

THE HIGH COURT

[2015 No. 1421 P.]

BETWEEN

PETER HYNES

PLAINTIFF/RESPONDENT

AND

ALLIED IRISH BANKS PLC.

DEFENDANT/APPLICANT

JUDGMENT of Mr. Justice Donald Binchy delivered on the 20th day of April, 2018

1. This matter came before this Court on 31st January, 2018 following upon an order of Barr J. made on 27th March, 2017 directing the trial of a preliminary issue, specifically to determine "whether or not the proceedings are statute barred by virtue of the provisions of s. 11(2)(c) of the Statute of Limitations 1957 (as inserted by s. 38 of the Defamation Act 2009) where the cause of action alleged in the statement of claim accrued to the plaintiff more than two years prior to the commencement of the within proceedings".

Background

2. On 15th March, 2011 the applicant obtained judgment in the sum of €7,563.85 against the respondent at Roscommon Circuit Court. That judgment was obtained in default of appearance. The applicant then proceeded to register the judgment as a judgment mortgage on the title to a property belonging to the respondent in Roscommon. The judgment mortgage was registered on 20th November, 2012. The title to the property is unregistered and accordingly the judgment mortgage is registered in the Registry of Deeds. The respondent was unaware of the registration of the judgment mortgage, and claims that he was not notified of the same at the time.

3. Upon the application of the applicant, a deed of release of the judgment mortgage dated 16th August, 2013 was registered in the Property Registration Authority on 13 September, 2013. The respondent claims that he was unaware of either the registration of the judgment mortgage in the first place or the subsequent registration of the deed of release of the same in September, 2013. He claims that he did not in fact become aware of the judgment mortgage until 26th March, 2014, although he said that he had been informed by a branch manager of the applicant, on 1st February, 2013 that judgment had been obtained against him. The applicant also applied to the Circuit Court to set aside the judgment, which application was granted on 1st September, 2014.

4. On 20th February, 2015, the respondent issued proceedings against the applicant claiming defamation of character arising from the registration of the judgment mortgage against the title to his property. The proceedings were not served on the respondent until later that year. A statement of claim was delivered on 4th May, 2016, and a defence was delivered on 20th September, 2016.

Pleadings

5. In the plenary summons, the respondent claims:-

"Damages as a result of the defamation and/or breach of contract, and/or negligence, breach of duty, including breach of statutory duty, and/or breach of fiduciary duty and/or misrepresentation by the defendant, its servants or agents together with the costs of these proceedings."

6. In the statement of claim, it is claimed that in its natural and ordinary meaning, the judgment and the registration of the judgment mortgage against the property of the respondent meant and was understood to mean, inter alia, that the respondent had reneged on his debt to the applicant, was unable to pay his debts and was not creditworthy. The respondent pleads that the applicant failed to remove and expunge from the record details of the judgment and judgment mortgage and that they remain accessible to members of the public. It is claimed that by reason of the wrongful registration of the judgment mortgage, the respondent has been exposed to ridicule and contempt and lowered in the esteem of right thinking people. It is claimed that the publication is continuing and that as a consequence the respondent has suffered loss and damage and that his character and reputation has suffered, and that he has suffered considerable embarrassment. All of the above is a summary of six paragraphs in the statement of claim which appear after the setting out of the facts and which may be said to be concerned with or arising out of the defamation of the plaintiff's character.

7. There is however one additional paragraph by which the respondent claims that the applicant was negligent and in breach of duty in obtaining and registering a judgment mortgage. In the usual way the statement of claim then goes on to deal with particulars of loss and damage. There are six paragraphs under this heading. The first three relate directly to damage to reputation. The second three however could be said to be a claim for loss and damage flowing from the publication. These are:-

"(d) The plaintiff's credit rating has been downgraded by the defendant Bank, its subsidiaries and other financial institutions.

(e) The plaintiff is aware that his overdraft facility was withdrawn when it was discovered that a judgment mortgage was registered against his property.

(f) The plaintiff is fearful that the fact that a judgment mortgage was registered against his property will come to the attention of other financial institutions and other institutions with whom he does business."

Arguments

8. The applicant relies upon s.38 of the Defamation Act 2009 (the "Act of 2009") which provides as follows:-

"38.— (1) Section 11 of the Act of 1957 is amended—

(a) in subsection (2), by the substitution of the following paragraph for paragraph (c):

"(c) A defamation action within the meaning of the Defamation Act 2009 shall not be brought after the expiration of

(i) one year, or

(ii) such longer period as the court may direct not exceeding 2 years,

from the date on which the cause of action accrued.””

9. Accordingly, the applicant submits that it was incumbent on the respondent to issue the proceedings within twelve months from the date on which the judgment was registered in the Property Registration Authority i.e. by 20th November, 2013.

10. In order to avail of the two year period, it would have been necessary for the respondent to apply for an extension of time of the prescribed period within that period, and no such application was made. Moreover, the respondent, on his own case, knew of the registration of the judgment mortgage on 26th March, 2014 and would have had eight months to make such an application before the expiration of the two year period.

11. It is submitted on behalf of the applicant that the cause of action in this case does not accrue on the date that the respondent had knowledge of the registration of the judgment mortgage, but on the date that is expressly provided by statute which in this case is the date of publication i.e. the date of registration of the judgment mortgage, 20th November, 2012.

12. In anticipation that the respondent might argue that the date of accrual of the cause of action was the date upon which he became aware of the publication, the applicant submitted that the accrual of the cause of action does not depend on the date on which the person affected by the publication becomes aware of the same – it accrues on the date the defamatory statement is first published. That that is so is apparent from s. 38(3B) of the Act of 2009, which provides as follows:-

“For the purposes of bringing a defamation action within the meaning of the Defamation Act 2009, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and, where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium.”

13. The applicant referred to the decision of O'Malley J. in the case of *Murray v. Sheridan & Others* [2013] IEHC 303 which affirmed that the Act of 2009 “does not, on the face of it, allow for any extension of time in a case where a plaintiff was unaware of the fact of publication of a defamatory statement, such as where it is published to a specially limited audience of which the plaintiff is not part.”

14. In the event, the respondent did not argue to the contrary. Instead the respondent has argued that the cause of action did not accrue until the date on which judgment was set aside i.e. 1st September, 2014 because until that date the publication was correct in its content i.e. a judgment had been obtained by the applicant against the respondent. (In making submissions counsel mistakenly gave this date as being the 6th August 2014, but that is the date of the applicant's application to set aside judgment, not the date on which it was actually set aside). This is certainly a creative argument. In reply, counsel for the applicant pointed out that in the pleadings – whether in the substantive proceedings or in the reply to the points of claim for the purpose of this application, the respondent does not anywhere assert the date of accrual of the cause of action as being the date on which judgment was set aside. Furthermore, counsel for the applicant argued that the truthful character of the information conveyed by the publication does not change by reason of the judgment being set aside or the registration of the deed of release. In other words, if the applicant should not have obtained judgment in the first place then the fact that it did so and then published that fact through the registration of the judgment mortgage are the events that give rise to the cause of action.

15. Creative and all as is the argument advanced on behalf of the respondent, it must be rejected. On any analysis, it is the registration of the judgment mortgage that is the publication that has given rise to the proceedings. The fact that the applicant might have had a defence to the proceedings based on truth i.e. that it had obtained a judgment is neither here or there. The registration of the deed of release and/or the setting aside of the judgment merely served to make it easier for the respondent to succeed with the proceedings. The act is explicit and its meaning could not be more clear: the cause of action for defamation of character accrues on the date on which the defamatory statement is *first* published. That was 12th November, 2012.

16. The respondent says, in his reply to the points of claim, that he did not become aware of the fact of the judgment mortgage until in or about 26th March, 2014, as a result of a response of the applicant to correspondence from the Ombudsman, which presumably issued in response to a complaint made by the respondent to the Ombudsman. At that point in time, the applicant would still have had time to apply to extend the time limit for the issue of proceedings, pursuant to s.11 (2)(c)(ii) of the Statute of Limitations 1957 (the “Act of 1957”), as inserted by s.38 of the Act of 2009. No application was made to extend the time and proceedings were then issued outside not just the twelve month limit, but also the outer limit of two years. Accordingly, it follows that this argument cannot succeed.

17. The respondent also pleads in the reply to points of claim on this application that the defamation of character is of a continuing nature because every time a person carries out a search against the respondent's property, the fact of the judgment mortgage is published to that person, and each occasion this occurs constitutes a fresh publication and the accrual of a fresh cause of action.

18. For the applicant it is submitted that the concept of a continuous publication is expressly excluded both by ss. 11 and 38 of the Act of 2009. As has been seen above, s. 38 refers specifically to the date of first publication. Section 11 of the Act of 2009 provides as follows:-

“(1) Subject to subs. (2), a person has one cause of action only in respect of a multiple publication.

(2) A court may grant leave to a person to bring more than one defamation action in respect of a multiple publication where it considers that the interests of justice so require.

(3) In this section “multiple publication” means publication by a person of the same defamatory statement to two or more persons (other than the person in respect of whom the statement is made) whether contemporaneously or not.”

19. It could not be more clear that the effect of s.11, in combination with s.38, is that the cause of action accrues on the date of first publication and that the fact that the defamatory statement is published again to a larger audience does not give rise to a separate cause of action – this is apparent from the phrase *whether contemporaneously or not* – unless the court gives leave for the issue of more than one action pursuant to s.11 (2) of the Act of 2009. Obviously a person who chooses to repeat the same publication over and over takes a great risk in relation to damages, but the publication of the same defamatory material only gives rise

to one cause of action, subject to s.11 (2) as aforesaid. It follows from all of the above that the respondent's argument that there is a continuing defamation of character must be rejected.

20. The respondent has also pleaded in response to this application that "the defendant deliberately hid the fact of the judgment mortgage from him up to 26th March, 2014, and that such concealment amounts to a fraudulent concealment for the purposes of s.71 (1)(b) of the Act of 1957, and therefore that the period for the issue of proceedings should be extended pursuant to that section which provides as follows:-

"71.—(1) Where, in the case of an action for which a period of limitation is fixed by this Act, either—

...

(b) the right of action is concealed by the fraud of any such person, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

21. The respondent argues that he was first informed that a judgment had been obtained against him on 1st February, 2013 when he was so informed by a branch manager of the applicant, but he was not informed at the time that this judgment had been registered as a judgment mortgage. Nor was he informed when the respondent applied to the Property Registration Authority for the registration of a deed of release from the judgment mortgage over the respondent's property. The respondent contends that he only became aware of the existence of the judgment mortgage on 26th March, 2014, and that that was as a result of correspondence received from the Ombudsman, to whom the respondent had made a complaint about the conduct of the applicant, and not as a result of any communications received from the applicant itself.

22. The respondent acknowledges that a letter addressed to him from the solicitors for the applicant, Ivor Fitzpatrick & Co., and dated 18th September, 2013 was read to the respondent over the telephone on 25th October, 2013. However, the respondent denies receiving this letter in the post. In any case, that letter states:-

"Dear Mr Hynes,

We refer to the above matter and to previous correspondence herein.

We confirm judgment has been satisfied and the application to discharge the judgment mortgage completed.

Yours faithfully,

Ivor Fitzpatrick and Company".

23. On the same date on which this letter was read to him over the telephone, the respondent wrote in the following terms to Ivor Fitzpatrick & Co.:-

"Dear Ivor Fitzpatrick & Co.,

I have spoken with AIB today regarding the above affair and the fact that you have registered a judgment against me at St. Patrick's Street, Castlereagh.

This judgment would appear to have been incorrectly and unlawfully obtained as it would appear that you sent all correspondence regarding this matter to a non-existent address.

I must now ask what steps you intend to take to rectify this matter and restore my good name.

There have been wide-ranging repercussions as a result of this mistake, most notably my standing within my new workplace.

The letter that you claimed to have sent me has been read to me over the telephone by the manager of AIB in Castlereagh and the fact that you have said the judgment is satisfied is simply not acceptable.

The judgment should never have been registered in the first place.

I look forward to your immediate response.

Yours,

Peter Hynes".

24. The respondent further relies upon a letter of Ivor Fitzpatrick & Co. dated 31st January, 2014 which is in the following terms:-

"Dear Mr. Hynes,

We refer to the above matter and to previous correspondence communications in this matter.

Attached please find judgment search conducted by our office. This shows that as a search of your name for judgments registered that no judgments appear.

As previously discussed, as the above amount remains owing to our client your Irish Credit Bureau record will still record the amount as due. The Irish Credit Bureau is not affected by court judgments and a search of court judgments against you shows up no result, as attached.

We trust you will note the position.

Yours faithfully,

25. As indicated in this letter, there is attached to it a judgment search which states that on a search made in the appropriate records offices, no judgments were found as being recorded against the respondent.

26. It is submitted on behalf of the respondent that the letter of Ivor Fitzpatrick & Co. of 18th September, 2013 is misleading and conceals the true import of what occurred. In particular it is submitted that it conceals the fact that the judgment was registered by the same firm of solicitors as a judgment mortgage against the property of the plaintiff. It is submitted that this correspondence supports the contention of the respondent that the defendant, its servants or agents failed to disclose and concealed information from the plaintiff in respect of the judgment mortgage.

27. The respondent relies upon the decision of the Court of Appeal in the matter of *O'Dwyer v. Daughters of Charity and others* [2015] 1 I.R. 328 as regards the interpretation of s. 71(1)(b) of the Statute of Limitations Act, 1957. The Court of Appeal in that case approved and adopted the decision of Lord Evershed, M.R., in *Kitchen v. Royal Airforce Association* [1958] 1 WLR 563 as regards the interpretation of “fraud” for the purposes of the interpretation of the equivalent statutory provision in the United Kingdom. In that case Lord Evershed said:-

“It is now clear that the word ‘fraud’ in the section that I have read, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to *Beaman v. ARTS Ltd.* that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define 200 years ago and I certainly shall not attempt to do so now, but it is, I think clear that the phrase covers conduct which having regard to some special relationship between the two parties concerned is an unconscionable thing for the one to do towards the other.”

28. The respondent also relies on the decision of Hedigan J. in *O’Sullivan v. Rogan* [2009] IEHC 456 in which, on an application such as this, Hedigan J. adjourned the motion to plenary hearing because of the difficulty in determining the facts on affidavit evidence only.

29. In reply to these arguments, the applicant argues that s.71 (1)(b) of the Act of 1957 does not apply to these proceedings by reason of the following:-

(a) that the applicant was under no obligation to notify the respondent that a judgment mortgage had been registered against his property;

(b) that it is clear from the correspondence exchanged between the parties that the applicant did not intend to conceal the fact of the judgment mortgage at any time;

(c) that the applicant could not possibly have concealed the fact of the judgment mortgage which was registered in the Registry of Deeds at all material times; and

(d) that, with reasonable diligence, the plaintiff could have discovered the registration of the judgment mortgage at any time from 25th October, 2013 onwards.”

30. The applicant submits that the case of *O’Sullivan v. Rogan* may be distinguished on the facts. In that case the plaintiff contended that the defendants, who were solicitors, failed to advise the plaintiff, when implementing a transaction on his behalf, that they had a cause of action against him due to their failure to advise him properly in relation to that transaction.

31. Counsel for the applicant refers to the following passage in the decision of Hedigan J.:-

“Owing to the centrality of the defendants’ conduct in relation to the events at the time and owing to the inevitable conflicts in relation thereto which can only be resolved by plenary hearing, I cannot come at a preliminary stage to any conclusion as to whether s. 71 applies.”

32. It is submitted that in this case the facts are not in dispute and there is no evidential conflict which would require the issue to be adjourned to plenary hearing.

It is further submitted that there is no obligation on a person who registers a judgment mortgage against a property registered in the Registry of Deeds, to notify the owner of the property of the fact of registration of the judgment mortgage. Insofar as there is any obligation at all as regards registered land, it is an obligation imposed upon the Property Registration Authority to notify the registered owner of the property affected by the judgment mortgage.

33. It is submitted that the correspondence relied upon by the respondent makes it clear that the applicant was not attempting to conceal the registration of the judgment mortgage. Even if the letter of Ivor Fitzpatrick & Co. of 18th September, 2013 was not received by the respondent, the respondent acknowledges that it was read to him over the telephone and it clearly refers to the judgment mortgage. The preparation of such a letter and the fact that it was read to the plaintiff is completely inconsistent with any allegation of fraudulent concealment. It is submitted the letter of Ivor Fitzpatrick & Co. of 31st January, 2014 was sent in response to the letter of the respondent of 25th October, 2013 in which he had raised concerns in relation to the registration of the judgment only, and the letter of 31st January, 2014 was addressing matters specifically raised by the respondent.

34. In any event it is submitted that the judgment mortgage was readily available to the general public and could not possibly have been concealed from the respondent by the applicant. Moreover, it is submitted that the respondent failed to exercise reasonable diligence as is required by s.71. Had he done so, he would have discovered the registration of the judgment mortgage and had ample time within which to issue proceedings. In particular, he could have done so following his telephone call with the solicitors for the applicant on 25th October, 2013. It is submitted that taking the respondent’s case (in relation to concealment) at its height, the plaintiff would have had one year from that date within which to institute proceedings, and failed to do so.

35. It is clear that the applicant did not notify the respondent as to the registration of the judgment mortgage. While it is not entirely clear how the applicant came to obtain judgment and then to register it as a judgment mortgage against the property of the respondent, it seems to be the case that the applicant realised reasonably quickly that this had occurred in error and took steps to correct the error, including the registration of a deed of release of the judgment mortgage. These steps were taken without notice to the respondent.

36. The respondent does not go so far as to argue that the applicant had a duty to notify the respondent of the erroneous registration of the judgment mortgage, and it is strongly argued on behalf of the applicant that there is no such duty. I think that this must be correct. There is clearly no express statutory duty to do so, and there is in my view a distinction to be drawn between not informing a party as to a particular fact on the one hand, and actively concealing that fact on the other. There is nothing at all to suggest that in this instance the applicant was attempting to conceal the registration of the judgment mortgage from the respondent. On the contrary, the letter of Ivor Fitzpatrick of 18th September, 2013 evinces an intention to keep the applicant apprised of matters. While counsel for the respondent has submitted that the respondent is a lay person and would not have understood the full import of that letter when it was read to him over the telephone, the fact is that the letter demonstrates an openness on the part of the applicant, and not a desire to conceal. It is also reasonably clear that the respondent did have an insight into the significance of the issue which is articulated in his letter of 25th October, 2013 to Ivor Fitzpatrick & Co. So if the term "reasonable diligence" as used in s. 71 of the Act of 1957 is to mean anything at all, it must mean that there is an obligation on parties to make such enquiries as are appropriate – whether in public record offices or elsewhere – in order to be able to invoke s.71 for the purpose of gaining an extension to a statutory limitation period. In this case, the exercise of such reasonable diligence would have included a search in the Registry of Deeds which in turn would have revealed the existence of the judgment mortgage and, at a later date, the deed of release of the same.

37. All of that being the case, I do not believe that it is open to the respondent to invoke s.71 of the Act of 1957 for the purpose of extending the statutory limitation period. It follows from all of the foregoing that the respondent's claim for damages for defamation of his character has not been issued within the time limits prescribed by the Act of 1957, as amended by the Act of 2009. Accordingly, the proceedings must be dismissed in so far as they are concerned with a claim for defamation of the respondent's character.

38. One final issue raised by the respondent in opposition to this application is that the proceedings are not confined to an action for defamation of character, but also include a claim for damages allegedly sustained by the respondent as a result of the negligence of the applicant. In this regard, counsel for the applicant submitted that it is open to the court to dismiss the proceedings if there is no reality in the other causes of action pleaded. It is argued that negligence is pleaded against the applicant in the most general of terms. No duty of care is pleaded, no damages flowing from the negligence alleged are pleaded and no causation in respect of any such damages is pleaded. It is submitted that if the respondent was serious about the claim in negligence he would have pleaded the same in the same degree of particularity as the claim for defamation.

39. There does not appear to be any authority in this jurisdiction on this specific point. The applicant relies upon two authorities in other jurisdictions in this regard, the first being the case of *Walkin v. South Manchester Health Authority* [1995] 1 WLR 1543, a decision of the Court of Appeal in England, and the second, a decision of the District Court of New South Wales in the case of *Ghosh v. Ninemsn Pty. Ltd. and others* [2013] NSWDC 63. In *Walkin* the plaintiff had issued proceedings claiming damages for economic loss caused by the negligent medical treatment and advice afforded to her by the defendant. The proceedings, if construed as a claim for damages in respect of personal injuries, were statute barred, but were not statute barred if viewed as a claim for damages caused by the negligence of the defendant. In the High Court the judge held that, regardless of the way in which the plaintiff's claim was pleaded, it was a claim for damages in respect of a personal injury and accordingly the action was statute barred. In dismissing the appeal, the Court of Appeal stated:-

"The question whether an action is for damages in respect of personal injuries is one of substance, and not a matter of pleading ... the claim for damages, or the head of loss, must be considered in the context of the cause of action to which it relates... The question is how to determine in any given case the true nature of the claim, by which, in this context, is meant whether it is an action for damages consisting of or including damages in respect of personal injuries."

In effect, the Court dismissed the appeal because it considered that the time limit applicable to personal injuries actions applied to the proceedings before it because the damages claimed were caused by the personal injury sustained by the plaintiff.

40. In *Ghosh* the plaintiff had instituted proceedings claiming damages for defamation of character as well as damages for assault and damages in respect of losses of rental and other special damages alleged. While there were a number of publications involved some of the claims for defamation were outside the applicable limitation period. The plaintiff tried to get around this by claiming financial losses. The Court held that "the plaintiff cannot avoid the limitation period for defamation by bringing a claim for damages (whether a breach of contract or otherwise) by framing her claim in contract or tort rather than defamation".

41. In reply to this argument, counsel for the respondent argues that the first relief claimed by the respondent in the statement of claim is an order directing the applicant to take all steps to remove the details of the judgment and judgment mortgage from the respondent's title. This is followed by a claim for damages for defamation and then by a claim for damages arising from the negligence and breach of duty, including breach of statutory duty, of the applicant. He submitted that the respondent's primary motivation is to get the publication expunged from the record, and this can only be done by way of a court order. He submits that the claim for this relief is independent of the claim for damages for defamation of character.

42. As I have said above, this is a point upon which there does not appear to be any decision handed down in this jurisdiction to date. Counsel for the respondent in effect argues that even if the claim for defamation of character is statute barred, a claim for damages based on the negligence and breach of duty owed by the applicant to the respondent could survive. In other words, the respondent claims that owing to the negligence and breach of duty of the applicant, he has suffered, or may suffer, loss and damage arising out of the publication of the judgment separate and distinct from the damage to his reputation. Particulars of this damage as claimed in the statement of claim are set out in para. 7 above. By and large, these are concerned with the respondent's credit rating. While there were no submissions made to the Court as to the factors taken into account by financial institutions in the consideration of a person's credit rating, it is not unreasonable to surmise that in considering the same, a financial institution will chiefly be concerned with a person's liquidity, asset base and track record in repayment of debt. To the extent that any of these may be damaged by a publication, such damage could only be regarded as constituting damage to a person's financial reputation. Inevitably therefore that leads to the conclusion that the damage caused is in the nature of a defamation of the character of the person concerned, insofar as it relates to financial matters. It seems to me therefore that no matter what way the proceedings are framed, they amount to a claim for defamation of the plaintiff's character, specifically insofar as they relate to the plaintiff's character where financial matters are concerned. I agree with the reasoning of the Court of Appeal in *Walkin* and the District Court of New South Wales in *Ghosh*. The passage cited from *Ghosh* at para. 40 above is apposite so far as these proceedings are concerned.

43. It follows from all of the above that the answer to the preliminary issue raised by applicant is that the proceedings were statute barred on the date on which they were issued.