status as a representative of the deceased or of his estate when the plenary summons was issued. The action initiated by the issue of the plenary summons could not have been maintained and is still not maintainable. In the circumstances, it must be struck out. The court has unquestionably jurisdiction to strike out the proceedings under its inherent jurisdiction in accordance with the principles set out in Barry v. Buckley [1981] I.R. 306.

13. It was submitted by counsel for the defendant that, if the court determined to strike out the proceedings, it should not address the alternative issue raised on the notice of motion, namely, the assertion that the claim is statute barred. I think it is proper to accede to that submission. If the proceedings are not maintainable, as I believe to be the case, then the court has no jurisdiction to deal with any issue raised other than the issue as to whether they are maintainable. Apart from that, it seems to me that it would be inappropriate to express a view which might have the effect of prejudging an issue which may arise if the plaintiff issues fresh proceedings against the defendant in his capacity as personal representative of the Deceased.

14. Therefore, there will be an order striking out the proceedings and vacating the *lis pendens*.